

EL 228

[REDACTED]  
[REDACTED]om>  
From:  
Sent:  
To: Tobacco Packaging  
Subject: Standardised Packaging

Hello,

I wish to confirm my opposition to the introduction of standardised tobacco packaging.

Its introduction in Australia did not reduce consumption. It simply contributed to increased illicit trade.

All it can achieve here is more smuggling and counterfeiting with loss of revenue for the government.

With thanks,

[REDACTED]  
This email was received from the internet and scanned by the Government Secure Intranet anti-virus service supplied by Vodafone in partnership with Symantec.

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Department  
of Health



Llywodraeth Cymru  
Welsh Government



The Scottish  
Government  
Riaghaltas na h-Alba



Department of  
Health, Social Services  
and Public Safety  
www.dhsspsni.gov.uk

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

**a. Are you responding (required):**

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

**b. Please provide your details and contact information:**

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

**Now go to question f**

**c. Please provide your organisation's details and contact information:**

Name of organisation (required):

Derbyshire County Council

Name of person providing submission (required):

[Redacted]

Job Title (required):

Director of Public Health

Contact address of organisation (required):

Derbyshire County Council, County Hall, Matlock DE4 3AG

Contact email address (required):

[Redacted]

Is this the official response of your organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

e. If you are responding on behalf of an organisation, what type is it?

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)



If other, please tell us the type of organisation:

**f. Does your response relate to (required):**

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

**g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)**

No

Yes (please describe below)

If yes, please describe:

**h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box**

## Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

Smoking is an addiction largely taken up in childhood and adolescence, so it is crucial to reduce the number of young people taking up smoking in the first place. It is estimated, 207,000 children aged 11-15 still take up smoking each year in the United Kingdom.

Across the population, the highest rates of smoking are among young people. Around 26 per cent of people aged 16-24 smoked in 2009. While the rates of smoking among young people have reduced considerably in recent years, the uptake of smoking by young people continues to be a serious problem. An estimated 330,000 young people under the age of 16 try smoking for the first time in England each year, and around 6 per cent of pupils aged 11-15 were regular smokers in 2009 (1).

Young people can rapidly develop nicotine dependence and symptoms of dependence can develop soon after a young person's first puff on a cigarette. We are particularly concerned about the early age at which people become regular smokers in England and that nicotine addiction for most people starts in adolescence. In England, almost two-thirds of current and ex-smokers say that they started smoking regularly before they were 18 years old, with 39 per cent saying that they were smoking regularly before the age of 16. Very few people start smoking for the first time after the age of 25 (1).

Treating smoking-related illnesses was estimated to have cost the NHS £2.7 billion in 2006/07, or over £50 million every week. In 2008/09, some 463,000 hospital admissions in England among adults aged 35 and over were attributable to smoking, or some 5 per cent of all hospital admissions for this age group. Illnesses among children caused by exposure to secondhand smoke lead to an estimated 300,000 general practice consultations and about 9,500 hospital admissions in the UK each year (1).

In the report of the Chantler review, Sir Cyril came to the conclusion that "there is sufficient evidence derived from independent sources that the introduction of standardised packaging, as part of a comprehensive policy of tobacco control measures, would be very likely, over time, to contribute to a modest but important reduction in smoking prevalence, especially in children and young adults. Given the dangers of smoking, the suffering that it causes, the highly addictive nature of nicotine, the fact that most smokers become addicted when they are children or young adults and the overall cost to society, the importance of such a reduction should not be underestimated"

For the reason outlined above, we consider the case for standardised has been made, and that the Government should lay Regulations on standardised packaging,

under Section 94 of the Children and Families Act, before Parliament as soon as possible.

(1) Healthy Lives, Healthy People: A Tobacco Control Plan for England

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

Standardised packaging needs to be part of a comprehensive strategy

The DH Tobacco Control Plan for England runs until the end of 2015 and needs to be renewed and refreshed for the period 2016 onwards, the period when standardised packaging will be implemented. It is important in updating its tobacco strategy that the Government gives careful thought to how to maximise the public health benefits of the implementation of standardised packaging, by, for example:

- Increasing funding for sustained mass media campaigns in advance of standardised packaging coming into effect;
- making stop smoking services mandatory and ensuring delivery to a high quality standard
- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force;

We agree with the Chantler review that standardised packaging, should be introduced "as part of a comprehensive policy of tobacco control measures".

On the 1st of December 2012, Australia became the first country in the world to require all tobacco products to be sold in plain, standardised packaging. In Australia, standardised packaging, was introduced as part of comprehensive strategy, which included larger health warnings, and a sustained mass media campaign. Derbyshire County Council would support a comprehensive strategy alongside the implementation of the standardised packaging.

Illicit Tobacco Trade

The Chantler review stated "I am not convinced by the tobacco industry's argument that standardised packaging would increase the illicit market, especially in counterfeit cigarettes. It seems to me that the solution to illicit use is instead, to have an effective enforcement regime, and the enforcement agencies in the UK have already demonstrated that an effective enforcement regime and appropriate sanctions can keep illicit [tobacco products] to low levels, even in a relatively high tax jurisdiction".

The draft regulations would not affect the labelling requirements for tobacco products such as health warning and fiscal features such as authentication markings and security features. As such illicit tobacco should still be identifiable.

#### Evidence from Australia

Information from the Australian Government's Department of Health has released figures showing that the total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:

- \$5.135 billion in September 1959;
- \$3.508 billion in December 2012 (when standardised packaging was introduced); and
- \$3.405 billion in March 2014.

Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the Quitline New South Wales service (2). Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc.) suggested that the number of calls to Quitline NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later and a significant increase in calls was sustained over time.

Wakefield M et al, Cancer Council Victoria, Annenberg School for Communication Pennsylvania and South Australian Health and Medical Research Institute University of Adelaide, reported in 2013 that smokers in Australia were less willing to display their packs in public and smoke in outdoor areas since plain packaging was introduced. Researchers counted patrons, smokers and tobacco packs at cafes, restaurants and bars with outdoor seating for several months both before and after the introduction of standardised packaging. They found that pack display on tables declined by 15% after plain packaging, which was mostly due to a 23% decline in the percentage of patrons who were observed smoking. The study also found that the declines in pack display and patrons observed smoking were stronger in venues where children were present (3).

Tobacco retailers in the UK have suggested that the introduction of standardised packaging means that it will take longer to serve customers and so convenience stores will lose custom. As the Impact Assessment (IA) concludes there is no evidence at all that this is the case from the experience in Australia, indeed transaction times have tended to decline post implementation not increase. Most recently, research published at the end of May, which may not be taken into account in the IA, reported that the claim that plain packaging would negatively impact small tobacco retailers by making it harder to locate and retrieve cigarette packs, thereby increasing transaction times, has not eventuated in Australia (4).

(2) Young JM et al. Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis Medical Journal of Australia 2014; 200: 29-32

(3) Zacher, M et al. Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips Addiction, 2014; 109: 653-663 - doi: 10.1111/add.12466

(4) Wakefield M, Bayly M, Scollo M. Product retrieval time in small tobacco retail outlets before and after the Australian plain packaging policy: real-world study Tobacco Control 2013 - doi:10.1136/tobaccocontrol-2013-050987.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

Derbyshire County Council welcomes the draft regulations.

Implementing the draft regulations will require supporting enforcement through Improved Intelligence sharing and adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force. Derbyshire has seen a significant rise in seizures of illicit tobacco. Approximately 878,000 cigarettes and 794 kg of Hand Rolled Tobacco were seized during 2013-14 period, an increase from 47,912 cigarettes and 27.5kg of HRT in 2012-13. Derbyshire County Council Trading standards will require adequate sustained funding to continue to monitor and take effective action against traders that deal in illegal tobacco and cigarettes.

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Each year in Derbyshire we estimate that smoking costs society approx. £188.3m

Figure 1 shows the estimated cost of smoking in Derbyshire (see attachment)

Impact on retailers

Tobacco sales are undergoing long-term decline. At its peak in the 1950s adult male smoking prevalence was 80% (5). Female smoking prevalence continued to rise and reached a peak of 45% in the mid-1960s. Since then smoking prevalence

amongst both men and women has declined significantly and is now under 20% and government policy is designed to sustain and increase this trend. More recent data from HMRC tobacco clearances shows the impact this has had on sales volume with the number of million cigarette sticks cleared for UK sales falling from 94.080 million in 1992/3 to 54.737 million in 2002/3 to 37.932 million in 2012/13, a decline of 30% in the last ten years. Small retailers have had to adjust to this decline and will continue to have to do so, it is important to note that any impact of standardised packaging will be marginal compared to the overall secular trend.

## Conclusion

Derbyshire County Council supports the report of the Chantler review, that:

- standardised packaging will have a positive impact on public health
- is highly likely to reduce the number of children taking up smoking
- standardised packaging will be very likely, over time to contribute to a modest but important reduction in smoking prevalence, especially in young adults.

Standardised packaging needs to be part of a comprehensive tobacco control strategy.

Illicit tobacco should still be indefinable through authentication markings and security features.

Evidence from Australia supports the introduction of standardised packaging, with the lowest consumption of cigarettes in first quarter of 2014 and a sharp rise in phone calls to quit lines.

Standardised packaging is backed by the Smokefree Action Coalition, which is an alliance supported over 250 organisations including medical Royal Colleges and other medical organisations, health and children's charities such as the British Heart Foundation and Cancer Research UK, the Chartered Institute of Environmental Health, the Trading Standards Institute and others. The consensus of medical professionals, public health and other relevant experts is that it would make an important positive contribution to reducing the harm caused by tobacco consumption.

Standardised packaging is also popular with the public. A poll on the issue by YouGov, conducted for ASH in March 2014, found that overall 64% of adults in Great Britain were in favour of standardised packaging with only 11% opposed. There was majority support across age groups, genders and social classes. It is clear that most people believe that this policy, combined with other tobacco control initiatives, is an important way to prevent the next generation of young people from starting to smoke (6).

(5) Wald, N. & Nicolaides-Bouman, A. UK Smoking Statistics (2d ed.). OUP, 1991.

(6) The poll total sample size was 12,269 adults. Fieldwork was undertaken by YouGov between 5th and 14th March 2014. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+).

Respondents were shown what a standard pack could look like, including larger health warnings as in Australia

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

## **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

### **Completing the online form on the Department of Health website at:**

[http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

[1](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

- o **Filling in the response form by downloading it at:**

<https://www.gov.uk/government/consultations>

- o **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- o **Posting your response to**

Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB





Our Ref: JLB/Plain Packaging  
 Date: Wednesday 6<sup>th</sup> August 2

Department of Health Standardised Tobacco  
 Packaging Consultation  
 PO Box 1126  
 CANTERBURY CT1 9NB

Dear Department of Health,

**Consultation on the Introduction of regulations for standardised packaging of tobacco products**

**Response from Sandwell Metropolitan Borough Council**

Sandwell is a Metropolitan Borough Council (SMBC) formed in 1974, and is one of seven authorities that make up the West Midlands conurbation, with a population of 314,300. It is estimated that 53,627 of Sandwell's 16+ population are smokers, costing the local economy approximately £88.5million each year.

Sandwell Metropolitan Borough Council is a member of the Smokefree Action Coalition – a group of health and welfare organisations which campaign for measures to reduce the harm caused by tobacco.

The health of people in Sandwell is generally worse than the England average and the estimated levels of adult smoking are also worse than the England average. Furthermore, it is estimated that 1,087 children start smoking in Sandwell each year. Therefore, introducing regulations for the standardised packaging of tobacco products is an important part of our local Public Health policy in tackling health inequalities and the ongoing burden of disease caused by smoking.

As Director of Public Health I welcome the opportunity to respond to this consultation and urge the Government to lay Regulations on standardised packaging, under Section 94 of the Children and Families Act, before Parliament as soon as possible. I believe that this policy, combined with other tobacco control policies, will make a positive contribution to prevent the next generation of young people taking up smoking.

**Consultation Question 1: Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?**

1. Sir Cyril Chantler stated in his covering letter to the Secretary of State: *"it is in my view highly likely that standardised packaging would serve to reduce the rate of children taking up smoking" and "the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time in the uptake and prevalence and thus have a positive impact on public health."*

[IL1: PROTECT]  
 SANDWELL METROPOLITAN BOROUGH COUNCIL  
 Public Health  
 Sandwell Council House  
 PO Box 2374, Oldbury,  
 West Midlands, B69 3DE  
 Web: [www.sandwell.gov.uk](http://www.sandwell.gov.uk)

2. A report by Professor David Hammond for the Irish Department of Health<sup>1</sup> backs up Sir Cyril Chantler's view. He concluded that,

*"Overall, the existing evidence on plain (standardised) packaging supports four primary conclusions:*

- 1) Plain packaging will reduce smoking initiation among youth and young adults.*
- 2) Plain packaging will promote smoking cessation among established smokers.*
- 3) Plain packaging will support former smokers to remain abstinent.*
- 4) Plain packaging will help to denormalize tobacco use."*

3. We welcome the response of Jane Ellison MP, Minister for Public Health, to the Chantler Review. She said that the report found standardised packaging was *"very likely to have a positive impact"* on public health. She went on to say: *"In the light of the report and the responses to the previous consultation in 2012, I am minded to proceed with introducing regulations to provide for standardised packaging"* and that she wished to *"proceed as swiftly as possible"*. She also reported that the Government's Chief Medical Officer, Dame Sally Davies, had written to her supporting the conclusions of the Chantler Review and the introduction of standardised packaging.<sup>2</sup>

4. We therefore consider that the case for standardised packaging has been made, and that the Government should lay Regulations on standardised packaging, under Section 94 of the Children and Families Act, before Parliament as soon as possible. Given that notification to the European Union of the intended Regulations will take six months, there is now only a short time available to do this before the 2015 General Election.

**Consultation Question 2: Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?**

**Standardised packaging needs to be part of a comprehensive strategy**

5. Tobacco control policies must be pursued in parallel if they are to have their best possible effect in reducing prevalence rates. The optimum date for implementation of standard packaging would be May 2016 at the same time as implementation of the EU Tobacco Products Directive, which includes updated larger health warnings and graphic warnings on the front of the packs.
6. The DH Tobacco Control Plan for England runs until the end of 2015 and needs to be renewed and refreshed for the period 2016-2020, the period when standardised packaging will be implemented. It is important in updating its tobacco strategy that the Government gives careful thought to how to maximise the public health benefits of the implementation of standardised packaging, by, for example:
  - increasing funding for sustained mass media campaigns in advance of standardised packaging coming into effect;
  - making stop smoking services mandatory and ensuring delivery to a high quality standard;

<sup>1</sup> Hammond, D. Standardized Packaging of Tobacco Products. Evidence Review. Prepared on behalf of the Irish Department of Health. March 2014.

<sup>2</sup> Hansard. H.C column 1018 et seq. (3rd April 2014):

- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force;
- introducing tax rises on tobacco products over and above the existing escalator, particularly to counteract any possible negative effects from brand-shifting or price cutting.

### Illicit Tobacco Trade: General

7. A principal tobacco industry argument against standardised packaging has been that it will inevitably lead to an increase in the illicit tobacco trade. There is no good reason to accept this argument, since there is no plausible mechanism of action, and indeed evidence published since the 2012 consultation suggests that it is false.
8. There is no plausible mechanism of action because all the key security features on existing packs of cigarettes would also be present on standardised packs, and additional markings will be required under the EU Tobacco Products Directive. These include unique identifiers, coded numbering and covert anti-counterfeit marks. Jane Ellison, Parliamentary Under-Secretary of State for Health, said in a November 2013 Parliamentary debate that: *"I am grateful to those hon. Members who have made the point that if we were to adopt standardised packaging, it would not mean plain packaging. Approaches such as anti-smuggling devices could be built into standardised packaging, if we choose to go down that route."*<sup>3</sup>
9. Number codes will develop further into an international standard system because of the requirements of Article 15 of the revised EU Tobacco Products Directive and Article 8 of the Illicit Trade Protocol, a subsidiary treaty under the WHO Framework Convention on Tobacco Control, to which the UK is a Party.
10. Article 15 of the Tobacco Products Directive states that: *"Member States shall ensure that all unit packets of tobacco products are marked with a unique identifier. In order to ensure the integrity of the unique identifier, it shall be irremovably printed or affixed, indelible and not hidden or interrupted in any form, including through tax stamps or price marks, or by the opening of the unit packet."*<sup>4</sup>
11. Article 8.3 of the Illicit Trade Protocol states that: *"With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party."*<sup>5</sup>
12. Andrew Leggett, Deputy Director for Tobacco and Alcohol Strategy at HM Revenue and Customs has said about standardised packaging that *"we're very doubtful that it would have a material effect [on*

<sup>3</sup> Hansard: backbench business debate. H.C Column 477. (7 November 2013)

<sup>4</sup> Revised EU Tobacco Products Directive: Article 15

<sup>5</sup> Text of the Illicit Trade Protocol: Article 8.3

counterfeiting and the illicit trade in tobacco]".<sup>6</sup> This conclusion was supported by the House of Commons Home Affairs Select Committee, in its report on the illicit tobacco trade published in June 2014. The Committee reported that: "We believe that the decision on standardised packaging should be driven by health reasons and the imperative need to reduce the numbers of young people who start smoking. We note the statement of Sir Cyril Chantler to the effect that he was not convinced that standardised packaging would bring about an increase in the illicit market; even if this were the case, we believe that the proper response would be a more vigorous effort on enforcement rather than any lessening in the Government's drive towards introducing standardised packaging."<sup>7</sup>

### **Illicit Tobacco Trade: Australia**

13. The tobacco industry has repeatedly claimed that the level of illicit trade in Australia has increased since, and as a result of, the introduction of standardised packaging. For example, BAT told investors in March 2014 that total illicit activity in Australia had risen by more than 30 per cent since the introduction of standardised packaging.<sup>8</sup>
14. These claims were examined during the Chantler Review and shown to be unsupported, a fact that was effectively admitted during Review meetings with representatives of the tobacco industry in Australia.<sup>9</sup> The Australian Government and customs officials have also rejected tobacco industry claims that illicit trade in Australia has risen since the introduction of standardised packaging.<sup>10</sup> In March 2014 the *Sydney Morning Herald* reported that there had been only one seizure of counterfeit plain packs since December 2012.<sup>11</sup>

### **Tobacco Consumption In Australia**

15. The tobacco industry has also claimed that tobacco consumption in Australia has risen since the introduction of standardised packaging. Again, independent evidence does not support this proposition.
16. The tobacco industry in Australia has reported an increase in tobacco sales from 21.015bn sticks in 2012 to 21.074bn in 2013,<sup>12</sup> and the industry and its front groups in the UK have claimed that this showed standardised packaging was not working. Although the industry reported a small (0.28%) increase in sales year on year, they did not report the increase in the Australian population between 2012 and 2013. Adjusted for population, tobacco sales per person by their measure of consumption would in fact have fallen, from 920.4 per person in 2012 to 906.9 in 2013.<sup>13</sup>

<sup>6</sup> Oral evidence to the House of Lords European Union Sub Committee (Home Affairs) on 24th July 2013.

<sup>7</sup> Home Affairs Select Committee First Report on Tobacco Smuggling; paragraph 44

<sup>8</sup> Greenblat, E. Plain packaging making 'no impact' on Australian smokers, say tobacco chiefs: *The Australian* 4th March 2014

<sup>9</sup> Chantler Review, Notes-of-Australia-based-meetings; see for example exchange with Mark Connell of BAT Australia, page 38.

<sup>10</sup> See p.48 of the Explanatory Memorandum to the Australian Excise Tariff Amendment (Tobacco) Bill 2014 and p.6 of Sir Cyril Chantler's report.

<sup>11</sup> Corderoy, A Tobacco Industry claims on impact of plain packaging go up in smoke, *Sydney Morning Herald*, 12 March 2014.

<sup>12</sup> Kerr, C. Labor's plain packaging falls as cigarette sales rise: *The Australian*, 6 June 2014

<sup>13</sup> Is Smoking Increasing in Australia?: *Guardian Datablog*, 6 June 2014

17. The Australian Government's Department of Health has released figures showing that total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:

- \$5.135 billion in September 1959;
- \$3.508 billion in December 2012 (when standardised packaging was introduced); and
- \$3.405 billion in March 2014.

18. This is supported by figures from the Australian Treasury showing that tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced. Clearances are an indicator of tobacco volumes in the Australian market.<sup>14</sup>

#### **Other Evidence from Australia**

19. Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the Quitline New South Wales service.<sup>15</sup> Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc.) suggested that the number of calls to Quitline NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later and a significant increase in calls was sustained over time.

20. Wakefield M et al, Cancer Council Victoria, Annenberg School for Communication Pennsylvania and South Australian Health and Medical Research Institute University of Adelaide, reported in 2013 that smokers in Australia were less willing to display their packs in public and smoke in outdoor areas since plain packaging was introduced. Researchers counted patrons, smokers and tobacco packs at cafes, restaurants and bars with outdoor seating for several months both before and after the introduction of standardised packaging. They found that pack display on tables declined by 15% after plain packaging, which was mostly due to a 23% decline in the percentage of patrons who were observed smoking. The study also found that the declines in pack display and patrons observed smoking were stronger in venues where children were present.<sup>16</sup>

21. Tobacco retailers in the UK have suggested that the introduction of standardised packaging means that it will take longer to serve customers and so convenience stores will lose custom. As the Impact Assessment concludes there is no evidence at all that this is the case from the experience in Australia. Indeed transaction times have tended to decline post implementation not increase. Most recently, research published at the end of May, which may not been taken into account in the IA, reported that the claim that plain packaging would negatively impact small tobacco retailers by making it harder to locate and retrieve cigarette packs, thereby increasing transaction times, has not eventuated in Australia.<sup>17</sup>

<sup>14</sup> Tobacco facts and figures: Australian Department of Health. 19 June 2014

<sup>15</sup> Young JM et al. Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis

<sup>16</sup> Zacher, M et al. Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips *Addiction*, 2014; 109: 653-663 - doi: 10.1111/add.12466

<sup>17</sup> Wakefield M, Bayly M, Scollo M. Product retrieval time in small tobacco retail outlets before and after the Australian plain packaging policy: real-world study *Tobacco Control* 2013 - doi:10.1136/tobaccocontrol-2013-050987.

**Consultation Question 3: Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?**

22. Sandwell Metropolitan Borough Council welcomes the draft regulations. However, if the government decides to proceed with the legal controls on packaging, beyond the draft regulations, published as part of this consultation, we would expect to be consulted on any of the specific guidance or additional materials to be provided to support both businesses and enforcers in enforcing the regulations.
23. Furthermore, we believe that the regulations should also apply to specialist tobacco products including cigars and cigarillos. While we note the explanation for their exclusion is their low rate of use by young people, we consider that it sets an unhelpful example if any smoked tobacco products are excluded from the regulations, since this might be interpreted as endorsement of the idea that they are in some way less harmful to health.
24. Additionally, in the Australian regulations, the dimensions of the cigarettes and packs are stipulated, and we suggest that this may be useful in preventing any attempt to circumvent the intent of the regulations by introducing an element of branding. In particular we would like to see the UK prohibit the sale of 'slim' cigarettes. We also recommend that the UK prohibit the use of misleading brand variant names such as 'slim', 'natural', 'organic', 'without additives', 'without flavours' as well as 'smooth', 'gold' and 'silver'.<sup>18</sup>

**Consultation Question 4: Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?**

25. We note that the impact assessment does not include any recognition of the additional costs of enforcement of these regulations. Whilst appreciating that this is small compared to revenue and healthcare cost considerations, it is however an important issue. Given the resource constraints at a local level, any new enforcement requirements would need to be properly recognised and resourced.

**Impact on Retailers**

26. Tobacco sales are undergoing long-term decline. At its peak in the 1950s adult male smoking prevalence was 80%.<sup>19</sup> Female smoking prevalence continued to rise and reached a peak of 45% in

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<sup>18</sup> Hammond D, Dockrell M, Arnott D et al. Cigarette pack design and perceptions of risk among UK adults and youth. *European Journal of Public Health* 2009; 19:631-7.

<sup>19</sup> Wald, N. & Nicolaides-Bouman, A. *UK Smoking Statistics* (2d ed.). OUP, 1991.

the mid-1960s.<sup>19</sup> Since then smoking prevalence amongst both men and women has declined significantly and is now under 20% and government policy is designed to sustain and increase this trend. More recent data from HMRC tobacco clearances shows the impact this has had on sales volume with the number of million cigarette sticks cleared for UK sales falling from 94.080 million in 1992/3 to 54.737 million in 2002/3 to 37.932 million in 2012/13, a decline of 30% in the last ten years. (See table below from the HMRC Tobacco Factsheet November 2013). Small retailers have had to adjust to this decline and will continue to have to do so, it is important to note that any impact of standardised packaging will be marginal compared to the overall secular trend.

27. HMRC clearance data also shows the importance of the government's anti-smuggling strategy in supporting retailers. The impact is clearest with respect to handrolled tobacco. At its peak the illicit market share of handrolled tobacco was estimated to be over 60%, most recent estimates by HMRC suggest that it has fallen to 36%. This is matched by a growth in the amount of taxed HRT released for consumption which rose 2.8 million kilograms in 2002/3 to 6.2 million kilograms in 2012/13.
28. The Impact Assessment page 28 p.112 states 'anecdotally the profit margins on the sale of tobacco may be relatively low.' This is corroborated by information provided to ASH by a retailer in Gateshead, John McClurey, a member of the ASH advisory council. According to John McClurey profit margins on cigarettes average around 4.5% compared to profits on other products on sale in his shop which average around 22%. This means that while tobacco currently amounts to around 50% of his sales turnover it is a much smaller proportion of his profits. In fact he estimates that currently tobacco sales only amount to about 20% of his profits with 80% of his profits coming from sale of non-tobacco products. To illustrate the point John McClurey has told us that if a customer buys a packet of chewing gum he makes around 17 pence in profit compared to 14 pence on a price-marked packet of 10 John Player Special. Plus a price-marked pack of 10 JPS cigarettes costs £3.50, while a packet of chewing gum only costs 50 pence, so the customer buying chewing gum as opposed to cigarettes has £3 left over available to spend on other items.
29. For a shop where tobacco only accounts for 20% of turnover, which is the average estimated in the ACS report referenced in the IA, the proportion of profits would be even smaller at around 5% for tobacco compared to 95% for non-tobacco products.
30. Comprehensive data on prices and profit margins is available from wholesalers such as Bookers who can be contacted via their website <https://www.booker.co.uk/help/contactus.aspx>. Data on the proportion of tobacco sales accounted for by different types of outlet is available from AC Nielsen who can also provide data on the trends in sales of tobacco between different types of retailers over time. We recommend that the DH get in touch with Bookers and AC Nielsen for more information.

## Conclusions

31. Standardised packaging is backed by the Smokefree Action Coalition, which is an alliance supported over 250 organisations including medical Royal Colleges and other medical organisations, health and children's charities such as the British Heart Foundation and Cancer Research UK, the Chartered Institute of Environmental Health, the Trading Standards Institute and others.<sup>20</sup> The consensus of

<sup>20</sup> [Smokefree Action Coalition](#)

medical professionals, public health and other relevant experts is that it would make an important positive contribution to reducing the harm caused by tobacco consumption.

32. Standardised packaging is also popular with the public. A poll on the issue by YouGov, conducted for ASH in March 2014, found that overall 64% of adults in Great Britain were in favour of standardised packaging with only 11% opposed. There was majority support across age groups, genders and social classes.<sup>21</sup> It is clear that most people believe that this policy, combined with other tobacco control initiatives, is an important way to prevent the next generation of young people from starting to smoke.
33. Section 94 of the Children and Families Act 2014 was passed overwhelmingly in both the House of Lords (nem con) and House of Commons (24 MPs voted against), following a strong cross-Party campaign in support of the policy. It therefore demonstrably has majority support in Parliament.
34. Opposition to standardised packaging has been driven and financed by the tobacco industry, which requires young people to start smoking in large numbers every year, as its previous consumers quit or die prematurely from smoking-related disease.<sup>22</sup>
35. Following the six week consultation on the draft regulations, the Government will then have to notify the European Union of the draft Regulations, under the Technical Standards and Regulations Directive 98/34/EC. This process can take up to six months.<sup>23</sup> Therefore, time is now short if Parliament is to get the opportunity to vote on the Regulations before the General Election. If this opportunity were now to be missed, it would be widely understood as a public health disaster and as suggesting that the tobacco industry still has excessive influence at the heart of Government.



Director of Public Health  
Sandwell Metropolitan Borough Council

<sup>21</sup> The poll total sample size was 12,269 adults. Fieldwork was undertaken by YouGov between 5th and 14th March 2014. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+). Respondents were shown what a standard pack could look like, including larger health warnings as in Australia.

<sup>22</sup> The pro-smoking group FOREST, which receives virtually all its funding from the tobacco industry, have hired the marketing agency Kreate to collect "digital signatures" for the "Hands off Our Packs" petition to the Prime Minister. Kreate describes itself as "an experiential agency that specialises in the delivery and staffing of face-to-face experiences". Agencies have also been commissioned directly by BAT to run a six week, "anti-plain packs roadshow", aiming to sign up 100,000 people to oppose plain packs. The company is reported to have allocated £500,000 to the activity. Over 100 people a day will be working on this campaign. ASH recommends that consultation responses generated in this way should be regarded by the Government as constituting a single response on behalf of the tobacco industry.





From:  
Sent:  
To:  
Cc:  
Subject:

to: tobacco products

Dear Sirs

We have read with interest the responses to the above consultation from our trading standards colleagues in our fellow south west authorities, Smoke Free South West and the ACTSO.

We support their comments and in particular would like to emphasise that:

1. Central government needs to make sure that trading standards services have the resources to respond to the enforcement work involved in the implementation of plain packaging legislation, and
2. The references within the consultation documents to using plain packaging "in the course of business" should be amended, by the removal of the words "in the course of business" because potentially it enables those that sell illegal tobacco from houses or on the street/in the park to try to avoid prosecution for trading illegal tobacco.


Should you have any queries about this response please do not hesitate to contact me.

Yours faithfully

Vice

A Joint Service Commissioned by Devon and Somerset County Councils

My office base is County Hall, Topsham Road, Exeter EX2 4QD



[www.devonsomersettradingstandards.gov.uk](http://www.devonsomersettradingstandards.gov.uk)

Follow us on Facebook [www.facebook.com/tsconnected](http://www.facebook.com/tsconnected)

For Approved Local Traders, to recommend a business for the scheme, or to apply to join Buy with Confidence visit [www.buywithconfidence.gov.uk](http://www.buywithconfidence.gov.uk) <<http://www.buywithconfidence.gov.uk>>

For clear practical Consumer Advice call the Citizens Advice Consumer Service on 03454 04 05 06

For Business advice call 01392 381381 from Devon or 0845 345 9188 from Somerset

If you have emailed me and not received a response within 5 working days, I may be away from the office. If you require a response urgently, please forward your email to [tsadvice@devon.gov.uk](mailto:tsadvice@devon.gov.uk), or if your email contains RESTRICTED or PROTECTED information use [tssecure@devon.gcsx.gov.uk](mailto:tssecure@devon.gcsx.gov.uk).

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From:  
Sent:  
To:  
Cc:  
Subject:  
Attachments:

gov.uk

Hello

Please find enclosed our joint response to the consultation on the introduction of regulations for standardised packaging of tobacco products from the Wigan & Leigh Tobacco Control Alliance and Professor Kate Ardern (Director of Public Health for the Wigan Borough).

Wigan Council is a Local Authority situated within the North West of England. During the 2012 Consultation, at least 3,509 public responses were collected from the Borough in support of the introduction of plain, standardised tobacco packaging. Wigan Council was the first Local Authority to pass a motion (at Full Council) in support of the campaign for plain packaging and Wigan Council's Leader, Lord Peter Smith, delivered a speech in the House of Lords on the subject.

We do hope that you find the response of use.

Thanking you in advance



Wigan Council  
PO Box 100  
WN1 3DS



[www.wigan.gov.uk](http://www.wigan.gov.uk)  
[www.twitter.com/wigancouncil](https://twitter.com/wigancouncil)  
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Confident Place, Confident People.

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Department  
of Health



Llywodraeth Cymru  
Welsh Government



The Scottish  
Government  
Riaghaltas na h-Alba



Department of  
Health, Social Services  
and Public Safety  
[www.dhssosni.gov.uk](http://www.dhssosni.gov.uk)

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

**a. Are you responding (required):**

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

**b. Please provide your details and contact information:**

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

**Now go to question f**

**c. Please provide your organisation's details and contact information:**

Name of organisation (required):

Joint response from Wigan & Leigh Tobacco Control Alliance and Professor Kate Ardern (Director of Public Health for Wigan Borough).

Name of person providing submission (required):

[Redacted]

Job Title (required):

Health Improvement Practitioner

Contact address of organisation (required):

Wigan Council, PO BOX 100, WN1 3DS

Contact email address (required):

[Redacted]

Is this the official response of your organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

- Duty free shop
- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

**e. If you are responding on behalf of an organisation, what type is it?**

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation

University or research organisation

Other (please provide details below)

If other, please tell us the type of organisation:

f. Does your response relate to (required):

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)

No

Yes (please describe below)

If yes, please describe:

- h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box

### Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

Currently 21.8% of Wigan's adult population smoke, although Wigan has seen a welcome reduction in local smoking prevalence, the figure remains higher than the national. Locally we would welcome the introduction of standardised packaging, as given the Chantler Review findings, we feel it would help to further reduce smoking prevalence and make tobacco less attractive to young people.

We welcome the Chantler Review findings including:

- 'Having reviewed the evidence it is in my view highly likely that standardised packaging would reduce the rate of children taking up smoking and implausible that it would increase the consumption of tobacco. I am persuaded that branded packaging plays an important role in encouraging young people to smoke.'
- 'I am satisfied that the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time on the uptake and prevalence of smoking and thus have a positive impact on public health.'
- 'I am not convinced by the tobacco industry's argument that standardised packaging would increase the illicit market, especially in counterfeit cigarettes. There is no evidence that standardised packaging is easier to counterfeit, and indeed in Australia, hardly any counterfeit standardised packages have been found to date.'

Given the evidence outlined within the Chantler Review we therefore consider the case for standardised packaging has been made and that the Government should act as soon as possible and resist efforts by the tobacco industry (and its surrogates) to delay production of the final Regulations.

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

We would like to draw attention to and highlight the Chantler Review findings that there is no evidence that standardised packaging is easier to counterfeit and the evidence from Australia, which has shown there to be no increase in the illicit tobacco trade since the measure was introduced while tobacco consumption has fallen.



3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

We welcome the draft regulations outlined; however we believe that the regulations should include all tobacco products, including specialist tobacco products. Whilst we note the explanation for their exclusion is their low rate of use by young people, we consider that it sets an unhelpful example if any smoked tobacco products are excluded from the regulations.

We would also welcome regulation regarding the dimensions and size of cigarettes and the packaging, to prevent manufacturers using this as a method of differentiation.

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Tobacco control policies must be pursued in parallel and not seriatim if they are to have their best possible effect in reducing prevalence rates. It is therefore important that the UK Government gives careful thought to how to maximise the public health benefits of standardised packaging, by:

- funding a sustained mass media campaign around the time that standardised packaging comes into effect
- ensuring that stop smoking services are adequately funded in every locality
- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the Border Agency
- considering tax rises on tobacco products over and above the existing escalator, particularly to counteract any possible negative effects from brand-shifting or price cutting, and
- considering further levies on the industry, based on local sales data, and designed to fund stop smoking services and other tobacco control initiatives, and health costs caused by tobacco consumption.

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

## **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

### **Completing the online form on the Department of Health website at:**

[http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

[1](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

- **Filling in the response form by downloading it at:**

<https://www.gov.uk/government/consultations>

- **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB

EL 234

[REDACTED]

**From:** [REDACTED]  
**Sent:** [REDACTED]  
**To:** Tobacco Packaging  
**Subject:** Plain packaging

I am in support not to vote for plain packaging on cigs this will affect all retailers

[REDACTED]

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[REDACTED]

From:  
Sent:  
To:  
Subject:

[REDACTED]

FAO - Department of Health Standardised Tobacco Packaging Consultation Team  
PO Box 1126  
CANTERBURY CT1 9NB

Dear Sir or Madam,

As a retailer who has been trading for over twenty years, I feel that the Government's intention to legislate on plain packaging is completely ill thought out and will irrevocably damage the retail trade and not have the desired effect of reducing young people smoking.

I currently own two shops in the Glasgow area and we already suffer lost sales on cigarettes because of the increasingly prevalent illicit trade. Take it from me, as money has been tight over recent times people have been seeking out cheaper products from the illicit market. My customers constantly complain about the high taxation on cigarettes is it any wonder they seek out cheaper illegal product when times are hard. The amount of sales the average Scottish shopkeeper is losing to illicit trade is ridiculous let alone the money the treasury loses. Can you imagine how bad the situation would be if plain packaging was introduced and the criminals only have one packet to copy they will be laughing all the way to the bank.

Consultation questions:

**Do you have any information, in particular any new or additional information since the 2013 consultation, relating to the wider aspects of standardised packaging, that you can bring to our attention?**

The only country to introduce plain packaging is Australia and there is an increasing body of evidence to suggest that it hasn't reduced the smoking rate. Quite the opposite the smoking rate has actually increased and the illicit market has exploded with illegal branded cigarettes being sold by smugglers. I can't understand why the UK Government would want to introduce this policy which will be completely ineffective and only damage the livelihoods of hardworking retailers.

**Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?**

As a responsible retailer, I support every sensible approach to deter youngsters from smoking. These include: the tried and tested existing proof of age schemes such as Young Scot and

CitizenCard; giving more resources to our hard-pressed enforcement agencies; and stiffening the penalties for the criminals involved in counterfeiting and smuggling. However the introduction of plain packaging will not deter young people from smoking and reduce the smoking rate only increase their access to tobacco via criminal illicit sellers.

On a practical level, plain packaging will increase queuing times and therefore retailers will lose sales as people will not be prepared to wait. There is also a crime and safety issue for retailers as we will have to increasingly turn our backs to customers for longer to try and find the pack requested. This leaves the retailers open to increased losses through theft and more importantly the opportunity for being attacked.

I hope you can take all these points into consideration and come to right decision that plain packaging of tobacco products shouldn't be legislated upon.

Yours sincerely,

A large black rectangular redaction box covering the signature of the sender.

Glasgow retailer

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## Consultation on the introduction of regulations for standardised packaging of tobacco products

Response from British Lung Foundation Scotland & Northern Ireland



### About:

1. One person in five in the UK is affected by lung disease with millions more at risk. The British Lung Foundation (BLF) is the UK's lung charity working to champion respiratory health by: offering support to all those affected by lung disease, campaigning for greater awareness and positive change in the nation's lung health, and funding vital research, so that new treatments and cures can help save lives. The BLF does not receive any funding from the tobacco industry.
2. BLF Scotland & Northern Ireland is the branch of BLF operating in those nations.

### Consultation Questions:

Q1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

3. The BLF welcomed the outcome of the review conducted by Sir Cyril Chantler, which analysed all the available evidence on the effectiveness of standardised packaging of tobacco products as a policy to reduce long-term smoking rates. Sir Cyril met with a variety of stakeholders on both sides of the debate and travelled to Australia before he came to the conclusion that standardised packaging should be implemented in the UK. The Government must now keep its promise and act on Sir Cyril's recommendation.
4. Standardised packaging for tobacco products would produce a long-term decline in smoking rates by reducing the appeal of the branding and marketing of tobacco products to children and young people. In his report, Sir Cyril states: *"Although the number of children taking up smoking has been falling since the 1990s, an estimated 207,000 children aged 11-15 still take up smoking each year in the United Kingdom. If this rate were reduced even by 2%, for example, it would mean 4,000 fewer children took up smoking each year, greatly improving their health outcomes."*
5. Tobacco is a deadly and addictive product, killing half of its long-term users. The BLF believes that even a small reduction in children taking up smoking would be worthwhile if it helped to bring down long-term smoking rates and de-normalised the habit over time. Furthermore, children are not able to make an informed choice about the dangers of their future addiction and therefore any policy which would help to protect children from a life-long addiction to tobacco should be favoured. Standardised packaging is currently the best proposal available to prevent the next generation from becoming addicted to tobacco products.

6. Evidence suggests that people who started smoking younger, tend to be heavier smokers later on, and are therefore at higher risk of developing smoking-related diseases. Among current heavy smokers (20 cigarettes or more per day), 58% started smoking regularly before they were 16 years of age compared with 44% of current moderate smokers (10-19 cigarettes a day) and 35% of current light smokers (under 10 cigarettes a day).<sup>1</sup>
7. In his report, Sir Cyril found that standardised packaging is likely to be very effective at changing smoking behaviour: *"I see the importance of Stirling [Review] as being the consistency of its results on appeal, salience and perceptions of harm, most notably that standardised packaging is less appealing than branded packaging. This evidence is direct and not reliant on stated intentions. Evidence from other spheres shows a strong non-conscious link between appeal and subsequent behaviour regardless of stated intentions. I therefore conclude that, by reducing its appeal, standardised packaging would affect smoking behaviour."*
8. At the time of the publication of the Chantler report, Public Health Minister Jane Ellison MP confirmed that she "is minded to proceed with introducing regulations to provide for standardised packaging" and that she intended to proceed "as swiftly as possible".
9. Scottish Public Health Minister Michael Matheson MSP said that "there is strong evidence to support the positive impact plain packaging would have on public health".
10. Standardised packaging has been shown to be popular with the public. A poll by YouGov found that 64% of adults in Great Britain were in favour of standardised packaging with only 11% opposed it. There was majority support across age groups, genders and social classes.<sup>2</sup>
11. Standardised packaging has been shown to have overwhelming support in the Scottish Parliament and Northern Irish Assembly, where legislative consent motions allowing the change to go ahead were passed without opposition.
12. Opposition to standardised packaging has been driven and financed by the tobacco industry, which needs young people to start smoking in large numbers every year, to replace previous consumers lost through quitting or dying prematurely from smoking-related disease.
13. Following the six-week consultation on the draft regulations, the Government will then have to notify the European Union of the draft regulations. Since this process

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<sup>1</sup> Chapter 1 – Smoking, General Lifestyle Survey Overview – a report on the 2011 General Lifestyle Survey.

<sup>2</sup> Poll conducted by ASH in March 2014. The poll total sample size was 12,269 adults. Fieldwork was undertaken by YouGov between 5th and 14th March 2014. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+). Respondents were shown what a standard pack could look like, including larger health warnings as in Australia.



can take up to six months, it is paramount that regulations are laid before Parliament as quickly as possible to give an opportunity for a vote to take place on the regulations before the General Election. If this opportunity were now to be missed, it would be widely accepted as a public health disaster and as suggesting that the tobacco industry still has excessive influence at the heart of Government.

**Q2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?**

#### Tobacco consumption in Australia

14. The policy of introducing standardised packaging for all tobacco products is designed to work over the long-term to produce a decline in smoking rates over time, as fewer children and young people take up smoking.
15. However, recently published evidence from the Australian Government's National Drugs Strategy Household Survey, shows that smoking rates have dropped by 15% between 2010 (when smoking prevalence stood at 15.1%) and 2013 (when prevalence dropped to 12.8% of the general population). This indicates that the removal of branding seems to have had a wider effect than just on children and young people, also perhaps encouraging existing smokers to quit. This large 24,000-person survey was conducted in Autumn 2013 but finished before the introduction of tax rises on 1st December. It therefore measured a large drop in smoking rates after the introduction of standardised packaging for tobacco products, but did not include the effect of new higher tobacco duties.
16. In contrast, London Economics consultancy published a study in November 2013 showing that there was no statistical change in the number of smokers in Australia since the introduction of standardised packaging.<sup>3</sup> This study was funded by Phillip Morris International and has been widely criticised for its methodology. For instance, the online survey panel was not deemed to be representative of the general population and the survey sample size of 5,000 was too small to show smaller declines in smoking prevalence for the size of the Australian population.<sup>4</sup>
17. It is also worth noting that the policy of introducing standardised packaging for tobacco products is designed to be a long-term strategy, which aims to produce a decline in smoking rates over time, as fewer children and young people get addicted to smoking.
18. The tobacco industry in Australia has also reported an increase in tobacco sales from 21.015bn sticks in 2012 to 21.074bn in 2013.<sup>5</sup> Although the industry reported a small (0.28%) increase in sales year on year, they did not report the increase in

<sup>3</sup> An analysis of smoking prevalence in Australia, London Economics consultancy, November 2013.

<sup>4</sup> Cancer Council Victoria, Comments of the Philip Morris funded London Economics report "An analysis of smoking prevalence in Australia: final", 2013, Cancer Council Victoria: Melbourne.

<sup>5</sup> Kerr, C. Labor's plain packaging falls as cigarette sales rise: *The Australian*. 6 June 2014

the Australian population between 2012 and 2013. Adjusted for population, tobacco sales per person by their measure of consumption would in fact have fallen, from 920.4 per person in 2012 to 906.9 in 2013.<sup>6</sup>

19. However, the Australian Government's Department of Health figures show that the total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products. It was \$3.508 billion in December 2012 (when standardised packaging was introduced) and \$3.405 billion in March 2014.<sup>7</sup>
20. This is further supported by figures from the Australian Treasury showing that tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced.<sup>8</sup>
21. An Australian study published in January 2014 showed that the introduction of standardised packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the Quitline New South Wales service.<sup>9</sup> Even when adjusted for other factors, such as health advertising campaigns happening at the time and changes in price of cigarettes, the number of calls to Quitline NSW rose by 75% between the week before standardised packs were first introduced and four weeks later.
22. Another Australian study reported in 2013 that smokers in Australia were less willing to display their packs in public and smoke in outdoor areas since plain packaging was introduced. Researchers counted numbers of smokers and tobacco packs displayed openly at cafes, restaurants and bars with outdoor seating for several months both before and after the introduction of standardised packaging. They found that pack display on tables declined by 15% after standardised packaging was introduced, which was mostly due to a 23% decline in the percentage of patrons who were observed smoking. The study also found that the declines in pack display and patrons observed smoking were greater in venues where children were present.<sup>10</sup>

#### Importance of a package of measures

23. It is vital that standardised packaging is implemented together with other tobacco control measures, as part of a comprehensive strategy, to ensure that it is most effective at bringing smoking rates down. Wider measures such as tobacco taxation increases and awareness raising campaigns need to accompany the implementation

<sup>6</sup> Is Smoking Increasing in Australia? *Guardian Datablog*, 6 June 2014

<sup>7</sup> Tobacco key facts and figures, Department of Health, Australian Government (last checked on 22 July 2014)

<sup>8</sup> Tobacco facts and figures; Australian Department of Health, 19 June 2014

<sup>9</sup> Young JM et al. Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis *Medical Journal of Australia* 2014; 200: 29-32

<sup>10</sup> Zacher, M et al. Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips *Addiction*, 2014; 109: 653-663 - doi: 10.1111/add.12466

plan. Other measures could include better supporting enforcement of illicit tobacco trade by the Border Agency and HMRC.

24. In Australia, standardised packaging was introduced in conjunction with other measures, including larger health warnings and a sustained mass media campaign. Australia also committed to annual increases in tobacco taxation of 12.5 per cent over inflation each year for four years, which started in December 2013.<sup>11</sup>
25. The BLF welcomes the implementation date for the regulations in May 2016 to coincide with a package of measures falling out of the EU Tobacco Directive, which were passed earlier this year.

#### Arguments on illicit trade

26. The tobacco industry has put forward several arguments against standardised packaging. One of these is speculation of a possible increase in illicit supply of tobacco. However, given that all the key security features will be the same on standardised packaging as on current branded packs, it is highly unlikely that illicit trade would be affected by the introduction of standardised packaging. Furthermore, a further set of security measures, such as unique identifiers, coded numbering and anti-counterfeit marks, are due to be introduced from May 2016 as part of the implementation of the EU Tobacco Products Directive.
27. A number of official comments suggest that the effect of standardised packaging on illicit trade is likely to be non-existent. The HMRC stated that standardised packaging is "not going to create any new risks" on illicit tobacco and Andrew Leggett, Deputy Director for HM Revenue and Customs, has expressed strong doubts about any material effects of standardised packaging on illicit trade.<sup>12</sup>
28. Furthermore, the Home Affairs Select Committee report on Tobacco Smuggling concluded: *"We believe that the decision on standardised packaging should be driven by health reasons and the imperative need to reduce the numbers of young people who start smoking. We note the statement of Sir Cyril Chantler to the effect that he was not convinced that standardised packaging would bring about an increase in the illicit market; even if this were the case, we believe that the proper response would be a more vigorous effort on enforcement rather than any lessening in the Government's drive towards introducing standardised packaging."*<sup>13</sup>

Q3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?

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<sup>11</sup> News article, 1 Aug 2013, ABC News website.

<sup>12</sup> Oral evidence to the House of Lords European Union Sub Committee (Home Affairs) on 24th July 2013.

<sup>13</sup> Home Affairs Select Committee First Report on Tobacco Smuggling: paragraph 44

29. The BLF welcomes these draft regulations as drafted, with the exception of the exclusions attached to specialist tobacco products.
30. The reason given for excluding specialist tobacco products from standardised packaging regulations is the low number of young people using these products, yet smoking cigars, cigarillos, beedis and pipes produces similar ill health for the principal user and those around them. All tobacco products should be included in the regulations for standardised packaging to avoid any possible loopholes or of the impression that products excluded from regulations are somehow less harmful. A full definition of exactly which tobacco products are 'specialist' should also be included for clarity of the regulations.
31. With regards to the enforcement of the regulations, the BLF agrees that there should be no upper limit for fines imposed on those who breach the regulations. However, we believe there should be minimum fine amounts. This will ensure that there are good incentives for compliance with the law. Minimum fines should be set at varying and proportionate levels to ensure they are high enough to be of consequence to individuals, organised groups and to corporations. A corporation or organised group may be selling branded packs in much larger quantities than an individual and there needs to be recognition given to the severity of the breach.
32. We believe that further details need to be provided on how these regulations will apply to corporations and enterprises, and in particular how cases will be dealt with where there is a director or senior person liable for the breach, rather than the corporation itself.

**Q4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation stage impact assessment?**

Illicit trade and cross border shopping

33. For the reasons stated in answer to Q.2 above we do not believe that the evidence justifies inclusion of "possible losses from a potential increase in consumption of illicit product and/or product legitimately bought outside the UK".
34. The UK previously introduced a major change in packaging and labelling in advance of the rest of Europe by introducing coloured picture warnings on packs from 1 October 2008. This change to pack design in fact led to a decline in both cross border shopping and illicit trade over the period between introduction and full implementation from October 2008 to September 2010.<sup>14</sup> The Impact Assessment document acknowledges that cross border shopping rates are mostly influenced by external factors such as the £/€ exchange rate and the number of passenger journeys (point 131). Therefore, just as with graphic warnings, standardised packaging is unlikely to have a significant impact.

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<sup>14</sup> Table 6 – Historic Clearances, Tobacco Bulletin – November 2013, HM Revenue and Customs.

[REDACTED]

**From:** [REDACTED]  
**Sent:** [REDACTED]  
**To:** Tobacco Packaging  
**Subject:** Plain Packaging.

Never has so much time, effort and down right arrogance been directed at a single cause. Have you people not had enough soundbites out of this subject that you are willing to go down this route.

It does not take a politician to work out that this Plain Packaging will lead to untold damage - from an increase in sale of illicit cigarettes to loss of further tax revenues and the uptake of under age smoking as more and more supply will be unregulated.

If you can answer one simple question I'll accept that you are right and that after years in the retail business I am wrong.

When was the last time someone had a cigarette and then killed, maimed, abused or injured someone else - ( passive smoking is a piece of a unreliable research that has been seized upon by the rather vociferous anti smoking lobby) .

You want to do something positive..... BAN ALCOHOL- which would appear to be at the route of most of societies' problems!! But of course- we all like a wee tipple don't we Mr Policy Maker!!!!!!!!!!!!!!

[REDACTED]

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Chief Executive: Melanie Laws

6 August 2014

Department of Health  
Standardised Tobacco Packaging Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB  
(via [TobaccoPackaging@dh.gsi.gov.uk](mailto:TobaccoPackaging@dh.gsi.gov.uk).)

Dear Dept. of Health

**Response to consultation on the Introduction of regulations for standardised packaging of tobacco products**

The Association of North East Councils is the representative body for local government in the North East. It encompasses all 12 local authorities in the region, throughout Northumberland, Tyne and Wear, Durham and the Tees Valley, on issues of concern to them and the communities they serve. It is a cross-party organisation, with all of its members democratically elected and accountable politicians.

**In 2012, the Association expressed its strong support for measures to introduce standardised packaging and we welcome the opportunity to reaffirm our support in the consultation on the introduction of regulations.** This co-ordinated response is submitted on behalf of our member authorities who in addition may be submitting their individual responses.

**Reducing smoking rates in the North East**

Local authorities and the NHS have historically worked together to tackle smoking through local tobacco control alliances and through the Fresh programme, set up in 2005 to reduce smoking rates in the North East of England through helping smokers to quit, preventing young people from starting to smoke and protecting people from tobacco-related harm. Smoking rates have reduced from 29% in 2005 to 22% in 2012 as a result of co-ordinated and comprehensive tobacco control partnerships at local and regional levels.

The Association, with its councils, has played a key role in previous major tobacco control policies including our work to build the case for comprehensive smokefree legislation. Our councils continue to play an integral part in ensuring both high public support for and

Chair: Councillor Paul Watson  
Vice Chairs: Councillor Simon Henig, Councillor Bill Dixon

subsequent high compliance with this ground breaking legislation. Our Trading Standards departments deliver vital tobacco control including the enforcement of age of sale legislation and action to reduce the supply of and demand for illicit tobacco and have helped to build the case for tighter tobacco regulation.

The Association is a member of the Making Smoking History in the North East Partnership which has the strategic aim of reducing smoking rates in the North East to 5% by 2025.

### **The harms of tobacco use**

Smoking remains our biggest avoidable public health problem and contributor to health inequalities. Tobacco use is the leading cause of premature death and preventable disease in the North East and every year there are 5,500 smoking-related deaths in our region. One in two long term smokers will die as a result of their addiction.

Tobacco use also places a burden on our economy, costing the NHS in the North East £110.4 million per year; the cost of smoking-related hospital admissions alone is calculated to be nearly £65.8 million per year. An additional £32.1 million is also lost to the regional economy each year through increased levels of absence from work amongst smokers compared to their non-smoking counterparts, which accounts for over 361,000 additional lost days of productivity per year across the North East.

Around 9,000 young people in the North East start smoking each year and the average age of starting to smoke is just 15. We need to do all we can to reduce the appeal of tobacco products to children and we believe that standardised tobacco packaging is a proportionate response and an appropriate next step in helping to reduce youth uptake.

### **Support for and effectiveness of standardised packaging**

Support for standardised tobacco packaging is at an all-time high: 69% of people in the North East are in favour and only 9% oppose it. Nationally, public support is equally high, and indeed more smokers support standard packs (32%) than oppose (30%) them, with the remainder ambivalent or undecided. Further measures to regulate tobacco are popular with the public – only 12% of people in the North East think the government is 'doing too much' to tackle smoking.

We welcome the findings of the Chantler Review, particularly the impact that standardised tobacco packaging could have on the uptake of smoking among young people in England. Research and discussions with young people in the North East since 2012 have continued to demonstrate the potential impact that standardised packaging could have on reducing youth uptake with standardised packs being rated as likely to be more harmful and less attractive than branded packs.

Latest evidence from Australia, where standardised packaging has been in place since December 2012, indicates that social norms in smoking behaviour are already beginning to change as a result of the measure. Smoking rates are already beginning to reduce faster than expected; there has been a sharp rise in the number of calls to quit lines, and smokers are less willing to display their packs in public or to smoke in outdoor public places particularly where children are present.

We note that Chantler remains unconvinced by the tobacco industry's argument that standardised packaging would increase the illicit market, especially in counterfeit cigarettes. These views are also upheld by the North East Trading Standards Association (NETSA) which represents the interests of all 12 Trading Standards departments in the

North East and the Association echoes their response to this consultation. Local authority Trading Standards officers will be tasked with enforcing this legislation and it is important that the UK government invests in this vital service and provides it with the leadership and powers it needs to continue delivering effective tobacco control.

We also welcome the draft regulations which, on the whole, are comprehensive and fit for purpose. However, we would like to see all tobacco products, including cigars and cigarillos, included in the proposed regulations and not just cigarettes and hand-rolling tobacco, as this creates the misperception that some tobacco products are less harmful than others.

We welcome the overall recommendations of the consultation-stage impact assessment particularly its statement that the implementation of standardised tobacco packaging is worth pursuing now and that the cost of delaying a decision is too great in public health terms.

### **Next steps**

Given that notification to the European Union of the intended regulations will take six months, there is now only a short time available to do this before the 2015 General Election. We call for government action to adopt this measure now and to help make smoking history for more children in the North East.

Yours faithfully







Department  
of Health



Llywodraeth Cymru  
Welsh Government



The Scottish  
Government  
Riaghaltas na h-Alba



Department of  
Health, Social Services  
and Public Safety  
www.dhsspsni.gov.uk

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

### a. Are you responding (required):

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

### b. Please provide your details and contact information:

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

Now go to question f

### c. Please provide your organisation's details and contact information:

Name of organisation (required):

Name of person providing submission (required):

[Redacted] \_\_\_\_\_

Job Title (required):

Public Health Lead

Contact address of organisation (required):

33 Witham, Hull. HU9 1DB

Contact email address (required):

[Redacted] \_\_\_\_\_

Is this the official representative of the organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

**e. If you are responding on behalf of an organisation, what type is it?**

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)

If other, please tell us the type of organisation:

**f. Does your response relate to (required):**

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

**g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)**

No

Yes (please describe below)

If yes, please describe:

**h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box**

## Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

1. Sir Cyril Chantler stated in his covering letter to the Secretary of State: "it is in my view highly likely that standardised packaging would serve to reduce the rate of children taking up smoking" and "the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time in the uptake and prevalence and thus have a positive impact on public health."

2. A report by Professor David Hammond for the Irish Department of Health backs up Sir Cyril Chantler's view. He concluded that,

"Overall, the existing evidence on plain (standardised) packaging supports four primary conclusions:

- 1) Plain packaging will reduce smoking initiation among youth and young adults.
- 2) Plain packaging will promote smoking cessation among established smokers.
- 3) Plain packaging will support former smokers to remain abstinent.
- 4) Plain packaging will help to denormalize tobacco use."

3. We welcome the response of Jane Ellison MP, Minister for Public Health, to the Chantler Review. She said that the report found standardised packaging was "very likely to have a positive impact" on public health. She went on to say: "in the light of the report and the responses to the previous consultation in 2012, I am minded to proceed with introducing regulations to provide for standardised packaging" and that she wished to "proceed as swiftly as possible". She also reported that the Government's Chief Medical Officer, Dame Sally Davies, had written to her supporting the conclusions of the Chantler Review and the introduction of standardised packaging.

4. We therefore consider that the case for standardised packaging has been made, and that the Government should lay Regulations on standardised packaging, under Section 94 of the Children and Families Act, before Parliament as soon as possible. Given that notification to the European Union of the intended Regulations will take six months, there is now only a short time available to do this before the 2015 General Election.

5. The Government should resist efforts by the tobacco industry and its surrogates to delay decision-making and laying of the regulations before Parliament. As outlined below, there is now strong evidence that the industry's arguments are either weak or without foundation while their data on illicit have been shown to be highly misleading.

### References

1. Hammond, D. Standardized Packaging of Tobacco Products. Evidence Review. Prepared on behalf of the Irish Department of Health. March 2014.

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

6. Tobacco control policies must be pursued in parallel and not seriatim if they are to have their best possible effect in reducing prevalence rates. The optimum date for implementation of standard packaging would be May 2016 at the same time as implementation of the EU Tobacco Products Directive (TPD), which includes updated larger health warnings and graphic warnings on the front of the packs.

7. Standardised packaging was introduced in Australia as part of a comprehensive strategy. This included larger health warnings (75% rather than the 65% in the TPD), mass media campaigns and reducing affordability by increasing taxation. Australia is committed to annual increases in tobacco taxation of 12.5 per cent over inflation each year for four years, starting in December 2013, a far higher increase than the current escalator in place in the UK which is only 2% above inflation. The Australian strategy has been very successful with a significant increase in calls to the quitline, and a significant decline in tobacco consumption immediately following implementation of plain packaging.

8. To introduce a mass media campaign equivalent to Australia at the time of the introduction of plain packaging, would, on a per capita basis, cost the equivalent of £33.7 million a year in the UK, a far higher amount than is currently being spent here. In relation to mass media campaigns it is important to note that new evidence from the UK shows that mass media campaigns are highly effective in reducing smoking prevalence and consumption, that both the negative and positive emotive campaigns used in the UK are effective in this respect and the suspension of smoking cessation literature and websites). Yet currently in the UK mass media campaigns are not consistently being screened at a level that would maximise their effectiveness.

9. The DH Tobacco Control Plan for England runs until the end of 2015 and needs to be renewed and refreshed for the period 2016-2020, the period when standardised packaging will be implemented. It is important in updating its tobacco strategy that the Government gives careful thought to how to maximise the public health benefits of the implementation of standardised packaging, by, for example:

- Increasing funding for sustained mass media campaigns in advance of standardised packaging coming into effect;
- making stop smoking services mandatory and ensuring delivery to a high quality standard;

- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force;
- introducing tax rises on tobacco products over and above the existing escalator, particularly to counteract any possible negative effects from brand-shifting or price cutting;
- restructuring taxation to minimise the variance in tax between handrolled tobacco and manufactured cigarettes and the taxation between different price categories of manufactured cigarettes; and
- introducing further levies on the industry to fund stop smoking services and other tobacco control initiatives, and to meet health costs caused by tobacco consumption.

#### Impact of standardised packaging on the illicit market

10. A principal tobacco industry argument against standardised packaging has been that the illicit trade in tobacco in the UK is on the increase and that plain packaging will inevitably exacerbate this trend. There is no good reason to accept either of these arguments. With respect to the first argument tobacco industry data purporting to show an increase in illicit is misleading, with respect to the second there is no plausible mechanism of action by which plain standardised packaging would lead to an increase in the size of the illicit market, and indeed evidence published since the 2012 consultation suggests that it is false.

#### Misleading nature of tobacco industry data on illicit

11. Research and leaked industry documents have now established that claims by industry that rates of illicit tobacco use are increasing markedly in the UK and will increase further following standardised packaging should be seen simply as part of the tobacco industry's public relations campaign to prevent the policy. Analysis shows that the number of press articles citing industry data on illicit increased suddenly once standardised packaging emerged on the policy agenda, that industry data significantly exaggerate the scale of illicit and claim trends are upwards when independent data show the opposite.<sup>13</sup> Further, evidence cited in industry submissions to support its claims that standard packaging will increase illicit has been shown to be very poor quality and effectively manufactured by the industry to support its case – all such 'evidence' was produced by industry or those funded by it and none was peer-reviewed.<sup>3</sup>

12. Part of this strategy has been to fund a growing number of third parties – organisations and individuals (notably ex-policemen) - who provide a more credible voice in debates, produce reports which are presented as independent while reinforcing industry messages. Yet the links to industry have rarely been disclosed.<sup>3</sup>

13. More broadly, growing evidence from a number of jurisdictions now suggests that tobacco company commissioned data and evidence on illicit, including that published by leading accountancy firms, will tend to over-estimate the scale of the illicit trade, exaggerate the upward trend (either by exaggerating current levels or by revising historical figures downwards) and mis-represent the nature of the trade in order to down-play the extent of tobacco industry involvement.

14. Although empty pack surveys can provide accurate figures on the extent of non-domestic tobacco use, the limited methodological detail available on the tobacco industry's empty pack surveys which usually form the basis of their data suggest that the industry may be deliberately designing these surveys to exaggerate the extent of the illicit trade.<sup>15 18</sup>

15. In a public climb-down following criticism of its previous data which suggested that in 2012 rates of illicit in the UK had suddenly increased countering previous trends, KPMG's latest report, this time commissioned by all four transnational tobacco companies, has revised its illicit estimate for the UK illicit trade downwards stating that "alternative data sources suggest this [the 2012 estimate] may have overstated non-domestic incidence for the full year" They claim that additional data which were not previously available to them "suggest there has been a more gradual decline from 2011 to 2013" (pages 300-302). It is a moot point whether these figures would have been revised without academic criticism of KPMG's data for industry both in the UK<sup>15</sup> and Australia and this revision undermines the industry's public claims about illicit.

16. Growing evidence also suggests that the tobacco manufacturers continue to facilitate the illicit trade in their products and at best are failing to control their supply chains. <sup>15</sup> In October last year the Chair of the Public Accounts Committee said that: "The supply of some brands of hand-rolling tobacco to some countries in 2011 exceeded legitimate demand by 240%. HMRC must be more assertive with these manufacturers. So far it has not fined a single one of them."

17. Even the industry's own data indicates that around a fifth of illicit cigarettes across the EU are PMI's own brands, a level which outstrips counterfeit PMI product approximately five times<sup>15</sup> while Imperial Tobacco's brand Classic which, until recently, it was producing in Ukraine, was so consistently found in the illicit market it was labelled as an illicit white product.

Lack of plausible mechanism of action by which standardised packaging would cause an increase in illicit

18. Consistent with the highly misleading nature of industry data on illicit outlined above, there is no plausible mechanism of action because all the key security features on existing packs of cigarettes would also be present on standardised packs, and additional markings will be required under the EU Tobacco Products Directive. These include unique identifiers, coded numbering and covert anti-counterfeit marks. Jane Ellison, Parliamentary Under-Secretary of State for Health, said in a November 2013 Parliamentary debate that: "I am grateful to those hon. Members who have made the point that if we were to adopt standardised packaging, it would not mean plain packaging. Approaches such as anti-smuggling devices could be built into standardised packaging, if we choose to go down that route."

19. The production costs of illicit cigarettes (including packaging) are very low. In Paraguay costs can be as low as 5 US cents a pack, a Jin Ling pack in Kaliningrad or a Chinese counterfeit pack may cost about 20 cents a pack to produce. Counterfeiters are also able to produce quality and apparently genuine packaging at low prices in a short time. It follows that outside packaging is a very poor indicator of



whether a pack of cigarettes is licit or illicit. The only obvious circumstances in which external packaging could be useful in this respect is precisely if standardised packaging is introduced – which would of course enable easy visual identification of “cheap white” brands (ones with no licit market in the UK) and diverted licit brands (where the first destination market was in a country without standardised packaging, and the product has been diverted into illicit channels).

20. Number codes will develop further into an international standard system because of the requirements of Article 15 of the revised EU Tobacco Products Directive and Article 8 of the Illicit Trade Protocol, a subsidiary treaty under the WHO Framework Convention on Tobacco Control, to which the UK is a Party.

21. Article 15 of the Tobacco Products Directive states that: “Member States shall ensure that all unit packets of tobacco products are marked with a unique identifier. In order to ensure the integrity of the unique identifier, it shall be irremovably printed or affixed, indelible and not hidden or interrupted in any form, including through tax stamps or price marks, or by the opening of the unit packet.”

22. Article 8.3 of the Illicit Trade Protocol states that: “With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party”. The Illicit Trade Protocol also specifies that any track and trace system should be fully independent of the tobacco industry.

23. It should be noted that Philip Morris International has developed a coding system called “Codentify”, which the company has licensed for free to JTI, Imperial Tobacco and BAT. The four tobacco multinationals have set up a “Digital Coding and Tracking Association”, based in Zurich to promote Codentify globally as the track and trace system of choice despite serious limitations in the Codentify system and the industry’s involvement contravening the Illicit Trade Protocol. According to PMI, the system is based on unique twelve digit codes and it would be a simple matter to identify “fake” codes on illicit packaging. PMI’s promotional material claims that “Codentify”.... “makes the leap into the digital age and can meet the demands of governments that want to improve tax revenue collection, the robustness of verification processes and supply chain security ... When it comes to protecting government tax revenues, securing the supply chain and fighting illicit trade, Codentify offers a highly advanced, secure and cost-effective solution for the 21st century”.

24. It is clear that the tobacco industry is promoting contradictory messages depending on which issue it is addressing: on the one hand it claims to have a robust coding system which enables it to identify counterfeit products, and on the other it claims that pack design is vital in combatting illicit trade. While we do not support the use of a coding system which is proprietary to the tobacco industry as is the case with Codentify it is certainly the case that this or any other coding systems

independent of the industry could be used on standardised packs as readily as on branded ones.

25. Not surprisingly therefore, Andrew Leggett, Deputy Director for Tobacco and Alcohol Strategy at HM Revenue and Customs has said about standardised packaging that "we're very doubtful that it would have a material effect [on counterfeiting and the illicit trade in tobacco]". This conclusion was supported by the House of Commons Home Affairs Select Committee, in its report on the illicit tobacco trade published in June 2014. The Committee reported that: "We believe that the decision on standardised packaging should be driven by health reasons and the imperative need to reduce the numbers of young people who start smoking. We note the statement of Sir Cyril Chantler to the effect that he was not convinced that standardised packaging would bring about an increase in the illicit market; even if this were the case, we believe that the proper response would be a more vigorous effort on enforcement rather than any lessening in the Government's drive towards introducing standardised packaging."

#### Evidence from Australia on Illicit Tobacco

26. The tobacco industry has repeatedly claimed that the level of illicit trade in Australia has increased since, and as a result of, the introduction of standardised packaging. For example, BAT told investors in March 2014 that total illicit activity in Australia had risen by more than 30 per cent since the introduction of standardised packaging.

27. These claims were examined during the Chantler Review and shown to be unsupported, a fact that was effectively admitted during Review meetings with representatives of the tobacco industry in Australia. The Australian Government and customs officials have also rejected tobacco industry claims that illicit trade in Australia has risen since the introduction of standardised packaging. In March 2014 the Sydney Morning Herald reported that there had been only one seizure of counterfeit plain packs since December 2012.

28. In response to this article, the paper was contacted by Sonia Stewart, the former Head of Corporate Affairs & Legal for Imperial Tobacco Australia, who has now left the industry. In her job at IT Australia she had "commented numerous times in the media during 2011-2013 about the anticipated impact of plain packaging", claiming for example that "the legislation will make the counterfeiters' job both cheaper and easier by mandating exactly how a pack must look". She wrote to the paper that "based on these figures from Australian Customs authorities, there doesn't appear to be any evidence that plain packaging itself has caused an increase in tobacco smuggling." She added: "Imperial Tobacco did expect to see an increase in tobacco smuggling because of plain packaging, but based on the figures from Australian Customs it looks like those predictions were simply wrong."

29. Research in Victoria, Australia found there was no increase in the availability of illicit tobacco in small retail outlets after the implementation of standardised packaging, and despite predictions by the tobacco industry of a marked increase in the sale of counterfeit cigarettes, post-legislation in 2013 only 2.6% of cigarette smokers reported having purchased one or more packets in non-compliant packaging in the past three months.

#### Tobacco Consumption in Australia

30. The tobacco industry has also claimed that tobacco consumption in Australia has risen since the introduction of standardised packaging. Again, independent evidence does not support this proposition.

31. In November 2013 a study by the consultancy firm London Economics, funded by Phillip Morris, reported that since the introduction of plain packaging in Australia their survey showed no statistically significant change in smoking prevalence. This report has been sharply criticised by, among others, the Cancer Council of Victoria, since:

- The survey was conducted on the mistaken assumption that adult smoking prevalence ought to have markedly declined in the immediate aftermath of the policy's implementation, which was not the assumption underpinning the policy intervention.
- The report used an online survey panel which was not representative of the general population (for example, the panel's smoking prevalence rate was higher than the Australian average).
- The survey had a sample size of 5,000, which is nowhere near big enough to pick up the sort of declines in smoking prevalence expected from one year to the next. To measure a statistically significant decline of, for example half a percentage point, which is the sort of magnitude one might expect to see over a twelve month period, would have required a sample size of around 90,000.

32. The Australian Institute of Health and Welfare (AIHW) National Drug Strategy Household Survey, released online on 17th July, showed that fewer Australians are smoking daily. The daily smoking rate dropped significantly between 2010 and 2013, from 15.1% to 12.8% among people 14 or older. As shown in the graph below this fall was greater than the underlying trend and is evidence that Australia's comprehensive policy approach to tobacco control is working. Importantly, this decline occurred before the large tax increases were introduced and Australian experts therefore suggest it can be attributed to standardised packaging, suggesting it has been effective at reducing smoking prevalence.

33. Smokers have also reduced the average number of cigarettes they smoke per week-down from 111 cigarettes in 2010 to 96 cigarettes in 2013. And the results show younger people are delaying starting. The proportion of 12-17 year olds who had never smoked remained high in 2013 at 95%, and the proportion of 18-24 year olds who had never smoked increased significantly between 2010 and 2013 (from

72% to 77%). The age at which 14 to 24-year-olds smoked their first full cigarette was almost 16, rising from 14.2 to 15.9 years of age between 1995 and 2013.

34. The tobacco industry in Australia has reported an increase in tobacco sales from 21.015bn sticks in 2012 to 21.074bn in 2013, and the industry and its front groups in the UK have claimed that this showed standardised packaging was not working. Excise tax must be paid before tobacco products are released for home consumption, but may be paid while stock is still in the warehouse. An analysis by Cancer Council Victoria found that it was evident from the 'bump' in industry monthly sales figures that some pre-stocking did occur prior to the large tax increase in December 2013 which would also have tended to increase sales figures in 2013, with retailers likely to have purchased sufficient stock to cover not just December but some weeks after 1st January 2014 as well." In addition although the Industry reported a small (0.28%) increase in sales year on year, they did not report the increase in the Australian population between 2012 and 2013. Adjusted for population, tobacco sales per person by their measure of consumption would in fact have fallen, from 920.4 per person in 2012 to 906.9 in 2013.

35. The Australian Government's Department of Health has released figures showing that total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:

- \$5.135 billion in September 1959;
- \$3.508 billion in December 2012 (when standardised packaging was introduced); and
- \$3.405 billion in March 2014.

36. This is supported by figures from the Australian Treasury showing that tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced. Clearances are an indicator of tobacco volumes in the Australian market.

37. In June 2014, Professor Ashok Kaul of the University of Saarland and Professor Michael Wolf of the University of Zurich published research funded by Philip Morris International, purporting to show that smoking prevalence had not been reduced in Australia by standardised packaging legislation in the first year since its implementation. Even if this analysis were correct, it would be largely irrelevant, since the primary purpose of the legislation is to discourage young people from starting to smoke, and thus contribute to reducing smoking prevalence rates over an extended period of time. A one year effect, even if the Kaul and Wolf methodology was adequate, would be unlikely to show up clearly in monthly prevalence data that is affected by a range of factors, including other tobacco control policies, seasonality, and unstable monthly estimates (some monthly sample sizes in the survey data set used by Kaul and Wolf are substantially smaller than others).

Other Evidence from Australia

38. Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised

packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the New South Wales Quitline service. Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc.) suggested that the number of calls to Quitline NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later and a significant increase in calls was sustained over time.

39. Guillaumier A et al, University of Newcastle, Australia, reported in June 2014 that 'following the implementation of plain packaging, perceptions of the quality and taste of cigarettes have changed'. Thematic analysis of six focus groups with 51 participants revealed some participants reporting reductions in product quality. For example, 'I've noticed the reduction in the grading of the tobacco.'

40. Wakefield M et al, Cancer Council Victoria, Annenberg School for Communication Pennsylvania and South Australian Health and Medical Research Institute University of Adelaide, reported in 2013 that smokers in Australia were less willing to display their packs in public and smoke in outdoor areas since plain packaging was introduced. Researchers counted patrons, smokers and tobacco packs at cafes, restaurants and bars with outdoor seating for several months both before and after the introduction of standardised packaging. They found that pack display on tables declined by 15% after plain packaging, which was mostly due to a 23% decline in the percentage of patrons who were observed smoking. The study also found that the declines in pack display and patrons observed smoking were stronger in venues where children were present.

41. Tobacco retailers in the UK have suggested that the introduction of standardised packaging means that it will take longer to serve customers and so convenience stores will lose custom. As the Impact Assessment concludes there is no evidence at all that this is the case from the experience in Australia; indeed transaction times have tended to decline post implementation not increase. Most recently, research published at the end of May, which may not be taken into account in the IA, reported that the claim that plain packaging would negatively impact on small tobacco retailers by making it harder to locate and retrieve cigarette packs, thereby increasing transaction times, has not eventuated in Australia.

42. Furthermore, Trans-national Tobacco Companies are fee-paying members of the proponents of these messages: Scottish Grocers Federation, Association of Convenience Stores, National Federation of Retail Newsagents, and the Federation of Wholesale Distributors. The Tobacco Retailers Alliance, which has been extremely vocal in its opposition to standardised packaging is a front group of the Tobacco Manufacturers' Association, the transnational tobacco companies' trade association in the UK which is entirely funded by tobacco companies. A series of PMI leaked documents reveal the integral role that such organisations play in opposition to tobacco control regulation.

#### Other industry arguments in the UK

43. Recent research from the University of Bath examined the relevance and quality of the evidence tobacco companies have cited to support their argument that standardised packaging 'won't work'. This work is consistent with the growing

evidence from Australia outlined above which refutes, one by one, the industry's claims that standardised packaging won't work.

44. Research by Hatchard et al. found that tobacco companies cited only 17 research reports directly addressing standardised packaging, of which 14 (82%) were commissioned by or linked to global tobacco companies who have a commercial interest in the policy outcome. Analysis of the independence and publication status of this research showed that its quality is significantly lower than the quality of evidence supporting standardised packaging. The remainder of tobacco companies' evidence (60 research reports) did not address standardised packaging of tobacco products at all.<sup>5</sup>

45. Ulucanlar et al. examined two submissions and three research reports in great detail to reveal three techniques used by tobacco companies to misrepresent independent studies on standardised packaging:

- Fundamental misrepresentation of studies supportive of standardised packaging, mis-citing them and distorting their main messages;
- Use of a mimicked version of scientific critique to discredit the supportive literature, which featured insistence on methodological perfectionism and uniformity, lack of rigour and use of a litigation model of review;
- Evidential landscaping whereby industry evidence relevant to standardised packaging that would have undermined their case was withheld, while peer-reviewed and independence evidence on other issues (e.g. psycho-social drivers of smoking) was cited, giving the impression of evidential quality.<sup>4</sup>

46. Overall, the University of Bath found that the low quality of tobacco companies' evidence against standardised packaging and its highly misleading critique of the evidence in favour of standardised packaging suggest that their proposition that there is inadequate evidence that standardised packaging will lead to public health benefits is largely without foundation. Hansard. HoC column 1018 et seq. (3rd April 2014)

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3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

47. ASH welcomes the draft regulations, which we consider, with only minor changes, to be fit for purpose. The changes we recommend are set out below.

#### Exemption for tobacco products other than cigarettes and hand-rolling tobacco

48. The regulations should also apply to specialist tobacco products including cigars and cigarillos. While we note the explanation for their exclusion is their low rate of use by young people, we consider that it sets an unhelpful example if any smoked tobacco products are excluded from the regulations, since this might be interpreted as endorsement of the idea that they are in some way less harmful to health.

#### Regulation 4(7) with respect to pack size

49. This regulation while prohibiting packs containing less than 20 cigarettes allows manufacturers to compete on number by including more than 20 cigarettes. In Australia this has been a tactic used by the industry and extra cigarettes have been introduced into some brands for the same price as a promotional tool. Such extra free cigarettes are known colloquially as "loosies" and Imperial Tobacco has gone further and registered a brand name called "Peter Stuyvesant + Loosie" and made 21 cigarettes to a pack.

50. One way of preventing this would be by mandating that packs 'must contain 20 cigarettes' to prohibit additional cigarettes being included as a promotional tool.

#### Regulation 10 with respect to misleading brand names, variants and descriptors

51. Brand names, brand variant names and brand descriptors will become a more important element of tobacco product promotion once standardised packaging is introduced.

52. Recital (27) of the TPD specifically covers this issue:

"Tobacco products or their packaging could mislead consumers, in particular young people, where they suggest that these products are less harmful. This is, for example, the case if certain words or features are used, such as the words 'low-tar', 'light', 'ultra-light', 'mild', 'natural', 'organic', 'without additives', 'without flavours' or 'slim', or certain names, pictures, and figurative or other signs. Other misleading elements might include, but are not limited to, inserts or other additional material such as adhesive labels, stickers, inserts, scratch-offs and sleeves or relate to the shape of the tobacco product itself. Certain packaging and tobacco products could also mislead consumers by suggesting benefits in terms of weight loss, sex appeal, social status, social life or qualities such as femininity, masculinity or elegance. Likewise, the size and appearance of individual cigarettes could mislead consumers by creating the impression that they are less harmful. Neither the unit packets of tobacco products nor their outside packaging should include printed vouchers, discount offers, reference to free distribution, two-for-one or other similar offers that could suggest economic advantages to consumers thereby inciting them to buy those tobacco products."

53. There is good evidence for example that female-oriented brand descriptors such as "slims" target beliefs about smoking behaviour among young women, and these beliefs are an important predictor of smoking behaviour in this group.

54. However, the list in Recital (27) is not comprehensive and there is evidence that many other words are also misleading. For example:

- Smooth - population based studies have found that adult smokers perceive 'smooth' as a synonym for 'light'. A UK study found that over half of young people, including non-smokers as young as 12, believed that a cigarette brand labelled as 'smooth' would be less harmful.<sup>67</sup>

- Colour names - such as gold or silver - materials provided by Phillip Morris to retailers indicated that the names 'gold' and 'silver' have been used to replace 'light' and 'ultralight' and 'blue' has been used to replace 'mild'. Prohibiting the use of such colours is not sufficient, if the colour name is allowed to stay then the association will remain. Smokers will continue to believe, erroneously, that products labelled 'gold' and 'silver' are less harmful, even if all products are the same standardised colour.

- Numbers - as many as 80% of Canadian smokers shown packages with different numbers in the name reported that the brand with the lower number delivered less tar and could lower the risk. And a study in the US found that almost 90% of participants reported that a brand with the number '6' in the name would have lower risk than an otherwise identical pack but with the number '10' instead.

55. A requirement to prohibit misleading words or features is set out in Article 13 of the TPD, and is contained within Regulation 10 of the draft regulations on standardised packaging. Regulation 10 does not, however, specify which brand names and variants are prohibited

56. It is essential that the measures required to ensure that specific brand names and variants which are found to be misleading can be prohibited, including, but not limited to, those set out in recital (27), are transposed into UK legislation. Furthermore the responsibility should rest with the industry to demonstrate that any brand names, variants or descriptors are not misleading before they can be put on sale in the UK.

#### Review process

57. In Australia in the build up to the legislation tobacco companies engaged in strategies of reassuring customers, re-energising the names of brands, and expanding product ranges to provide extra value for money and retain consumer interest, e.g. menthol capsule cigarettes, packaging re-design, adding bonus cigarettes to packets, changing names so that they are longer and take up more room on plain packets. The Government should monitor such activity and where appropriate review and revise the regulations.

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4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

58. For the reasons stated in answer to Q.2 above we do not think the evidence justifies inclusion in "other key non-monetised costs" of "possible losses from a potential increase in consumption of illicit product and/or product legitimately bought outside the UK".

59. The UK previously introduced a major change in packaging and labelling in advance of the rest of Europe by introducing coloured picture warnings on packs from 1 October 2008. As shown in table 8 of the IA this did not lead to an increase in cross border shopping. Indeed both cross border shopping and illicit trade declined over the period between introduction and full implementation from October 2008 to September 2010. As the IA acknowledges this is because the greatest influence on cross border shopping is down to external factors such as the £/€ exchange rate and the number of passenger journeys and therefore, just as with graphic warnings, standardised packaging is unlikely to have a significant impact.

Impact on Retailers

60. Tobacco sales are undergoing long-term decline. At its peak in the 1950s adult male smoking prevalence was 80%. Female smoking prevalence continued to rise and reached a peak of 45% in the mid-1960s.<sup>69</sup> Since then smoking prevalence amongst both men and women has declined significantly and is now under 20%. Government policy is designed to sustain and increase this trend.

61. More recent data from HMRC tobacco clearances shows the impact this has had on sales volume with the number of million cigarette sticks cleared for UK sales falling from 94.080 million in 1992/3 to 54.737 million in 2002/3 to 37.932 million in 2012/13, a decline of 30% in the last ten years. (see table above from the HMRC Tobacco Factsheet November 2013). Small retailers have had to adjust to this decline and will continue to have to do so. It is important to note that any impact of standardised packaging will be marginal compared to the overall secular trend.

62. HMRC clearance data also shows the importance of the government's anti-smuggling strategy in supporting retailers. The impact is clearest with respect to handrolled tobacco. At its peak the illicit market share of handrolled tobacco was estimated to be over 60%; most recent estimates by HMRC suggest that it has fallen to 36%. This is matched by a growth in the amount of taxed HRT released for consumption which rose 2.8 million kilograms in 2002/3 to 6.2 million kilograms in 2012/13.

63. The impact of underlying trends in sales for independent retailers need to be taken into account too, particularly given the rise of small outlets set up by large retailers in the UK. An economic analysis of the impact of point of sale display legislation in Ireland using AC Nielsen data concluded that no statistically significant change in cigarette pack sales was observed following implementation of the legislation over and above seasonal and underlying trends, and that small and independent retailers are facing a broader and longer-term decline in sales generally which is most likely due to other causes. We would expect to see the same pattern occurring in the UK both as a result of the implementation of point of sale display legislation and standardised packaging, and recommend to DH that such data should be gathered for the UK as part of the evaluation of the impact of the legislation. In contrast to tobacco industry predictions in Australia there is no evidence to suggest that smokers have defected from smaller to larger stores to make their tobacco purchases in the wake of standardised packaging legislation.

64. The Impact Assessment page 28 p.112 states 'anecdotally the [retail] profit margins on the sale of tobacco may be relatively low.' This is corroborated by information provided to ASH by a retailer in Gateshead, John McClurey, a member of the ASH advisory council. According to John McClurey profit margins on cigarettes average around 4.5% compared to profits on other products on sale in his shop which average around 22%. This means that while tobacco currently amounts to around 50% of his sales turnover it is a much smaller proportion of his profits. In fact he estimates that currently tobacco sales only amount to about 20% of his profits with 80% of his profits coming from sale of non-tobacco products. To illustrate the point John McClurey has told us that if a customer buys a packet of chewing gum he makes around 17 pence in profit compared to 14 pence on a price-marked packet of 10 John Player Special. Plus a price-marked pack of 10 JPS cigarettes costs £3.50,

while a packet of chewing gum only costs 50 pence, so the customer buying chewing gum as opposed to cigarettes has £3 left over available to spend on other items.

65. For a shop where tobacco only accounts for 20% of turnover, which is the average estimated in the ACS report referenced in the IA, the proportion of profits would be even smaller at around 5% for tobacco compared to 95% for non-tobacco products.

66. Comprehensive data on prices and profit margins is available from wholesalers such as Bookers who can be contacted via their website <https://www.booker.co.uk/help/contactus.aspx>. Data on the proportion of tobacco sales accounted for by different types of outlet is available from AC Nielsen which can also provide data on the trends in sales of tobacco between different types of retailers over time. We recommend that the DH get in touch with Bookers and AC Nielsen for more information.

#### Consumer Surplus

67. In economic theory, consumer surplus is usually defined as the difference between the total amount that consumers are willing and able to pay for a good or service and the total amount that they actually do pay.

68. In point 160 of the IA it is accepted that the theory of consumer surplus is more difficult to apply both 'in principle and practice' to an addictive product like tobacco. The rationale for including "lost consumer surplus" as a potential cost of standardised packaging does not stand up to scrutiny. In paragraph 21, this is defined as "the loss of the ability of those who continue to smoke to gain the intangible benefit associated with smoking a particular brand that only the packaging of that brand, as it is currently available, can produce". We note that no attempt is made to describe the alleged "intangible benefit", for the very good reason, we would suggest, that it is illusory.

69. A more detailed analysis of the issues around consumer surplus prepared in response to the consultation stage Impact Assessment by the economist Dr Matthew Levy of the London School of Economics for the Department of Health is included at Appendix A. Some, but not all, of his concerns have been taken into account in the revised IA.

70. In any case if, in practice, standardised packaging were to lead to some brand switching by consumers, from high price to low price cigarette brands, or if the tobacco industry were to respond to the introduction of standardised packaging by cutting prices, this should be dealt with quickly by additional increases in tobacco taxation, above those currently required by the duty escalator.

#### Conclusions

71. Standardised packaging is backed by the Smokefree Action Coalition, which is an alliance supported over 250 organisations including medical Royal Colleges and other medical organisations, health and children's charities such as the British

Heart Foundation and Cancer Research UK, the Chartered Institute of Environmental Health, the Trading Standards Institute and others. The consensus of medical professionals, public health and other relevant experts is that standardised packaging would make an important positive contribution to reducing the harm caused by tobacco consumption.

72. Standardised packaging is also popular with the public. A poll on the issue by YouGov, conducted for ASH in March 2014, found that overall 64% of adults in Great Britain were in favour of standardised packaging with only 11% opposed. There was majority support across age groups, genders and social classes. It is clear that most people believe that this policy, combined with other tobacco control initiatives, is an important way to prevent the next generation of young people from starting to smoke.

73. Section 94 of the Children and Families Act 2014 was passed overwhelmingly in both the House of Lords (*nem con*) and House of Commons (24 MPs voted against), following a strong cross-Party campaign in support of the policy. It therefore demonstrably has majority support in Parliament.

74. Opposition to standardised packaging has been driven and financed by the tobacco industry which requires young people to start smoking in large numbers every year as its previous consumers quit or die prematurely from smoking-related disease. Furthermore, the claims that the tobacco industry and those it funds have made to oppose the legislation have now comprehensively been shown to be highly misleading and its data highly inaccurate.

75. Following the six week consultation on the draft regulations, the Government will then have to notify the European Union of the draft Regulations, under the Technical Standards and Regulations Directive 98/34/EC. This process can take up to six months. Therefore, time is now short if Parliament is to get the opportunity to vote on the Regulations before the General Election. If this opportunity were now to be missed, it would be widely understood as a public health disaster and as suggesting that the tobacco industry, whose appalling conduct in the debate over standardised packs has now been clearly documented, still has excessive influence at the heart of Government.

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76. The pro-smoking group FOREST, which receives virtually all its funding from the tobacco industry, have hired the marketing agency Kreate to collect "digital signatures" for the "Hands off Our Packs" petition to the Prime Minister. Kreate describes itself as "an experiential agency that specialises in the delivery and staffing of face-to-face experiences". Agencies have also been commissioned directly by BAT to run a six week, "anti-plain packs roadshow", aiming to sign up 100,000 people to oppose plain packs. The company is reported to have allocated £500,000 to the activity. Over 100 people a day will be working on this campaign. ASH recommends that consultation responses generated in this way should be regarded by the Government as constituting a single response on behalf of the tobacco industry.

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.



## **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

### **Completing the online form on the Department of Health website at:**

[http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

[1](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

- o **Filling in the response form by downloading it at:**

<https://www.gov.uk/government/consultations>

- o **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- o **Posting your response to**

Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB



## CONSULTATION ON THE INTRODUCTION OF REGULATIONS FOR STANDARDISED PACKAGING OF TOBACCO PRODUCTS

### Response from Somerset County Council

Somerset County Council (SCC) is responsible for protecting and improving the health of our population, through such services as Trading Standards, Public Health and commissioned Stop Smoking Services. The County Council therefore welcomes the proposed regulations for the introduction of standardised packaging of tobacco products as an essential child protection and public health measure, and endorses the findings of the Chantler review. The County Council also stresses the urgency of the need for their rapid introduction.

The County Council endorses the detailed response of Smokefree Southwest and warmly welcomes the proposed regulations, with one important caveat, addressed below.

SCC believes that to achieve their purpose an extension to the proposals is necessary, addressed below:

We believe the draft regulations should be strengthened. The regulations proposed apply only to cigarettes and hand rolling tobacco whereas cigars and pipe tobacco are exempted. This is a serious gap.

When the US Government introduced taxation changes for various tobacco products, the tobacco industry responded by promoting small cigars and pipe tobacco as alternatives to the now higher priced alternatives. This saw huge increases in sale and consumption of pipe tobacco and small cigars, as noted in these news reports:

<http://usatoday30.usatoday.com/news/health/story/2012-08-02/tobacco-cigarettes-cigars/56702480/1>

<http://www.nbcnews.com/health/kids-health/too-many-american-teens-are-smoking-little-cigars-report-says-f8C11433058>

Furthermore, the industry rebranded "roll your own tobacco" as "pipe tobacco" to avoid the new taxes.

<http://www.drugfree.org/join-together/sales-of-pipe-tobacco-surge-after-federal-tax-hike-on-roll-your-own-tobacco/>

While the US market is very different from that in the UK, we know from past experience that the tobacco industry in this country is adept at responding to new regulatory challenges by adapting to them and exploiting any remaining opportunities to market their products. For example the industry may exploit an exemption for small cigars by promoting them and through the use of attractive packaging, as it currently does with cigarettes. While at the present time small cigars are not a significant part of the youth market, government should expect the

Industry to respond to these regulations by exploiting any marketing potential for exempt categories in which case they might well soon become a significant part of the youth market.

Hand-rolling tobacco is a large part of the youth market in the South West, and a major concern for SCC. If the industry is able to rebrand hand rolling tobacco as pipe tobacco and thus avoid the standardised packaging regulations, the intent of the measure will be to a significant extent defeated.

For these reasons we believe the regulations should apply to all tobacco products, not just cigarettes and hand-rolling tobacco.

It should be noted that, at present, the industry is constantly introducing new packs and brand variants in a race against time before the market goes 'dark.' If the remaining tobacco products are not covered by these regulations, then the industry should be expected to exploit this new opportunity, deploying the packaging innovations developed for cigarettes to the cigar sector.

If, nevertheless, the government is minded to allow any exemption then in our view it should be much more tightly defined. For example, an exemption might be applied to high value cigars sold from specialist tobacconists, such as large Havana cigars, given that such products are highly unlikely to play a part in youth initiation and continuation of smoking.

Regulation is needed and it is needed now. Many hundreds of young people start smoking in Somerset each year. Every month of delay only adds to the numbers commencing a lifetime of addiction so we ask the Government to extend the proposed regulations as we have suggested and bring them forward as soon as possible. The urgency of the need is acute.



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Web-site: www.indicam.it

# INDICAM

Istituto di Centromarca  
per la lotta alla contraffazione

IL SEGRETARIO GENERALE

MILANO, 06/08/2014

## INDICAM response to the public consultation on tobacco packaging

Estimated Sirs

The public health is one of the most complex challenges for governments and industries. The threats to citizens' health are constantly growing and for this reason, we, among many others, welcome any initiative aimed to improve our common health. In our daily job, fighting counterfeit, the consumers' health is one of the key topics. Fake goods, whatever they are, are seriously threatening consumers on their healthiness. Counterfeiters are not taking any consideration about safety, respect of the rules, certification and compliance with laws. Today almost any item is available on his fake version; clothes, watches, electronic devices, car parts, airbags, medicines, cigarettes and tobacco products, just considering a few examples. We want to concentrate our attention on the latter. According to WHO's data, the WW consumption of fake cigarettes is around 10%.

Moreover: the recent and ultra-complete study by UNICRI (United Nations Interregional Crime and Justice Research Institute) testifies about the relationship between international criminal networks and the counterfeit industry. The study shows the inter-linked structure between main criminal Italian networks, the Camorra and the 'Ndrangheta clans, with Chinese clans in order to build a complete supply chain. The UNICRI report is a picture of the growing interest of such criminal networks for the fake items production. The reason is based on a simple concept; this a low risk crime, with the same marginality of narcotics, but far apart with lower risks. Cigarettes can be the perfect example of the third millennium illicit trafficking, managed by criminal networks as well as impacting on consumers' health. As reported by UNICRI, in some police seizures for tobacco products, "...retail buyers were ignorant of the true origin of the cigarettes...". The UNICRI report demonstrates that mixed items heavily infiltrated the legal supply chain. The production of such fake cigarettes was in China, the landing ports in EU were in Italy, the re-distribution in EU managed by the Camorra. Seized products, once analyzed, showed high presence of tar, nicotine and carbon monoxide.

We would like to highlight again the consequences of the possible introduction of standardized packages. The impact, as above described, could be the increase of the possibilities of illegal trafficking. The standardized package, reducing at almost zero, the possibilities to recognize the genuine from the fakes, de facto eliminating any sign of distinctiveness, will dramatically worsen the capacity of customs, and police, to check and to recognize the products. We cannot imagine, far from this that controls will take more time. Therefore, the result will be a dramatic reduction of controls. A direct impact will be also on the supply chain, with highly probable infiltration with a mix between fake and original products, perfectly similar as direct consequence of the standardization.

We would like to further explain our position, that is based, as above demonstrated, on the potentially highly dangerous consequences of standardization for the diffusion of fake goods as well on the power recognized to trademark and distinction signs.

Trademarks, and generally speaking IP rights (IPR), are a fundamental part of the EU economy; 39% of the GDP as well as 26% of total employment are generated by IP industries, as perfectly reported in the OHIM study for 2013. This is just one of the positive

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consequences of brands. The other important is the trust. Trust is the most solid link between the industry and the consumer. Trust is what is fundamental to make the consumer aware that the product he is being purchasing is compliant with many regulations. The possibility given to customers to identify products is based on trademarks and IP rights, so they are not just promotion but a fundamental stone in the buying process.

IPRs are the cornerstone of the evolution and of the development. Trademarks are recognized as fundamental rights by the EU charter of fundamental rights.

The WTO's TRIPS as well as Paris convention are conflicting with any hypothesis of deprivation of IPRs. The TRIPS, art. 8, allow authority to reduce rights of IPs in the case of public health, IF compliant with others TRIPS articles, so that is not the case of standardized package, because of the Art. 20, where is expressly prohibited any encumbrance on the use of trade marks.

The evidence of the impact of standardized package is not clear today. As repeatedly reported for example in the Chantler review, the introduction of standardized package in Australia is too recent to determine solid results, also considering that too many variables have been introduced in term of pricing and taxes.

The Chantler review, in our analysis, cannot be considered as a definitive source of knowledge and position. We agree on the position above mentioned as well as on the fact that would be extremely complicated to determine a scientific study comparing medium and long-term effects on young smokers of branded package vs. standardized package. What is typical in the Pharmaceutical sector for scientific is quite impossible in the specific case. However, far from this to resume the few "no-studies" as "Literature". As well as in the Chantler review we cannot agree with the too many "personal point of view" of the author, as reported many times. On the same level as IPR specialists, we cannot agree with the author's view and opinion on IPRs. He reported "*...In my view, the argument that standardized packaging makes it materially easier or cheaper for criminals to produce counterfeit packaging is not supported by the evidence I have seen...*" continuing with a too highly hypothetical perception. With all the due respect, the author's background is oriented to the medicine and not to the IP rights, so we would evaluate these declarations just as personal feeling and not proven facts.

As cited, WTO's rules are a fundamental cornerstone for the IPRs. For this reason, we take in serious consideration the request for a consultation with Australia that some nations asked to WTO's. This is another example that no decision can be taken in a rush reducing the impact of the decision just on a deprivation of rights. As suggested by the IP Crime report 2012/2013 the most successful actions in order to prevent risk for smokers and reduce smokers are the result of a systemic action based on blueprints can determine some positive results in term of significant reduction.

We strongly hope that a deep analysis of the above-mentioned points will take place in the British government, in order to be compliant with the International trade regulations as well as not depriving right owners from their properties as well as in the same time depriving customers from the possibility to recognize real products from fake ones.





Department  
of Health



Llywodraeth Cymru  
Welsh Government



The Scottish  
Government  
Riaghaltas na h-Alba



Department of  
Health, Social Services  
and Public Safety  
www.dssps.ni.gov.uk

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

**a. Are you responding (required):**

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

**b. Please provide your details and contact information:**

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

**Now go to question f**

**c. Please provide your organisation's details and contact information:**

Name of organisation (required):

Name of person providing submission (required):

[Redacted] \_\_\_\_\_

Job Title (required):

Director \_\_\_\_\_

Contact address of organisation (required):

Via Serbelloni 5 - 20122 Milan \_\_\_\_\_

Contact email address (required):

[Redacted] \_\_\_\_\_

Organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

- Tobacco retailer (supermarket)
- Tobacco retailer (convenience store)
- Tobacco retailer (other type of shop or business)
- Specialist tobacconist
- Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

e. If you are responding on behalf of an organisation, what type is it?

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)



If other, please tell us the type of organisation:

Anti-counterfeiting association

f. Does your response relate to (required):

- United Kingdom
- England only
- Scotland only
- Wales only
- Northern Ireland only

g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)

- No
- Yes (please describe below)

If yes, please describe:

We currently have in our association 2 members from the tobacco industry out of 140

h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box

### Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

We agree with the Chantler's perspective that a scientific study is difficult to be build in the specific case of standardized package, but this is not the reason to consider as scientifically valid assumptions that cannot be proven. On the same plan the author's background can be good on health related issues, but we cannot consider more than simple personal views the considerations above IP rights, and for example the less probabilities of the increasing counterfeit for standardized packages vs. brande ones. The general comment over this report, as well as on many other except the "IP crime report 2012/2013" is that no one is condering the actions in order to reduce smoke impact on a systemic way. Pointing the attention just on the package seems to be the easisest way to discharge on manufacturers all the responsibilities

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

Standardized package would increase the production of counterfeit cigarettes, today already estimated around 10% of global consumption WW (source WHO). Lowering the benefits in term of distinctiveness of brands and IPRs, can determine a growth in the already high interest for criminal networks in the trafficking of fake tobacco products. As reported by the UNICRI (United Nations Interregional Crime and Justice research Institute), the major criminal networks are today managing the production of fake goods, in partnership with Chinese clans. The trafficking of fake tobacco products is highly profitable, allowing criminal network like Camorra to fully exploit their territorial control and the network of sales all over the EU territory. The standardization would represent a real escape for the criminal industry to lower investments for the production as well increasing marginality. The controls of standardized products would be extremely difficult for customs and police, de facto feeding a vicious cycle "less controls-more production". The impact of standardized package on the supply chain would dramatically increase risks for mixed sales of good-real goods. The store check over the items is today available not only based on the distributor, but also on the quality of packages and on the visual presence of security features related to the trademarks, adopted by manufacturers in order to avoid the brand violations. In the case of standardized the deprivation of such signs over the package would significantly reduce the role of the reseller in the control of the genuinity

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

We suggest to consider a blueprint for a more structured action, even considering the results of the WTO settlements that will take place in the procedures asked by many Nations about the Australian introduction. Won't be realistic to become a process, partial and potentially hazardous as above mentioned, not even considering how the WTO will judge the Australian case. Moreover we suggest to consider only a systemic action aiming the reduction of smokers, not just depriving brands from their rights, as defined by Eu convention on human rights, TRIPS an

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

There's no strong scientific evidence that standardized package would be THE solution to improve common health. Also the Australian case is relatively too recent and too many influenced by other factors (pricing, taxes) to be valid, also considering that as far today is showing no significant effects on the consumption. Once again we can recommend an approach that is not just considering the unilateral deprivation of the rights (the IPR) of manufacturers, but that estimate not to take the action on a rush but on a solid basis

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

### **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

#### **Completing the online form on the Department of Health website at:**

[http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

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Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB



*The Mayor of Ballymena*  
06/08/2014

**BALLYMENA BOROUGH COUNCIL**

*Council Offices, "Ardeevin",  
80 Galgorm Road, Ballymena, BT42 1AB*

Telephone 028 2566 0300  
Facsimile 028 2566 0400

[www.ballymena.gov.uk](http://www.ballymena.gov.uk)

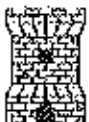
Dear Jeremy Hunt MP,

I write to you as the Mayor of Ballymena, Northern Ireland, regarding proposals for plain packaging for tobacco products, something which I have contacted the Government about previously. Please accept this as my formal response to your consultation on this matter.

You will no doubt be aware that Ballymena is home to the largest tobacco factory in the UK, JTI/Gallaher, which employs almost 1000 people contributing £57million directly into the local wage economy. As well as this, the factory provides business for over 100 local companies, spending a further £16million annually. These figures alone should help you realise just how important this industry is to the local economy in Ballymena and Northern Ireland, and forms the main basis for why I am writing to you.

At the outset I would like to make clear that I am not pro-smoking, and will always support any measure that is proven to reduce smoking rates across the UK, particularly amongst children. However plain packaging in my opinion, is a policy based on theory rather than evidence, and it is on this basis that I oppose its introduction.

We are now in the midst of the second consultation that the Government has conducted over this issue in the last two years. We in Ballymena very much welcomed the decision in July 2013 after the last consultation, to await evidence from Australia before making a decision in the UK. This was deemed robust and sensible policy making, something which the taxpayer appreciates.



The Prime Minister was absolutely correct at the time to state *"The decision not to go ahead, for the time being..."* is "...for the very simple reason that there isn't yet sufficient evidence for it and there is considerable legal uncertainty about it."

However, for reasons unbeknown to me, your Department announced the Sir Cyril Chantler review just five months later, in November of last year. Alongside this review, the Government also supported a plain packaging amendment to the Children and Families Bill, a surprising move given that this Bill was not concerned with public health. I'm sure you'll appreciate that the decision to progress this amendment at the same time as Sir Cyril's review, gives the entire process a definite "tick box" exercise feel.

I believe the Chantler Review is a very biased piece of research based on a lack of evidence and mere speculation. For the Government to be considering such an important piece of legislation on the back of this work is quite simply astonishing. From the very beginning of this document, Sir Cyril himself has stated that *"there are limitations to the evidence currently available"*, the evidence base *"is relatively modest"*, the evidence was insufficient to *"quantify the size of the likely impact"* and *"changes in consumption since the introduction of standardised packaging are not yet clear"*. At no given point does this review present any robust evidence that plain packaging will have a positive behavioural impact on smoking rates in the UK. It is a far cry from the words of the former Public Health Minister, Anna Soubry MP, in July 2013 when she stated, "all good legislation should be based on firm, strong evidence." It is quite unthinkable that your Department would consider this review to contain the "strong" evidence that was previously required.

Before my time in Ballymena Council, I was an independent retailer for 28 years, so I have first-hand experience and knowledge of how important the tobacco industry is to the retail sector across the UK. The illicit trade in tobacco is something which is becoming a greater problem every day for legitimate retailers. Evidence from Australia has shown that in the year following the introduction of plain packaging, the illicit trade grew by 2.1% (KPMG), and Australian Customs and Border Protection Service (ACBPS) figures show that the number of cigarettes seized increased by over 41% between 2011/2012 and 2012/2013. Even the UK Government's own Impact Assessment into this policy acknowledges that there would be loss to the Treasury of around £2 billion because of an increase in illicit trade. Yet it is then disregarded completely. The lack of consideration given by the Department of Health to such an important issue - which would cause further damage to businesses and jobs, reduce revenue for the Treasury and increase the availability of illegal tobacco on our streets - is very disappointing.



I understand that the introduction of plain packaging would be a form of "gold plating" on the incoming Tobacco Products Directive (TPD). You have been made very much aware of the significant impact this EU Directive will have on jobs at the factory in Ballymena. Predominantly due to new requirements for minimum pack sizing, 70 people in the local area will lose their employment overnight. Although this is small compared to the 540 people who will lose their jobs in Nottingham because of the Imperial tobacco factory closure (again TPD related), those 70 people in Ballymena will still see a loss of their livelihood because of the TPD. Yet before the TPD is even introduced, the UK Government is "minded to proceed" with plain packaging proposals which could worsen the situation even further. The total lack of regard for the employment and livelihoods of these people from Northern Ireland would be bitterly disappointing from this supposedly pro-business UK Government.

To conclude, I believe the Government should stand strong to its position in 2013, when the need for robust and compelling evidence for this policy was made abundantly clear. Until such evidence becomes available, I do not believe the Department of Health should be needlessly adding more regulatory burdens to legitimate businesses and put livelihoods even further at risk. As the policy has had no positive impact on smoking rates in Australia, it would be premature and needlessly damaging for the UK to proceed at this stage. I sincerely hope that my submission is unbiasedly considered for this consultation. This Coalition Government should be promoting jobs and employment, not destroying them over policies that are unsupported by robust evidence, in the interest of political point scoring. I look forward to reading the Consultation report.

Yours Sincerely,





Department of Health



Llywodraeth Cymru  
Welsh Government



The Scottish Government  
Riaghaidas na h-Alba



Department of  
Health, Social Services  
and Public Safety  
www.dhssps.ni.gov.uk

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

**a. Are you responding (required):**

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

**b. Please provide your details and contact information:**

Name of respondent (required)

[Redacted name field]

Address of respondent (required):

Portsmouth City Council Civic Offices, Guildhall Square, Portsmouth PO1 2AS

Contact email address (required):

[Redacted email address field]

**c. Please provide your organisation's details and contact information:**

Name of organisation (required):

[Redacted organisation name field]



Name of person providing submission (required):

Job Title (required):

Contact address of organisation (required):

Contact email address (required):

Is this the official response of your organisation? (required):

Yes

No

**d. If you are responding on behalf of a business, what type is it?**

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

**e. If you are responding on behalf of an organisation, what type is it?**

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)

If other, please tell us the type of organisation:

**f. Does your response relate to (required):**

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

**g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)**

No

Yes (please describe below)

If yes, please describe:

**h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box**

## Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

Portsmouth is a city which has a higher than average rate of smoking prevalence at 22.5% in adults aged 18 years and over, compared to 19.5 % in England (tobacco control profile 2012). Health outcomes reflect this position. Smoking directly accounts for more than 300 deaths in the city per year and there are significantly higher rates of deaths from lung cancer and chronic obstructive pulmonary disease. 17.3% of pregnant women continue to smoke through pregnancy measured at the time of delivery (2012/13) compared to 12.7% nationally. 39.2% of young women under 20 smoke throughout their pregnancies (2013/14). The estimated £61.7m economic burden of smoking on society is clearly documented by Action for Smoking and Health (<http://www.ash.org.uk/information/ash-local-toolkit>)

As Director of public Health for the city, I fully support the comprehensive response to this consultation question submitted by Action for Smoking and Health (ASH) which summarises that the case for standardised packaging has been made within the Chantler review.

This is an important measure to help reduce this burden of ill health and early preventable deaths in our population

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

I fully support the comprehensive response to this consultation question submitted by Action for Smoking and Health (ASH).  
I urge you to use the terminology "standardised packaging" at all times and refrain from using the description "plain packaging" which is misleading and has led to the assumption by some colleagues that the packaging will be easier to counterfeit and thus contribute to the illicit tobacco trade.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

I fully support the comprehensive response to this consultation question submitted by Action for Smoking and Health.

In particular I would like to highlight the importance of the inclusion of all tobacco products including cigars and cigarillos in any change to the legislation. If some products are excluded this may give the impression that these products are less harmful to health and drive an increase in their sales.

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Portsmouth City Council Trading Standards team run a proxy sales reporting scheme "Proxywatch". Improvements in retailer knowledge and checking procedures have meant that children now find it harder to buy cigarettes (and alcohol) directly, which in turn has led to more children attempting to coerce adults to make purchases on their behalf (the proxy sale). It seems logical to suggest that it will be harder for children to request proxy sales if packaging is standardised and they are unsure what to ask for or can't easily describe a packet by its colour or design. Coupled with the extension of point of sale regulations to small retail outlets, I would hope to see a marked decrease in uptake and prevalence of smoking by children and young people.

A local survey of young people (n=1608) in Portsmouth (2013) revealed that 3.7% of year 8 and 15.5% of year 10 pupils smoke regularly (daily, weekly or monthly). Of these 66% smoke daily. The evidence from Australia of a delay in young people starting to smoke and an increase in those who have never smoked suggests that standardised packaging could reduce the rates of smoking in young people in England.

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

### **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

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<http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1>

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TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB



Department  
of Health



Llywodraeth Cymru  
Welsh Government



The Scottish  
Government  
Riaghaltas na h-Alba



Department of  
Health, Social Services  
and Public Safety  
[www.dhsspsni.gov.uk](http://www.dhsspsni.gov.uk)

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

**a. Are you responding (required):**

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

**b. Please provide your details and contact information:**

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

**Now go to question f**

**c. Please provide your organisation's details and contact information:**

Name of organisation (required):

Derbyshire Health and Wellbeing Board

Name of person providing submission (required):


 Derbyshire Health and Wellbeing Board

Cabinet Member, Health and Communities

Contact address of organisation (required):

Derbyshire County Council, County Hall, Matlock DE4 3AG

Contact email address (required):

 Organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop



- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

**e. If you are responding on behalf of an organisation, what type is it?**

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)

If other, please tell us the type of organisation:

Derbyshire Health and Wellbeing Board

**f. Does your response relate to (required):**

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

**g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)**

No

Yes (please describe below)

If yes, please describe:

Pension fund investment (Derbyshire County Council)

Several other organisations are represented at the Derbyshire Health and Wellbeing Board. In order to meet the deadline for the submission we are unable to determine the position of each individual organisation. This information (if required), could be provided at a later date.

- h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box

### Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

Smoking is an addiction largely taken up in childhood and adolescence, so it is crucial to reduce the number of young people taking up smoking in the first place. It is estimated, 207,000 children aged 11-15 still take up smoking each year in the United Kingdom.

Across the population, the highest rates of smoking are among young people. Around 26 per cent of people aged 16-24 smoked in 2009. While the rates of smoking among young people have reduced considerably in recent years, the uptake of smoking by young people continues to be a serious problem. An estimated 330,000 young people under the age of 16 try smoking for the first time in England each year, and around 6 per cent of pupils aged 11-15 were regular smokers in 2009 (1).

Young people can rapidly develop nicotine dependence and symptoms of dependence can develop soon after a young person's first puff on a cigarette. We are particularly concerned about the early age at which people become regular smokers in England and that nicotine addiction for most people starts in adolescence. In England, almost two-thirds of current and ex-smokers say that they started smoking regularly before they were 18 years old, with 39 per cent saying that they were smoking regularly before the age of 16. Very few people start smoking for the first time after the age of 25 (1).

Treating smoking-related illnesses was estimated to have cost the NHS £2.7 billion in 2006/07, or over £50 million every week. In 2008/09, some 463,000 hospital admissions in England among adults aged 35 and over were attributable to smoking, or some 5 per cent of all hospital admissions for this age group. Illnesses among children caused by exposure to secondhand smoke lead to an estimated 300,000 general practice consultations and about 9,500 hospital admissions in the UK each year (1).

In the report of the Chantler review, Sir Cyril came to the conclusion that "there is sufficient evidence derived from independent sources that the introduction of standardised packaging, as part of a comprehensive policy of tobacco control measures, would be very likely, over time, to contribute to a modest but important reduction in smoking prevalence, especially in children and young adults. Given the dangers of smoking, the suffering that it causes, the highly addictive nature of nicotine, the fact that most smokers become addicted when they are children or

young adults and the overall cost to society, the importance of such a reduction should not be underestimated”

For the reason outlined above, we consider the case for standardised has been made, and that the Government should lay Regulations on standardised packaging, under Section 94 of the Children and Families Act, before Parliament as soon as possible.

#### (1) Healthy Lives, Healthy People: A Tobacco Control Plan for England

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

#### Standardised packaging needs to be part of a comprehensive strategy

The DH Tobacco Control Plan for England runs until the end of 2015 and needs to be renewed and refreshed for the period 2016 onwards, the period when standardised packaging will be implemented. It is important in updating its tobacco strategy that the Government gives careful thought to how to maximise the public health benefits of the implementation of standardised packaging, by, for example:

- increasing funding for sustained mass media campaigns in advance of standardised packaging coming into effect;
- making stop smoking services mandatory and ensuring delivery to a high quality standard
- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force;

We agree with the Chantler review that standardised packaging, should be introduced “as part of a comprehensive policy of tobacco control measures”.

On the 1st of December 2012, Australia became the first country in the world to require all tobacco products to be sold in plain, standardised packaging. In Australia, standardised packaging, was introduced as part of comprehensive strategy, which included larger health warnings, and a sustained mass media campaign. Derbyshire Health and Wellbeing Board would support a comprehensive strategy alongside the implementation of the standardised packaging.

#### Illicit Tobacco Trade

The Chantler review stated “I am not convinced by the tobacco industry’s argument that standardised packaging would increase the illicit market, especially in counterfeit

cigarettes. It seems to me that the solution to illicit use is instead, to have an effective enforcement regime, and the enforcement agencies in the UK have already demonstrated that an effective enforcement regime and appropriate sanctions can keep illicit [tobacco products] to low levels, even in a relatively high tax jurisdiction".

The draft regulations would not affect the labelling requirements for tobacco products such as health warning and fiscal features such as authentication markings and security features. As such illicit tobacco should still be identifiable.

#### Evidence from Australia

Information from the Australian Government's Department of Health has released figures showing that the total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:

- \$5.135 billion in September 1959;
- \$3.508 billion in December 2012 (when standardised packaging was introduced); and
- \$3.405 billion in March 2014.

Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the Quitline New South Wales service (2). Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc.) suggested that the number of calls to Quitline NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later and a significant increase in calls was sustained over time.

Wakefield M et al, Cancer Council Victoria, Annenberg School for Communication Pennsylvania and South Australian Health and Medical Research Institute University of Adelaide, reported in 2013 that smokers in Australia were less willing to display their packs in public and smoke in outdoor areas since plain packaging was introduced. Researchers counted patrons, smokers and tobacco packs at cafes, restaurants and bars with outdoor seating for several months both before and after the introduction of standardised packaging. They found that pack display on tables declined by 15% after plain packaging, which was mostly due to a 23% decline in the percentage of patrons who were observed smoking. The study also found that the declines in pack display and patrons observed smoking were stronger in venues where children were present (3).

Tobacco retailers in the UK have suggested that the introduction of standardised packaging means that it will take longer to serve customers and so convenience stores will lose custom. As the Impact Assessment (IA) concludes there is no evidence at all that this is the case from the experience in Australia, indeed transaction times have tended to decline post implementation not increase. Most

recently, research published at the end of May, which may not been taken into account in the IA, reported that the claim that plain packaging would negatively impact small tobacco retailers by making it harder to locate and retrieve cigarette packs, thereby increasing transaction times, has not eventuated in Australia (4).

(2) Young JM et al. Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis *Medical Journal of Australia* 2014; 200: 29-32

(3) Zacher, M et al. Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips *Addiction*, 2014; 109: 653-663 - doi: 10.1111/add.12466

(4) Wakefield M, Bayly M, Scollo M. Product retrieval time in small tobacco retail outlets before and after the Australian plain packaging policy: real-world study *Tobacco Control* 2013 - doi:10.1136/tobaccocontrol-2013-050987.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

Derbyshire Health and Wellbeing Board welcomes the draft regulations.

Implementing the draft regulations will require supporting enforcement through improved intelligence sharing and adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force. Derbyshire has seen a significant rise in seizures of illicit tobacco. Approximately 878,000 cigarettes and 794 kg of Hand Rolled Tobacco were seized during 2013-14 period, an increase from 47,912 cigarettes and 27.5kg of HRT in 2012-13. Derbyshire County Council Trading standards will require adequate sustained funding to continue to monitor and take effective action against traders that deal in illegal tobacco and cigarettes.

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Each year in Derbyshire we estimate that smoking costs society approx. £188.3m

Figure 1 shows the estimated cost of smoking in Derbyshire (see attachment)

Impact on retailers

Tobacco sales are undergoing long-term decline. At its peak in the 1950s adult male smoking prevalence was 80% (5). Female smoking prevalence continued to rise and reached a peak of 45% in the mid-1960s. Since then smoking prevalence amongst both men and women has declined significantly and is now under 20% and government policy is designed to sustain and increase this trend. More recent data from HMRC tobacco clearances shows the impact this has had on sales volume with the number of million cigarette sticks cleared for UK sales falling from 94.080 million in 1992/3 to 54.737 million in 2002/3 to 37.932 million in 2012/13, a decline of 30% in the last ten years. Small retailers have had to adjust to this decline and will continue to have to do so, it is important to note that any impact of standardised packaging will be marginal compared to the overall secular trend.

### Conclusion

Derbyshire Health and Wellbeing Board supports the report of the Chantler review, that:

- standardised packaging will have a positive impact on public health
- is highly likely to reduce the number of children taking up smoking
- standardised packaging will be very likely, over time to contribute to a modest but important reduction in smoking prevalence, especially in young adults.

Standardised packaging needs to be part of a comprehensive tobacco control strategy.

Illicit tobacco should still be indefinable through authentication markings and security features.

Evidence from Australia supports the introduction of standardised packaging, with the lowest consumption of cigarettes in first quarter of 2014 and a sharp rise in phone calls to quit lines.

Standardised packaging is backed by the Smokefree Action Coalition, which is an alliance supported over 250 organisations including medical Royal Colleges and other medical organisations, health and children's charities such as the British Heart Foundation and Cancer Research UK, the Chartered Institute of Environmental Health, the Trading Standards Institute and others. The consensus of medical professionals, public health and other relevant experts is that it would make an important positive contribution to reducing the harm caused by tobacco consumption.

Standardised packaging is also popular with the public. A poll on the issue by YouGov, conducted for ASH in March 2014, found that overall 64% of adults in Great Britain were in favour of standardised packaging with only 11% opposed. There was majority support across age groups, genders and social classes. It is clear that most people believe that this policy, combined with other tobacco control initiatives, is an important way to prevent the next generation of young people from starting to smoke (6).

(5) Wald, N. & Nicolaides-Bouman, A. UK Smoking Statistics (2d ed.). OUP, 1991.  
(6) The poll total sample size was 12,269 adults. Fieldwork was undertaken by YouGov between 5th and 14th March 2014. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+). Respondents were shown what a standard pack could look like, including larger health warnings as in Australia

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.



### **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

#### **Completing the online form on the Department of Health website at:**

[http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

[1](#)

- o **Filling in the response form by downloading it at:**

<https://www.gov.uk/government/consultations>

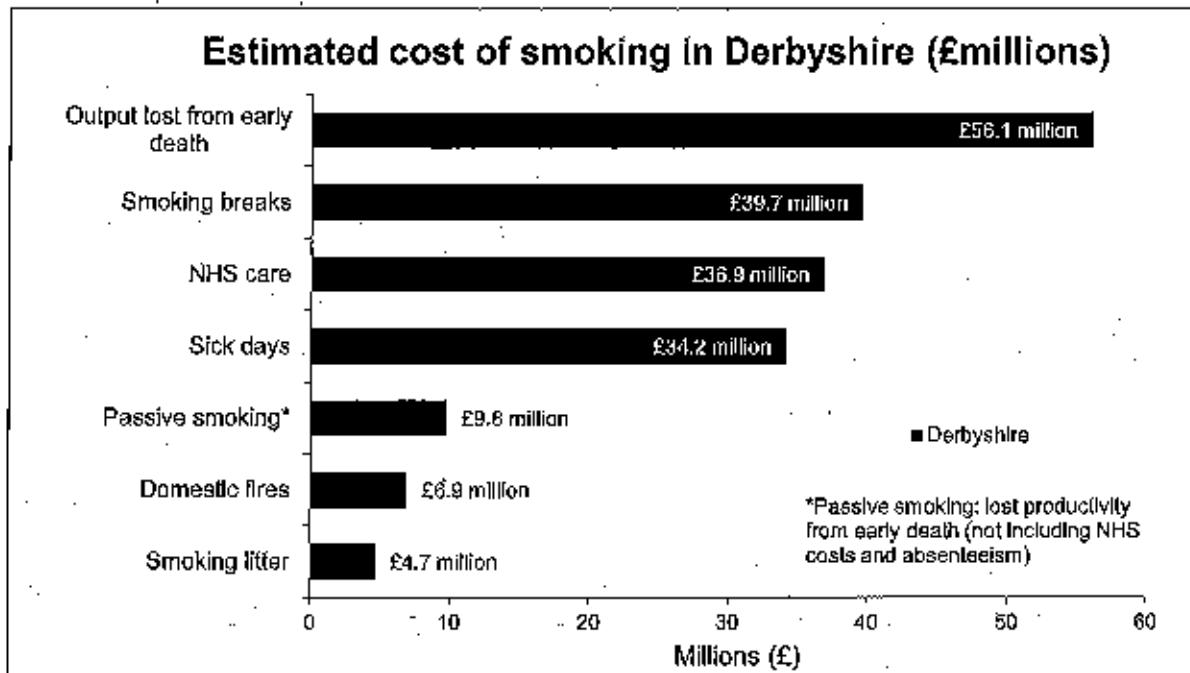
- o **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- o **Posting your response to**

Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB

**Figure 1 shows the estimated cost of smoking in Derbyshire**





**parkside**  
FLEXIBLES EUROPE

Department of Health Standardised Packaging Consultation  
P O Box 1126  
Canterbury  
CT1 9NB

6th August 2014

Dear Sirs,

**Plain Packaging Consultation Response**

I write to you as Managing Director of Parkside Flexibles (Europe) Ltd and wish to submit our formal business response to the Department of Health's consultation on the introduction of regulations for the standardised packaging of tobacco products.

Parkside are a flexible packaging company with manufacturing facilities based in Normanton, West Yorkshire and Kuala Lumpur, Malaysia. Our business is also supported by Sales and Marketing offices which are located in Singapore, Switzerland and Spain. Globally, our business employs 151 people with 124 of these jobs based in the UK.

Our business turnover for the UK (2013) totalled £18,944,000 with approximately 78% of our revenue being generated from the supply of tobacco packaging.

To produce the high quality packaging our customers demand, we employ a highly skilled workforce and operate both apprenticeship and graduate training schemes.

We are currently developing new products with fantastic global presence which will be brought to market in the coming months and we have also made the strategic decision to invest in technology in both Asia and the UK, which will see our business grow to at least twice its current size.

In addition to this investment, we planned to invest a further £5 million in the UK in printing presses and ancillary equipment which would have created 25 new positions at our Normanton site. These investments would also have secured the positions of our existing 124 employees.

Due to this consultation process all investment plans have currently been placed on hold, the introduction of plain packaging would, without exception, require our UK business to be re-structured and at worst would no longer allow us to operate in the UK.

The tobacco industry has been customers of Parkside for over 25 years.

Whilst we as a business would always support any legislation that would reduce youth smoking, we object to Plain Packaging on a number of issues.



## 2014 Impact Assessment

The impact assessment is based on unrealistic figures and little fact and largely relies on studies which are based on projected or theoretical behaviours, ignoring real world data and the available research from Australia.

The assessment also seems to understand very little about the packaging industry, as it only makes reference to the supply of cartons. The packaging for tobacco products is made up of a large number of components as well as the carton blank (cigarette box). Where is the impact on a business such as Parkside which produces the printed inner liners and overwrap films and papers? All these particular types of packaging are excluded under the proposed legislation but no mention is made to the loss of revenue or redundant machinery for these types of packaging. This lack of business understanding runs all the way through the assessment and vastly underestimates the real losses to UK businesses should this legislation be introduced.

In point 100, the assessment states that during the consultation, packaging companies advised standardised packing will save around £30m per annum. This is not actually a saving to packaging companies but to the tobacco companies. By introducing plain packaging you remove all the complexity and design elements from the pack. Innovation and differentiation are also no longer required. These are all the fundamental elements on which the packaging industry is based.

The assessment on employment in the tobacco / packaging industry is also vastly flawed as point 98b states any staff turnover will be absorbed within the wider economy and is not expected to exceed employee turnover as per the usual cycle. There is no explanation as to how this statement has been reached. The timing and implementation of such legislation has in no way taken into account the effect on the employees of the packaging industry. Parkside's annual labour turnover is less than 0.72% (2019). There would be a significant increase in this figure should plain packaging become legislation and there would also be direct implications to the Government through National Insurance contributions, Income Tax, Business rates etc., again none of these issues have been taken into account.

The impact assessment does not consider any alternatives to plain packaging. Germany has proven that increased education in schools has reduced the number of children taking up smoking; this is despite Germany having no advertising ban on tobacco products and no dark market. This is detailed in the study published by the Federal Centre for Health Education (Bundeszentrale für gesundheitliche Aufklärung, BZgA).

The report details how the number of teenage smokers in Germany has more than halved during the last decade and provides evidence that social prevention measures and awareness-raising campaigns are the most effective tools to prevent young people from smoking, while dissuasive warnings labels on cigarette packages prove to be much less effective.

The impact assessment has only received an amber rating, which we believe needs to be addressed, giving evidence that supports its claims before legislation can be passed. The consequences to UK business are too great not to fully understand the implications this legislation will bring.

## Regulations

The UK Government is looking to implement further legislation without understanding the effect of existing or planned legislation.

Plain packaging was introduced in Australia in December 2012. Emerging evidence shows the policy is actually having a negative effect, with increased illicit trade and no change in consumption levels. Australia has not officially yet reviewed its own evidence of plain packaging and do not plan to do so until December 2014, so why would the UK use this country as an example of how plain packaging would reduce smoking rates?

The UK also has legislation that has not yet been implemented or reviewed. The retail display ban has now been implemented in supermarkets and large stores who now have tobacco products hidden behind shutters. Small stores are also due to implement this legislation in April 2015.

TPD2 has been passed by the European Commission and is due to be enforced from May 2016. TPD2 is a significant change in the way tobacco products are manufactured and sold and will already have a significant impact on the tobacco packaging supply chain, yet the UK Government seeks to introduce further legislation without any evidence that indeed plain packaging is working in Australia but also that current / proposed measures are not having the desired effect. How can the Government even begin to understand the effect of TPD2 on smoking rates when it has not yet been introduced, are we saying that TPD2 is not robust enough and if this is the case then why has it been passed by the European Commission as law?

By introducing all these overriding policies without actually investigating how the current policy is performing how does the Government determine which policy was actually effective?

Would it not be beneficial to await the outcome of the Australian and TPD2 reviews so any decision regarding legislation can be based on reliable evidence rather than emerging evidence, which to date is far from conclusive.

## Chantler Review

The Chantler Review does not actually appear to be based on any hard evidence that the introduction of plain packaging in the UK will reduce smoking rates. The report examined the likely impact of plain packaging focusing mainly on public health benefits but even this was based on speculation. At no point in the report does Sir Cyril Chantler look at the wider implications of plain packaging, including the impact on business, packaging suppliers and the wider supply chain.

Sir Cyril also claims that it is "too early to draw definitive conclusions" from Australia, yet then proceeds to use "evidence" from Australia, that plain packaging "is likely" to have a positive impact on smoking behaviour, despite available data suggesting otherwise.

The Government continually tells us that the UK is open for business. Is the same Government really going to introduce legislation that will have a negative impact on UK business without any credible evidence to support it and on the premise that it will likely have an impact?

### Counterfeit

Tobacco packaging is incredibly difficult to produce and requires a great deal of specialist equipment and production knowledge. It is also heavily regulated in relation to the materials and inks which are used in its production. Counterfeit products are already an issue in this industry with current packs being copied and sold in the unregulated supply chain. The introduction of plain packaging actually benefits the counterfeiters, by removing branding and innovation from this product they only have one design to master and produce rather than the 200+ designs which are currently in the market today. This will enable the counterfeiters to produce more illegal products. In turn, this steals revenue from legitimate business within the packaging supply chain. £3.1 billion per annum is currently lost by the Government from non-paid tax of the sale of illicit tobacco and this figure is likely to increase should the introduction of plain packaging go ahead.

Standardised packaging also makes it very difficult for smokers, HMRC, Trading Standards and the police to recognise what is a genuine product.

We would urge the Government to give serious consideration to all the arguments surrounding plain packaging before proceeding with what is an unsubstantiated, deeply flawed piece of legislation that will have far reaching and unintended consequences on UK manufacturing and business.

Yours faithfully



Department of Health  
 Standardised Packaging Tobacco Consultation  
 PO Box 1126  
 Canterbury  
 CT1 9NB

6<sup>th</sup> August 2014

Dear Sir

We are writing to oppose the Government's proposal on plain packaging for cigarettes.

- 1) There is no mandate for such a step.
  - a) This proposal was not in the Conservative Party manifesto or the Liberal Democrat manifesto. Nor was this proposal placed in the Coalition agreement.
  - b) We believe that MPs were left in the dark as to the nature of the Children and Families Act 2014. We have heard numerous reports from Conservative Members of Parliament (including leading Government Ministers) that they were reassured by the Department for Health that there was nothing of note in the bill which would lead to such a policy shift.
  - c) The Government have treated their own backbenchers who have raised legitimate concerns with contempt on this matter. We were struck by how Jane Ellison treated MPs like Robert Halfon as if they were political opponents rather than a valued colleague.
  - d) Jane Ellison MP has no personal mandate for this step. Some of our supporters have the pleasure of living in Battersea and so we have been able to review Jane Ellison's campaign literature in 2010. We have seen no evidence of any commitment to plain packaging.
  - e) We note that this Government has abandoned the previous approach taken in the case of the Smoking ban in public places for a free vote on the legislation. This would have been a much more preferable option.
2. The Government are viewing this measure through the narrow spectrum of health without looking at the broader implications. We recommend a joined up approach across Government to this issue.
  - a) The consultation document shows no meaningful regard for the impact upon small shop keepers. In the section entitled "Wider considerations relevant to decision making" there is, bizarrely, no mention at all of such impact. We believe that a Conservative government should give due regard to the impact upon entrepreneurs who are supporting their family. No consideration seems to have been made towards this group. We note that there appears to have been no involvement of the Department for Trade and Industry – rather this is a naked power grab by the Department for Health.
  - b) The consultation document shows that this exercise will blow a £2bn hole in Government finances over the next decade. At a time of continuing pressure on public finances, we question whether this is the right step at the right time. This is an irresponsible measure by the Department for Health with little regard for the broader public finances.

- c) The proposal clearly represents a Government theft of brand assets carefully built up over many years by prudent shareholder investment. We believe that this theft could open up the Government to legal action which would further damage the public finances. It also ill behoves a Government which wishes to encourage a positive business climate to wilfully destroy brand assets – in particular, of often British companies. The Government's own assessment indicates that this is theft to the value of £166 million – though we believe that this is grossly understated. The fact that there is no discussion of input from the Department for Justice indicates to us that again this is a naked power grab by the Department for Health.
- d) A range of other industries risk being affected by this measure. We note that when Barry Gardiner MP raised the issue of jobs and workers in the print industry in Parliament on 3<sup>rd</sup> April 2014, Jane Ellison promised that a complete review on the jobs implication would follow in the Impact Assessment. We note that no such jobs assessment was forthcoming. We, therefore, call for the Impact Assessment to be withdrawn and amended in light of the Minister's commitment. Alternatively, the Minister could return to the House and make an apology for misleading Members of Parliament.
3. We remain deeply concerned that this is but a slippery slope to further intervention in an individual's private life.
- a) We are appalled that a Government document could contain a phrase like *"From a societal perspective, there is reason to discount the importance of this loss of freedom... The freedom to have branded tobacco, therefore, carries a cost to others; and society arguably need not accord value to a freedom that involves inflicting harm on others"*. There is an absurdity to the proposition that an adult having a coloured packet of cigarettes in their pocket makes them a participant to a killer of children.
- b) We also contrast the above statements in the Government's own consultation response with Jane Ellison's statement to Parliament on 3<sup>rd</sup> April 2014 in response to a question from Jacob Rees Mogg MP that *"the Government are not proposing to take away anyone's freedom"*. Clearly there is a disconnect here between the Government consultation document outlined above and Jane Ellison's statement to Parliament. We would encourage either the Department to withdraw and reissue a correct Impact Assessment or for Jane Ellison to apologise to the House for misleading them.
- c) We do not believe that this will be the end of the Government's war on tobacco. There will be further moves to criminalise adults' own enjoyment of a legal product. We further predict that this war will be extended to other areas of legitimate public enjoyment – like alcohol, chocolate or fizzy drinks.
4. As an organisation committed to fostering relations between the Anglosphere we are concerned that the right messages have not been taken from the Australian experiment with plain packaging.
- a) The data which we have seen is extremely inconclusive that plain packaging results in lower smoking rates. We are concerned that the Department of Health is a victim of classic capture by special interest groups and seeing only what they wish to see.
- b) We note the attempt by the Government to wrap themselves in the flag of Brussels in defence of this ill thought out proposal – *"In 2007, the European Commission (EC) suggested standardised tobacco packaging as a possible policy option in its consultation on revising the Tobacco Products Directive. It stated that 'in order to decrease the smoking initiation and to protect EU consumers on equal basis in all Member States the introduction of generic (black and white) standardised packaging for all tobacco products could be explored as a possibility to reduce the attractiveness"*. We would urge Jane Ellison MP to drop her ill advised and long standing love of Brussels and instead visit Australia to learn firsthand the inadequacies of her policy. We would be happy to facilitate such a visit to ensure she is made fully aware of both sides of this debate.

#### Disclosure and Summation

We note that the consultation document demands those submitting responses to state whether they have received funding from the Tobacco industry. We believe that this is a clear attempt to create a one sided consultation response. We note that no disclosure is required from groups funded by the well organised, well funded (often by taxpayers), partisan, often factional



"health" lobby, many of whom have salaries directly related to their opposition to the Tobacco lobby. As it happens we are happy to disclose that we have received no financial support from the Tobacco industry.

We did not need to be bribed to award Jane Ellison MP the "*White Feather Award for Political Cowardice*" for this disgraceful proposal. We would, however, like to extend to the Minister the opportunity to receive this award in person. She can receive her award from many of those same party members and activists whom she will be hoping will come and campaign for her at the next election.

In short, we did not need to be bribed to write this submission. Unlike her, we believe in Freedom.

Yours faithfully

**YOUNG BRITONS' FOUNDATION**



Department of Health  
 Standardised Packaging Tobacco Consultation  
 PO Box 1126  
 Canterbury  
 CT1 9NB

Gleider House, Ty Glas Road, Cardiff, CF14 5BD  
 Ty Gleider, Heol Ty Glas, Ceredydd, CF14 5BD  
 T: 029 2076 8850 E: [post@tenovus.org.uk](mailto:post@tenovus.org.uk) W: [tenovus.org.uk](http://tenovus.org.uk)  
 Patron HRH The Princess Royal  
 Naldwraig Ei Hochelder Breukinol Y Dywysogates Frenhinol

6 August 2014

Dear Sir / Madam,

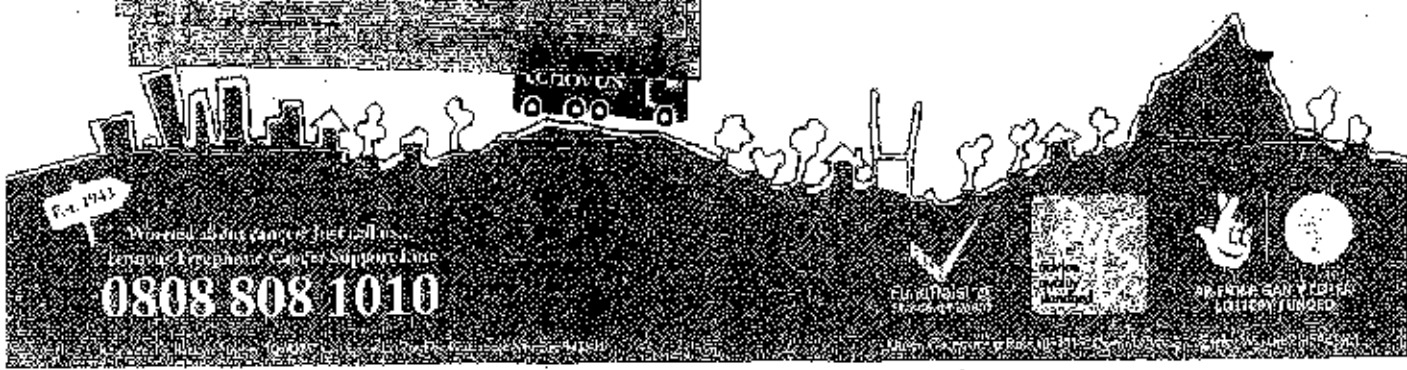
**RE: Response to consultation on standardised packaging of tobacco products:  
 draft regulations**

As Wales' leading cancer charity, Tenovus welcomes the opportunity to respond to this consultation on the standardised packaging of tobacco products: draft regulations. Tenovus is at the forefront of delivering prudent healthcare across Wales; helping those affected by cancer, whether it be through our Mobile Cancer Support Units, our support line open every single day of the year or funding the latest cancer research.

The continued scourge of tobacco related illnesses continues to cost each part of the United Kingdom profoundly, be it the continued burden upon NHS resources, the tragic loss of life or the economic impact on those in our workforce living with a debilitating chronic condition. Tobacco is unlike any other product on the market: the only legal consumer product that kills when used as intended by the manufacturer. In Wales Around 23% of people in Wales smoke making it one of the highest rates within the United Kingdom. It leads to approximately 5,600 premature deaths and nearly 27,700 hospital admissions a year. Estimated smoking costs for NHS Wales are more than £380m a year, accounting for 7% of healthcare expenditure.

The Chantler Review and subsequent response by Jane Ellison MP, Minister for Public Health has already made it explicitly clear that the case for implementing standardised packaging has been successfully made. In addition to this, we now have considerable evidence following the implementation of plain packaging in Australia that it has made a significant impact on attitudes, uptake and quit rates. The UK Government now needs to act immediately to ensure that standardised packaging is implemented throughout the United Kingdom. Tenovus believes that it would be an abject failure of this current UK Government to hesitate any further in implementing regulations to help mitigate this ongoing public health crisis.

Yours faithfully



**Official response to consultation on standardised packaging  
of tobacco products: draft regulations**



**Question 1:** Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

- 1.1 Tenovus believes that the recommendations should be swiftly implemented to support wider health interventions to lower the uptake of smoking and increase quitting.
- 1.2 On the evidence that has been presented from across the public health sector and by studying international comparators, Tenovus believes that the introduction of standardised packaging would indisputably progress the health outcomes of people living within the United Kingdom.
- 1.3 According to the World Health Organization<sup>1</sup>, plain packaging is an effective means in preventing smoking uptake and relapse due to it serving several key functions.
  - It reduces the appeal of packaging or product;
  - It increases the salience and effectiveness of health warnings;
  - It takes away the perception of products strength and harm.

**Question 2:** Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?

- 2.1 Following the Chantler review into standardised packaging, nearly two years has passed since the implementation of plain packaging by the Australian Government. This affords an opportunity to observe the notable progress made in Australia subsequent to the implementation of the Tobacco Plain Packaging Act on 1<sup>st</sup> December 2012.
- 2.2 Initial research and data has indicated that the Australian legislation has so far been a success and driven down tobacco consumption. This provides encouraging evidence that plain packaging is already having a positive impact on Australian public health and will continue to do so into the future.
- 2.3 Figures released by the Australian Bureau of Statistics show that the total consumption of tobacco and cigarettes in the first quarter of 2014 is the lowest ever documented, as measured by estimated expenditure on tobacco products
  - \$5.135 billion in September 1959
  - \$3.508 billion in December 2012
  - \$3.405 billion in March 2014<sup>2</sup>
- 2.4 The figures identified in 2.3 are further supported by data from the Australian Treasury showing that tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced<sup>3</sup>.
- 2.5 Research undertaken during the transitional phase of the Australian plain packaging legislation, when both plain and branded packs were available found that plain packaged cigarettes with larger health warnings increased smokers' urgency to quit and lowered the appeal of smoking<sup>4</sup>.
- 2.6 The effect of tobacco plain packaging, as part of Australia's comprehensive suite of tobacco control measures, will be seen over the longer term. In reducing the appeal of tobacco products and preventing consumers being misled about the harms of tobacco products, it is anticipated that tobacco plain packaging will have an impact on the uptake of smoking by young people, and will also encourage existing smokers to quit and stay off tobacco products.

<sup>1</sup> World Health Organization. Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products), 2008.

<sup>2</sup> Australian Government Treasury. Australian National Accounts: National Income, Expenditure and Product, Mar 2014

<sup>3</sup> Australian Department of Health. Tobacco facts and figures. 19 June 2014

<sup>4</sup> Wakefield MA et. al. Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study. BMJ Open 2013 3(7). (Downloaded from bmjopen.bmj.com on July 25, 2014)

**Question 3:** Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?

- 3.1 Tenovus strongly welcomes the draft regulations, which we consider, are for the most part comprehensive and fit for purpose.
- 3.2 However, we urge the need for consistency in dealing with the entire range of tobacco products. Regulations should also apply to tobacco products including cigars and cigarillos. Allowing these types of tobacco product to be exempt, may allow for the interpretation that it is an endorsement of the idea that they are in some way less harmful to health. The regulations should be applied across the range of tobacco products.
- 3.3 It is also not detailed why the UK regulations do not state the size of cigarette or tobacco packet labelling. In the Australian law and the New Zealand legislative deliberations, the dimensions are meant to be clearly stated and aim to act as a consistent way in tackling any attempts to introduce elements of brand image.

**Question 4:** Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

- 4.1 Standardised packaging is one strand of what needs to be a multifaceted strategy to stop the UK from smoking. To ensure the maximum public health benefits are derived from introducing standardised packaging, the UK Government and devolved administrations should also:
  - resource tobacco cessation helplines appropriately to meeting changing demand. Notably, following the introduction of plain packaging in Australia the research highlighted a significant increase in the number of calls to the smoking cessation helpline, Quitline, in New South Wales and the Australian Capital Territory. The research showed a 78% increase in the number of calls to the Quitline associated with the introduction of plain packaging. This peak occurred four weeks after the initial appearance of plain packaging. This research also found the increase in calls was sustained and was not attributable to anti-tobacco advertising activity, cigarette price increases, nor other identifiable causes<sup>5</sup>.
  - fund a sustained mass media campaign to inform the public of the standardised packaging changes
  - support enforcement through adequate funding to relevant authorities to ensure retailers are meeting the requirements placed upon them and to prevent the sales of illicit tobacco.
  - consider tax rises on tobacco products over and above the existing escalator, particularly to counteract any possible negative effects from brand-shifting or price cutting, and considering further levies on the industry, based on local sales data, and designed to fund stop smoking services and other tobacco control initiatives, and health costs caused by tobacco consumption.

#### Notable Research and Publications

- 4.2 The British Heart Foundation undertook a unique study into the attitudes of UK and Australian teenagers towards cigarette packaging in their respective countries. The study published in October 2013 presented the results that only a third (36%) of UK teenagers are deterred from smoking by current cigarette packs, compared to half (48%) of teenagers in Australia, where packs are almost entirely covered by graphic warnings<sup>6</sup>. Notably in the study, 10% of teenagers in the UK make the incorrect assumption that certain cigarette brands were healthier than others – twice as many as Australian teens (5%).

<sup>5</sup> Jane M Young, Ingrid Stacey, Timothy A Dobbins, Sally Dunlop, Anita L Dossaix and David C Currow. Association between tobacco plain packaging and Quitline calls: a population based, interrupted time-series analysis MJA 2014; 200: 29–32 doi: 10.5694/mja13.11070

<sup>6</sup> UK cigarette health warnings 'not up to the job' <http://www.bhf.org.uk/default.aspx?page=16473> October 07, 2013

**Official response to consultation on standardised packaging  
of tobacco products: draft regulations**



- 4.3 In a 2013 UK cross-sectional survey into cigarette pack design and adolescent smoking susceptibility, it was identified that participating teens who gave a higher rating to packages with more design features, distinctive shape or bright colours were also those who indicated they are more likely to smoke in the future. Plain packs were found to directly reduce the appeal of smoking to adolescents<sup>7</sup>.
- 4.4 New Zealand is in the process of adopting a similar set of rules to that of Australia who introduced plain packaging laws in December 2012. Plain packaging in New Zealand will mean that tobacco products will be sold in dark olive colored packages with generic fonts. The New Zealand Health Promotion Agency published public opinion polling in June 2013<sup>8</sup>. In the study about three-quarters (72%, 70-75%) of respondents either 'agreed' (50%, 47-53%) or 'strongly agreed' (22%, 19-25%) with the statement 'Tobacco companies should be required to have cigarettes and tobacco in government-specified packs like that in the showcard'. The showcard contained an image of a tobacco plain pack prototype produced by the Australian Government.

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Industry  
of consultation

<sup>7</sup> Ford A, MacKintosh AM, Moodie C, Richardson S, Hastings G. Cigarette pack design and adolescent smoking susceptibility: a cross-sectional survey 10.1136/bmjopen-2013-003282 BMJ Open 2013 3 (9).

<sup>8</sup> New Zealand Health Promotion Agency. Public opinion about tobacco plain packaging <http://www.hpa.org.nz/sites/default/files/Public%20Opinion%20about%20Tobacco%20Plain%20Packaging%20May%202013%20FA.pdf>. May 2013



## CONSULTATION ON THE INTRODUCTION OF REGULATIONS FOR STANDARDISED PACKAGING FOR OF TOBACCO PRODUCTS

### Response on behalf of Hertfordshire County Council

1. Hertfordshire County Council and Hertfordshire's Tobacco Control Alliance, Smokefree Hertfordshire, are committed to reducing the harm from Tobacco. This is a key priority for Hertfordshire's Health and Wellbeing Board and for Public Health and Community Protection in Hertfordshire.
2. **Consultation Question 1: Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?**

The introduction of standardised packaging is important to public health and likely to bring about a reduction in the uptake of smoking and contribute to a decline in smoking prevalence. Hertfordshire County Council endorses the views expressed by Jane Ellison MP, Minister for Public Health; Dame Sally Davies, Chief Medical Officer for England; Professor David Hammond for the Irish Department of Health and ASH who all support the conclusions of the Chantler Review in that the introduction of standardised tobacco packaging will decrease the demand for tobacco products and contribute to a reduction in smoking especially in children and young people.

Smoking is an addiction largely taken up in childhood and adolescence and dependence occurs very quickly with the majority of adult smokers having started before the age of 18, so it is crucial to reduce the number of young people starting to smoke in the first place. Hertfordshire County Council concludes that that from the evidence presented in the Chantler Review that standardised packaging will:

- 1) Reduce the uptake of smoking in young people
- 2) Promote more adults to quit smoking
- 3) Help ex-smokers to remain abstinent
- 4) Continue to de-normalise smoking by reshaping smoking norms
- 5) Reduce the attractiveness of tobacco products to young people particularly
- 6) Reduce the effect of packaging distracting from the health warnings
- 7) Reduce opportunities for tobacco companies to mislead consumers about the effects of smoking
- 8) Impact on the attitudes, beliefs and behaviours of smokers

- 9) Have the greatest impact on those likely to experience smoking-related health inequalities such routine and manual workers, the unemployed and those with long-term conditions, including mental health conditions
- 10) Have a particular benefit in reducing smoking in pregnancy as young women are particularly influenced by tobacco branding and pack sizing (such as slim cigarette packaging). Smoking prevalence in pregnancy is particularly high in women under the age of 20 and in routine and manual groups
- 11) Reduce exposure to second-hand smoke

Hertfordshire County Council recognises that standardised packaging needs to be part of a comprehensive approach to tobacco control in order to have an impact on reducing smoking prevalence, but conclude that it is likely to make a significant contribution to this work over time and reduce smoking-related health inequalities.

**3. Consultation Question 2: Do you have any information, in particular, any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?**

The optimum date for implementation of standardised packaging would be May 2016, at the time of the implementation of the EU Products Directive which includes larger pictorial health warnings and text warnings on tobacco packaging, information about smoking cessation and the message that tobacco smoke contains more than 70 substances known to cause cancer. The implementation of standardised packaging at this time will increase the impact of these messages.

Having read the evidence, Hertfordshire County Council refute the tobacco industry's claim that standardised packaging will lead to an increase in the illicit tobacco trade as the key security features will remain. However, Hertfordshire Trading Standards note that the provisions set out in Article 15 of the EU Tobacco Products Directive and Article 8 of the World Health Organisation's Framework Convention on Tobacco Control, Illicit Trade Protocol, that a unique coding and numbering system and effective tracking and tracing procedures are to be developed. These are to be welcomed to counteract illegal tobacco. Hertfordshire County Council notes the Chandler Review's response to the concern of the tobacco industry and endorses the review's response to increase the effort on enforcement rather than to delay the introduction of standardised packaging.

The effect of the draft regulation 2(6) and (7) appears to be that a distance retail sale from outside the UK to a UK consumer is to be treated as if it were a supply in the UK. The business would therefore commit an offence. Previous experience of compliance monitoring of the Tobacco Advertising and Promotions Act 2002 (Amendment) Regulations 2006 (Internet Advertising Regulations) demonstrated how difficult it is for local Trading Standards Officers to enforce such legislation

across international borders. This provision therefore requires further consideration in terms of responsibilities of HMRC or Trading Standards and the practicalities involved in order that the regulations can be adequately enforced.

The requirements only apply to tobacco packaging at retail level. Hertfordshire County Council recommends that in order to reduce confusion over definitions of warehouses, or in those premises where both retail and wholesale sales are carried out (e.g. Costco, with whom Hertfordshire Trading Standards have a Primary Authority relationship) that the regulations are extended to cover the extended supply chain.

The DH Tobacco Control Plan 'Healthy lives, healthy people: A tobacco control plan for England 2011-2015' needs to be updated. This is an opportunity for the Government and for Public Health England to review its current strategy and to support:

Mass media and social marketing campaigns to promote standardised packaging

Make stop smoking services mandatory and set quality standards and local targets based on smoking prevalence data.

Maintain the support and funding for Trading Standards and ensure a coordinated approach to tackling illegal and illicit tobacco.

Ensure that duty on tobacco products continues to rise in excess of inflation and rise to mitigate any effects of price cutting that might occur.

**Consultation Question 3: Do you have any comments about the draft regulations, including anything you want to draw our attention to on the practicalities of implementing the regulations as drafted?**

The exclusion of specialist tobacco products such as cigars from the regulations is a missed opportunity as cigar smokers are frequently omitted from media campaigns and cessation support. Although very few young people use cigars, standardised packaging is likely to impact on the behaviour of adult cigar smokers to promote abstinence, associated with the psychological cues and brand loyalty.

Young people are not excluded from the increased use of hand-rolling tobacco which is comparatively cheap compared to manufactured cigarettes. It is disappointing that cigarette rolling papers such as 'Rizzla' are excluded from the recommendations for standardised packaging as this remains a source of marketing for tobacco companies.

Hertfordshire County Council recommends national media coverage and a social marketing campaign in advance of the proposed regulations in order to maximise the benefits of the legislation and ensure that the public have the evidence to support the introduction of the regulations.



Hertfordshire County Council notes the very small impact that standardised packaging may have on the profit margins of small retailers especially following the implementation of the Tobacco Display (point of sale) Regulations coming into force with small retailers on 6 April 2015 and other tobacco control measures to reduce smoking prevalence.

**Consultation Question 4: Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?**

Every year in England over 200,000 young smokers become addicted to nicotine and over 80,000 adults die in England because of tobacco use.

In 2012 in Hertfordshire, tobacco use cost the local economy nearly £278 million and more than 1,500 smokers die annually in Hertfordshire; any small effect that standardised packaging is likely to have will bring significant health benefits and cost savings to our local taxpayers over time.

In conclusion, the overwhelming evidence presented in the consultation document on standardised packaging and pack sizing demonstrates a public health benefit both locally and nationally. Hertfordshire County Council welcomes the power of Secretary of State through the Children's and Families Act 2014 to make regulations for the whole of the UK to regulate the retail packaging of tobacco products in this way.

On behalf of Hertfordshire County Council,

ive Member, Public Health and Localism,

e Member, Community Safety & Planning



**From:** [Redacted]  
**Sent:** C  
**To:** T  
**Subject:** E tobacco Products and and why  
t

6<sup>th</sup> August 2014

**re: Draft Regulations on Standardised Tobacco Products and why they are Wrong**

Only yesterday I became aware of this draft and that the consultation period closes on 7<sup>th</sup> August – hence this hurried note.

I must register my serious objection to a proposal which is likely to have zero effect on the level of tobacco consumption, merely to upset the balance of competition in a market which is legal with consequential effects on employment levels and on share-based investments/savings innocently invested, and ultimately on pensions of retired tobacco employees.

As I understand it the evidence so far available indicates that to instigate standardised packaging has zero effect on consumption (I believe that experience in Australia has shown this). How very unsurprising - maybe some psychologist somewhere has persuaded the powers that be that that it would be fun to try an experiment. Debranding might break habit-based consumption and by reducing the attractiveness of the brand prevent youngsters even starting to smoke. What arrant nonsense! Unintended consequences? Hadn't got that far.

The only conclusion can be that implementation of this proposal will not only fail to achieve its aim but will have the (I hope unintended) damaging side effects mentioned above.

I suggest that the Government cancels the "experiment", to save the inevitable ridicule and associated harm resulting. Gesture politics seldom, if ever, succeed.



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Tel:

Our ref:

Date:

6 August 2014



Leicester  
City Council

Jane Ellison MP  
Parliamentary Under Secretary of State for Public Health  
Department of Health  
Richmond House  
79 Whitehall  
London  
SW1A 2NS

DEPT OF HEALTH  
RECEIVED  
11 AUG 2014  
MCPE  
(RH)

Dear Jane

**Consultation on the Introduction of regulations for standardised packaging of tobacco products**

I am writing as lead member for health to respond to the above consultation on behalf of Leicester City Council. Leicester has made significant progress in reducing smoking prevalence but it is a concern that young people will take up smoking and be replacement smokers for those quitting, or indeed for the many people who die from smoking related conditions each year.

The consensus of medical professionals, public health and other relevant experts, and of the Chantler Review itself, is that standardised packaging would make an important positive contribution to reducing the harm caused by tobacco consumption. It is however essential that the regulations are placed before Parliament before the 2015 general election if the benefits to our population and future generations of reduced smoking are to be secured.

The introduction of standardised packaging has our support and will have greater effect if bought in at the same time as the measures in the European Tobacco Product's Directive in April 2016 and reinforced by a new Department of Health Tobacco Plan for England which will cover the period 2016 to 2020.

**Consultation Question 1: Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?**

The Chantler Review has put beyond doubt that the introduction of standardised packaging would be likely to lead to a reduction in the numbers of young people starting to smoke tobacco and would, when included alongside other policy initiatives, contribute significantly over time to a reduction in smoking prevalence rates. Our view is that the Government should lay Regulations on standardised packaging before Parliament as soon as possible and certainly secure their enactment before the 2015 general election.

OFFICE OF THE DEPUTY CITY MAYOR

TELEPHONE: (0116) 4



Consultation Question 2: Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?

My personal view is that it would be better to have plain packaging rather than standardised packaging. However, I acknowledge the argument that standardised packaging will provide greater means of embedding security devices and identification and that the existing key security features of cigarette packets will be present in future standardised packs. This will mean that there will be no loss in the means to limit the illicit trade in cigarettes across borders. The experience of Australia would appear to support this. So far, since the introduction of standardised packaging in December 2012 there appears to have been limited experience of tobacco smuggling. It should be noted also that the revised EU Tobacco Products Directive requires that all cigarette packs are marked with an irremovable and indelible unique identifier.

It is also encouraging that the most recent population survey of smoking prevalence in Australia, conducted from 31 July to 1 December 2013, has shown that the adult daily smoking rate has fallen from 15.1% (before the introduction of standardised packaging) to 12.8%. This provides early support to the Chantler Review view that when applied in conjunction with other policy initiatives standardised packaging will contribute significantly over time to a reduction in smoking prevalence rates.

Consultation Question 3: Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?

I am aware that Action on Smoking and Health (ASH) have reviewed the proposed regulations and, in the main, found these to be comprehensive and fit for purpose. However they raise two reservations about the draft regulations with which I agree and think should be reconsidered. First, the exclusion from the proposed regulations of specialist tobacco products including cigars and cigarillos. It sets a confusing and unhelpful precedent if any smoked tobacco products are excluded from the regulations and implies that in some way they are less damaging to health. Second, the failure of the proposed regulations to specify the size of cigarette or tobacco packets. This failure may provide a means of circumventing the intent of the regulations and allow an element of branding to be introduced.

Consultation Question 4: Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

The key message from the Chantler Review and from the Australian experience is that standardised packaging when included alongside other policy initiatives will have a significant impact on take up of cigarettes by young people and on overall smoking prevalence. It is important therefore that the Department of Health Tobacco Control Plan for England, which is due to be renewed and refreshed for the period 2016-2020, is carefully reviewed.

OFFICE OF THE DEPUTY CITY MAYOR

TELEPHONE: (0116) 45

This should be in order to maximise the impact of the introduction of standardised packaging on take up and prevalence of smoking and should include sustained mass marketing in advance of the introduction of standardised packaging and a careful review, and reinforcement where necessary, of other key elements of tobacco control.

Yours sincerely

Leicester Health and Wellbeing Board

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**OFFICE OF THE DEPUTY CITY MAYOR**  
Rory Palmer

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## **Submission to the final consultation into standardised packaging of tobacco products.**

### **Introduction**

I am a former Scotland Yard Detective Chief Inspector with the Metropolitan Police Service in London. I was a serving detective for 32 years. Since November 2011 I have been conducting research on behalf of tobacco manufacturer Philip Morris International in order to gain intelligence and understanding of the illicit trade in cigarettes and other tobacco products across the United Kingdom and the Republic of Ireland. In the interests of transparency I can declare that this is work for which I receive a fee.

This submission however is my own work into my findings. The work and views represented are my own. I did not make a submission to the earlier consultation on standardised packaging.

Over the last three years I have studied the illicit trade across the UK including separate projects in England, Northern Ireland, Scotland and the Republic of Ireland. These studies have involved over 50 interviews with law enforcement, predominately Trading Standards, HMRC and the Police and conducting over 800 test purchases of illicit tobacco products. More recently I travelled to Australia to gain an insight of the situation there since the introduction of standardised packaging or plain packaging (PP) for tobacco products and also to New Zealand, primarily to give evidence to a Parliamentary Select Committee on standardised packaging.

### **UK Research**

Since 2011, I have been carrying out field research with trained ex-police officers right across the UK. In the 2011/12 project we visited 13 areas, mainly large towns and cities. In 2012/13 we visited a further 13 areas. This year we plan to visit a further 14. The areas where we conduct research are rotated to give as fuller picture as possible. I have also conducted similar separate projects in Scotland, Northern Ireland and the Republic of Ireland. I have found that a vibrant trade in illicit tobacco products exists right across every country with no town or city I have visited unaffected. We have found that illicit cigarettes could be purchased for as little as £2.50 against a legitimate retail price of £8 to £9 and were widely available from unscrupulous retailers, traders at car-boot sales, dealers in the street and in pubs, from suppliers operating out of private addresses called 'fag houses' and online. The illicit cigarettes were kept in many places such as:

- under the counter,
- above ceiling tiles,
- in the back storeroom,
- from vehicles parked outside,
- under specially built trap doors with push button releases,
- from the pockets of the shop assistants,
- behind genuine stock on display,
- under display cabinets often in the middle of the shop and
- even from within meat carcasses hanging in a cold room in the butchery area. T

The test purchasers were even offered illicit cigarettes by the single stick, clearly aimed at children and targeted at what has become known as "pocket-money" prices. As one Trading Standards officer told me, the situation in his area was "chronic".

We often found that the same brands, even batch numbers, were being sold in a number of outlets in particular areas clearly suggesting an organised supply chain. This was most apparent in one city where only one illicit brand was available with shopkeepers quoting the same - that they were expecting a delivery soon. We were often told that they did not know what brands were coming until the evening deliveries that were made most days. In Northern Ireland where illicit whites made up 78% of all the 344 packs of illicit cigarettes we purchased we found illicit tobacco most widely available in shops in notorious republican and loyalist areas. These shops appeared to sell nothing but illicit products and were guarded by 'heavy' types and lookouts. Working in Ireland in the North and South we also came across more than one organised supply chain of illicit tobacco and alcohol products operating with the blessing and backing of paramilitary groups.

In our current UK wide project we have visited 12 areas this year so far (Manchester, Westminster, Reading, Harlow, Birmingham, Streatham, Doncaster, Southampton, Newark, Sunderland, Stoke-on-Trent and Cardiff), with two more (Northampton and Cornwall) to complete. So far during the course of the project we have made over 340 separate purchases of illicit tobacco.

I have also just started a new project in Ireland, (North and South) and on our first visit to Belfast we found illicit tobacco widely available and made 49 separate purchases. To put this work into context these are purchases made by a small team of four test purchasers working in pairs over two or three days in each area. These test purchases are always intelligence led with the information derived from a number of sources or self-generated.

I always attempt to meet with local Trading Standards before the field-work starts however; unfortunately many are now refusing to speak to anyone associated with tobacco manufactures, even if the purpose is to purely discuss the illicit trade. All the intelligence we gain during the course of these projects is disseminated back to

law enforcement, either HMRC or where I have been able to liaise, with local Trading Standards. The intelligence fed back from our last UK project has directly led to a number of significant seizures and subsequent prosecutions, for instance in Medway a seizure of 4,500 cigarettes in concealments in one retail store, in Liverpool 67,000 illicit cigarettes and 4.5kgs of tobacco; in Luton from just one shop following our information 35,000 cigarettes. These are just a few examples of law enforcement activity as a direct result of this work. Perhaps more importantly we have used the information obtained to engage nationally and regionally with media to raise public awareness of the illicit trade and the consequences of buying illicit tobacco products.

The amount of illicit tobacco products purchased this year far exceeds that found by our previous yearly projects using the same methodology. This increase is mainly in the area of illicit whites and is in line with the latest Empty Pack Survey data and also HMRC's report Tobacco Tax Gap Estimates 2012-2013 which showed after a number of years of decline the illicit market is estimated to grow to 6 billion sticks in 2012/13, a rise of half a million sticks. Both the data from this survey and from HMRC suggest that the area of concern is mainly the staggering growth in illicit whites, a product that hardly existed a few years ago. This type of cigarette is not smuggled into the country a couple of cartons at a time but in large amounts; usually in containers, by organised criminal gangs and terrorist organisations. These products are unregulated and found in the past to contain dead flies, faeces and many times the levels of lead and other chemicals found normally found in cigarettes. Unlike regulated products they do not contain any fire retardant properties and have been held responsible for many house fires in the UK, even deaths.

In the UK a survey earlier this year by the well-respected Populus Group of over 500 serving police officers from Police Constable to Chief Superintendent found high levels of concern about the growth of the illicit trade.

Nine in ten (94 per cent) police officers believe money from contraband tobacco products is fuelling organised crime and criminal activity, while more than eight in ten (82 per cent) said that government plans for plain packs will accelerate the black market by removing vital anti-counterfeiting measures.

### **Australia Research**

I firmly believe that the UK government should closely study the evidence emerging from Australia, even waiting until the experiment there has been independently assessed. The background to my visit was the release of the KPMG study, *'Illicit Tobacco in Australia'* published on 4<sup>th</sup> November 2013 that found that since the introduction of plain packaging in December 2012 Australia's illegal tobacco market has risen from 11.8% in June 2012 to 13.3% in June 2013, costing the Australian Government up to AUD\$1bn in lost excise revenue. Branded illicit tobacco grew by 154% while unbranded loose tobacco (known in Australia as 'chop chop') decreased



by 54%, suggesting a significant change in the nature of the tobacco market. The KPMG study, *Illicit Tobacco in Australia* also found consumption of tobacco as a whole has not decreased. This was the first time since 2009 that consumption did not decline year over year. I am surprised that this report has not been more closely considered, first by the Chantler Review and also by the Government in Its Impact Assessment.

On top of the KPMG report are the latest Empty Pack Survey figures from Australia. This survey is regularly conducted across 16 of Australia's largest cities and involves the collection of discarded cigarette packs from the street and easy access bins. The latest survey where 12,000 packs were collected during the summer months of 2013 shows a non-domestic incidence rate of 11.7%, a large rise from the previous year rate of 5.4%, that was before the implementation of plain packaging.

Finally, the Australian Customs and Border Protection Service annual report (2012-13) revealed that the seizure of illicit cigarettes in 2012 – 13 was 200 million sticks, up from 82 million in 2010-11. Again, this Government data I feel should be part of the Impact Assessment evidence base.

I started my visit by speaking to law enforcement, particularly the Trident Task Force which is a joint agency taskforce comprising Victoria Police, Australian Federal Police, Australian Customs and Border Protection Service and others to tackle organised crime operating in a maritime environment. In early 2013 22 shipping containers were seized, 71 tonnes of tobacco and 80 million sticks, all fully branded were seized. The estimated loss to the revenue was \$67 million and the profits estimated at \$24 million to the criminals. Also recovered were 4 fully functioning cigarette machines. This is the biggest ever illicit seizure recorded in Australia. The majority of the branded products seized were 'illicit whites', including the brand Manchester that according to the KPMG report is now bigger than Camel, representing 1.3% of the market. Six persons have been charged and are awaiting trial. Police believe that the intended recipients of these were a chain of pop-up shops and distribution networks set up by the criminals in response to market for illicit whites in Australia since plain packaging.

In Frankston a suburb of Melbourne I met with the owner of a tobacconist. He runs a very busy shop. He stated that he has not seen any change in sales since PP came in. He has lost customers to a local pop-up shop selling illicit tobacco but when this shop runs out his customers come back. He does not see his customer's mindset changing because of PP. His main concern is that PP makes it much harder for him to operate. To stock the shelves, to identify the customers requirements, to stock take and order all take much more time for both him and his staff. He identified this pop-up shop, which he stated was also selling to children. I then observed this shop and saw schoolchildren waiting at a bus stop outside and going back and forwards inside the shop, returning and smoking cigarettes clearly bought from the shop. I then went into the shop and spoke to an Australian female shopkeeper and asked for cheap cigarettes. She then produced a pack of fully branded cigarettes called 'Modern' from under the counter. She said that these were good and were only \$9.

She said she had sold 30 cartons worth of these that day and showed me a book where she was keeping a record. I purchased two packs for \$18. Modern is an illicit white, a branded cigarette manufactured specifically for smuggling and normally smuggled by organised crime in bulk. On display were Venti boxes. These are boxes of 100 pre-formed cigarette tubes with a filter but empty of tobacco. These are then filled with the loose tobacco called 'chop-chop'. I asked if she had these filled and she sold me a filled box of 100 for \$32. This is less than the tax that should be paid which equates to 35 cents per stick.

In another shop in Cabramatta near Sydney run by an Asian female I purchased two packs of fully branded Marlboro Red and two packs of fully branded Marlboro Gold. These have Asian markings and state 'Duty Free'. They were sold to me from under the counter, again after being shown legitimate PP products on display and asking for something cheaper. They were sold at \$9 each. I then asked for the other brands that she had that I could try. She then sold me a pack of Davidoff and a pack of Dunhill. Both were fully branded and with Asian printing. Each cost \$9. I also purchased a pack called Timeless Time for \$8. This has very little marking on it and was found to be an illicit white. On return to Sydney at Wynyard Railway Station I went into a station tobacconist and purchased a fully branded pack of Double Happiness for \$11 and two fully branded Mevius another illicit white both for \$23. All were from drawers under the display and have Asian markings. Clearly visible walking along the streets in Sydney were discarded empty cigarette packs, many of which were fully branded.

I also visited Central Goldfields Council, Maryborough. 120 miles from Melbourne, out in the countryside. In Maryborough there is only one legitimate tobacconist, they estimate they are losing \$15K per week to a pop-up shop. Similar shops exist in towns nearby. Staff at the council expressed serious concerns that PP is not working. Information they have received states that there is at least 42 pop-up tobacconists selling illicit tobacco products in Victoria State alone and there are three organised crime syndicates operating that are behind all of these.

I then went to the pop-up identified by the council and found it to be a gift shop with no tobacco on show. I asked for a pack of cheap cigarettes but the Australian shopkeeper said he had just sold out of all the branded cigarettes but had some pre-filled boxes. He then produced and sold me a box of 'Silver Tip' 100 pre-filled sticks for \$33. In the conversation he said that he was expecting some Marlboro being delivered later that day from Melbourne. He suggested that they could be a cheap as \$6 against a retail price of around \$16. Pop-up shops and the increasing sales of illicit cigarettes are two areas that hardly existed in Australia before the advent of plain packaging.

Overall I found it very easy to purchase illicit tobacco products in Australia – even as a visitor. Everyone I spoke to suggested that the rise in illicit tobacco was because organised criminal groups were quick to exploit the introduction of plain packaging, rightly anticipating that smokers will still prefer branded products and will downgrade from premium products to cheaper versions, including illicit whites.

## Conclusion

My 32 years of fighting serious crime has shown me that organised criminal gangs are quick to exploit opportunities that deliver the maximum profit for least risk. Just as armed robberies of the 70s and 80s made way for the drugs trade and large scale fraud in the 90s, so a new 'crime of choice' has emerged, which carries even less risk and even greater profits. The smuggling and trade in illicit tobacco, until now thought to be a low level crime, has become the primary source of revenue for many criminal gangs and terrorist groups. The introduction of PP will in my view make the situation even worse. Criminals may well take the opportunity as in Australia to flood the market with branded products, particularly unregulated illicit whites. Also common sense would suggest that instead of the numerous different brands currently on sale with their own unique designs, the counterfeiter has only to produce one. In the 80's and 90's I was closely involved in the never-ending battle with organised counterfeiters producing good copies of UK and European high denomination bank notes. To keep one step ahead of the criminals bank note design regularly changed adopting more and more sophisticated security measures leading to where we are today, secure currency with few incidents of forgery. Removing individual designs and security measures such as trademarks and logos on tobacco products will just make it easier, allowing cigarettes to be filled with unregulated contents. This was clearly highlighted in the Sun Newspaper of 4<sup>th</sup> June 2014 when they infiltrated and exposed a smuggling gang operating from Asia that already imports containers of counterfeit cigarettes into the UK. The reporter recorded the head of the gang as he talked about how plain packaging would reduce their costs enabling them to grow their production aimed at the UK market and making their operation far more profitable. At a street level I found during the course of my projects that those who deal in illicit cigarettes do not care who they sell to, including young children. I firmly believe that plain packaging will fuel the black market trade and in fact could have the opposite effect to what is intended and expose more children to tobacco of all sorts, including far more harmful unregulated products. The Government should take full account of the evidence that already exists and undertake further studies to understand the potential impact on the UK. As it stands, this policy carries a risk that quiet simply should not be ignored.



Department of Health Standardised  
Tobacco Packaging Consultation  
PO Box 1126  
Canterbury  
CT1 9NB  
UK

British American Tobacco  
1 Eton St  
Richmond-Upon-Thames  
TW9 1EF

6th August 2014

**RE: The Doffi consultation on draft regulations for standardised & plain packaging of tobacco products**

To whom it may concern,

I have been working in the tobacco industry for the past 14 years and am concerned both as a member of the industry and as a supporter of the Conservative party, that this government is seeking to hastily introduce plain packaging regulation without due process and full consideration of all of the implications such as;

- Plain packaging is unlawful as it would not only breach several UK, EU and international laws and agreements but would constitute a wholesale expropriation of the industry's valuable intellectual property, requiring payment by the Government of very significant compensation;
- Given the lack of evidence and acknowledged risks, the Government has not demonstrated that the benefits would outweigh the adverse consequences of Plain Packaging; and
- There are a number of alternative evidence-based options that are proportionate, effective, workable and can achieve public health objectives while respecting intellectual property rights.
- Plain packaging would not be effective in reducing smoking prevalence since tobacco packaging is not a relevant factor in people's decision to smoke or quit;
- The Government had not considered the relevant research and relied on insufficient and unreliable evidence that failed to make the crucial link between packaging and any reduction in smoking;
- Plain packaging would exacerbate an already significant illicit trade problem in the UK;
- Plain packaging would have other significant adverse unintended consequences such as lowering prices and thereby increasing smoking, reducing Government revenue and harming small business;

Yours sincerely



Sent via email to: [TobaccoPackaging@dh.gsi.gov.uk](mailto:TobaccoPackaging@dh.gsi.gov.uk)

**From:** [REDACTED]  
**Sent:** 06 August 2014 19:22  
**To:** Tobacco Packaging  
**Subject:** standardised packaging

Dear sir,

I am not, nor ever have been a smoker, however I take exception to this proposal of standardised packaging. To my knowledge smoking in itself is not yet illegal. In fact the tax raised on it, is an ongoing source of revenue for any government.

Standardising packaging will not stop people, whether young or old, from smoking, nor will it encourage smokers to give up the habit.

What it will do, is encourage illegal imports from abroad, including those from countries where there is no quality controls.

I speak as a retired Trading Standards Officer who regularly confiscated counterfeit goods including tobacco products.

If the uk government feel so strongly about this matter, it should create a statute making the growing, manufacturing, selling and smoking of tobacco products illegal.


That I would support.



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EL255




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**Sent:**  
**To:**  
**Subject:**

Dear Sirs,

I am aware of the proposals being put forward regarding Standardisation of Tobacco Packaging and I would like to register my objection to the proposal. It is my opinion that to go down this line is an infringement of my liberty/ability to make an informed choice over what I do and/or buy. I also believe that by the implementation of this proposal it will create a vacuum which will be filled by counterfeiters who will flood the market with an inferior and unregulated product. This will result in there being very little diminution of supply and/or demand and will lessen the control on what is being supplied to the public. As a side issue, but of importance nevertheless, there will be a reduction in the tax collected by HMRC and this shortfall will have to be made up from a higher tax rate being imposed on the general public rather than those who wish to smoke tobacco.



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EL256

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 06 August 2014 21:22  
**To:** Tobacco Packaging  
**Subject:** Plain packaging for tobacco products.

Dear Sir,

I am a former employee of Imperial Tobacco, however, I agree with most of the restrictions placed on the industry to deter people from taking up smoking. No advertising, health warnings, but with fake products on the rise which are not taxed I feel that the move to plain packaging would be counter productive. The fake products are restricted to the most popular products, with plain packaging all brands can be faked. The faked products have less effective filters and tar levels higher than the legitimate products, therefore smokers smoking the fake products are using a product even more dangerous than the legal brands, thus creating an additional health risk. This is surely counter productive and may place an additional burden on the National health service, quite apart from the loss of revenues.

I left the industry in 1988 and subsequently gave up smoking.

Yours sincerely,  
[REDACTED]

PS. The information about the quality of the fake products was gleaned from a TV program called Fake Briton, the information coming from Custom and Excise.

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EL257

**From:** [REDACTED]  
**Sent:** [REDACTED]  
**To:** Tobacco Packaging  
**Subject:** Response to CONSULTATION OF THE INTRODUCTION OF REGULATIONS FOR STANDARDISED PACKAGING OF TOBACCO PRODUCTS

**Importance:** High

Department of Health Standardised Packaging Consultation  
PO Box 1126  
Canterbury  
CT1 9NB

6th August 2014

**Response to CONSULTATION OF THE INTRODUCTION OF REGULATIONS FOR STANDARDISED PACKAGING OF TOBACCO PRODUCTS**

I run a small creative business in South West London and I want to express my objection and opposition to plain packaging and contribute to the Consultation of Standardised Packaging to Tobacco Products.

Over the years I have employed very highly skilled individuals working on our creative work for Gallaher Limited and Japan Tobacco International (JTI), together providing employment and supporting the UK economy with profit and tax revenues.

The Evidence

In the previous 4-month consultation, these Plain Packaging plans were rejected by nearly two-thirds of responses.

Since then, no evidence has been presented by the Chantler Review that Plain Packaging will have any positive effects on UK smokers. In fact recent evidence from Australia points to the contrary where the figures of underage smoking has actually increased between 2010 and 2013. This has reversed previous declines, supplying proof and evidence that Plain Packaging doesn't and isn't working.

Australia is the only country in the world to run this Plain Packaging experiment and in Sir Cyril's own words '*It is too early to draw definitive conclusions*' from Australia.

This is therefore contradictory with his own conclusion that Plain Packaging is likely to have a positive impact on smoking behaviour nor increase the rate of decline in smoking. The Australian government are not even reviewing their own Plain Packaging policy until December 2014. Surely it would be wise to wait and see what the outcome there is?

Developments

This is now the third consultation on this issue over the last 6 years, with Plain Packaging being rejected by the majority of respondents and both Conservative and Labour governments due to lack of evidence.



It is also disappointing that this very short (only 6 weeks) consultation has landed in the middle of the summer holidays. Taking time to analyse these detailed Impact Assessments and consider draft regulations and respond is an additional further burden on small companies trying to operate.

With developments already from the EU Tobacco Products Directive (TPD2) coming in to effect in May 2016, which will ban packs of cigarettes in packs of less than 20 and RYO in packets under 30g, it is disproportionate that the UK pushing forward with this plan.

The large growth in illicit trade in this country is well documented. TPD2 will almost double the minimum price of cigarettes, almost treble the minimum price of hand-rolling tobacco and by banning the sale of menthols by 2020, the already cash strapped UK consumer will be led in to a perfect storm of cheap illegal trade and cross border tobacco shopping with reduced standards of control of the product or where their money paid eventually ends up.

Why would the UK push forward with an unproven policy of Plain Packaging without its own display ban implemented, with no international evidence, with no consultation consensus nor the EU's TPD2 in place?

Surely the UK should work with the EU TPD2 and analyse that before adding further red tape for the retail industry and removing our world leading creative jobs prematurely and handing them to other European businesses on a plate.

In February 2013, the Minister for Business and Enterprise stated his intention to "*deliver more certainty for business [and to] continue to withhold agreement for any new regulations that gold plate legislation.*" Surely the Government should stand by this promise to help small businesses in the wholesale, retail and creative sectors.

#### The Draft Regulations

Again, with illicit trade growing, creating a standard template will provide criminal counterfeiters with a standard format across all brands. If packs are easier to make (fake) then more fake packs will be on the black market. When packs are on the black market, no-one knows where or with whom they end up.

These regulations do not stand up to the Government's own Better Regulation principles. These principles state that ANY regulation should be clear, transparent, accountable, proportionate, consistent and targeted at only cases where action is needed. This is clearly NOT the case as other measures such as TPD2 and the Display Ban have not yet been fully implemented, and without evidence from the only other experiment – from Australia.

#### The black market and illicit trade

A report has been published by KMPG that examines the tobacco situation in Australia and indicates a growth in the illicit tobacco market since Plain Packaging was introduced. It grew from 11.8% to 13.9%.

The 2014 impact assessment also states that there is likely to be an increase in the UK duty Paid segment if Plain Packaging was implemented.

Further evidence from Australia shows that since Plain Packaging was introduced, consumers are even more driven by price. If this is mirrored by a Plain Packaging policy in the UK, they may turn to buying more tobacco, illegally (currently at 46% of roll-your-own and 16%) and thereby creating less footfall in to our struggling retail trade.

Impact assessment

Plain packaging will add an increased problem for retailers making stock management very difficult, and increasing the time to serve customers.

The Assessment has been given an Amber rating suggesting that the Government's own experts on regulation have concerns about it that need to be addressed.

I urge you to protect my business, the UK creative industry, the Intellectual Property of brands, and the freedom of choice.

These Plain Packaging plans are plain wrong.

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EL258

[REDACTED]

Sent: 06 August 2014 23:08  
To: Tobacco Packaging  
Subject: Standardised Packaging

I would like to say I totally disagree with the standardising of tobacco products. It has to be stopped. It will not make the slightest difference to people who really want to smoke and I do not believe it will achieve the Department of Health's objectives. In Australia where standardised packaging has been implemented, smoking prevalence has not decreased but illicit trade has increased by 20% since its introduction.

We must consider the effect it would have on consumers, wholesalers, retailers and our business and livelihoods.

PLEASE CONSIDER ALL OF THE ABOVE AND LEAVE THINGS AS THEY ARE.

[REDACTED]

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Asociación Interamericana de la Propiedad Intelectual  
 Inter-American Association of Intellectual Property  
 Associação Interamericana da Propriedade Intelectual

**SUBMISSION TO THE CONSULTATION ON THE INTRODUCTION OF REGULATIONS  
 FOR STANDARDISED PACKAGING OF TOBACCO PRODUCTS OF THE UK DEPARTMENT OF HEALTH**

The Inter-American Association of Intellectual Property (ASIFI) is a non-profit organization, established in 1964, with the purpose of bringing together professionals interested in studying, disseminating and developing intellectual property laws in the Americas.

ASIFI's objectives are advising governments and intergovernmental entities on matters related to the unification of the intellectual property laws, as well as encouraging relationships with related entities, such as the World Intellectual Property Organization (WIPO).

ASIFI recognizes the efforts of the UK Government to improve the public health policy and the welfare of the population.

Although ASIFI takes no position on public health policy, it has consistently expressed its opposition to standardized packaging because it would affect the rights of trademark owners and restrict their legitimate use. This could weaken the trademark system and have indirect and unintended consequences that go beyond public health.

Concerned by this issue, on June 5, 2011, ASIFI submitted its concerns regarding the Australian "Draft Bill" requiring plain packaging on all tobacco products.

Just over a year later on July 5, 2012, ASIFI wrote to the UK Department of Health (DH) in response to its public consultation inviting views on the potential introduction of standardized packaging in the UK.

- ASIFI shared its professional view that standardized packaging would violate several provisions of international IP law, including Article 7 of the Paris Convention and Articles 15(4) and 20 of the TRIPS Agreement (which would not be justified by Article 8 of TRIPS). We considered it particularly damaging for the UK Government to undermine such agreements due to the historic role of the UK in supporting IP rights internationally.
- ASIFI also expressed concerns at the effect the policy would have on the illicit trade in tobacco products, and its scepticism that trademarks or packaging influence smoking.

- ASIPI highlighted that the IP system, especially trademarks, should be seen as a mean to guide the consumer and strengthen the public policy related to public health.

ASIPI's views on all of the above have not changed since July 2012. To the contrary, ASIPI remains firmly of the view that standardized packaging will weaken the consumer and the IP system while potentially benefiting criminals engaging in the illicit trade. ASIPI believes that there is now further evidence to support these views.

**1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?**

ASIPI observes that the Chantler Review did not comment on trademark and IP issues. This is disappointing given the important precedent the policy sets with regard to IP rights, and the likelihood that a decision taken by the UK Government with respect to tobacco could be seen by other Governments to give the 'green light' to expropriating the property of other rights holders (not necessarily limited to the tobacco industry).

ASIPI is also unconvinced by the conclusions of the Chantler Review about the illicit trade. The illicit trade is a complex subject, and ASIPI acknowledges the difficulty of investigating it fully (particularly in the short period within which the Chantler Review had to report). However, it seems that the data from KPMG, a well-respected consultancy, should not be dismissed so easily. There also appears to be an inconsistency between HMRC's assessment (that "*standardised packaging is likely to enhance and diversify current risks that the UK faces from tobacco fraud*")<sup>1</sup> and the Chantler Review's dismissal of the risks. Both points are picked up in response to the other consultation questions.

**2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?**

There is no additional information in respect of the legal issues since the 2012 consultation. As explained above, these have not changed, and in our view remain a major concern, not least since they have not been addressed.

The legal issues are also of particular interest to ASIPI members given the involvement of three American countries (Cuba, Honduras and the Dominican Republic) in the WTO proceedings against Australia's plain packaging law. We would therefore urge the DH to give due consideration to the concerns and the comments we have with regard to Question 3 of the consultation set out below.

As referenced above, ASIPI is concerned that the Chantler Review misunderstands the risks that standardized packaging poses to the illicit trade. ASIPI recommends that the DH does not disregard the KPMG report on the illicit trade in Australia as the Chantler Review's basis for doing so appears flawed.

The Chantler Review is dismissive of the risk that standardized packaging poses to the illicit trade. Sir Chantler indeed mentioned: "*I am not convinced by the tobacco industry's argument that standardised packaging would increase the illicit market, especially in counterfeit cigarettes*".<sup>2</sup>

By contrast, the Impact Assessment draws a more cautious conclusion: "*Although compliance*

<sup>1</sup> Paragraph 126, Impact Assessment.

<sup>2</sup> Paragraph 5.13, Chantler Review.

*measures are in place to mitigate generic risks associated with illicit tobacco goods, HMRC assesses that standardised packaging is likely to enhance and diversify current risks that the UK faces from tobacco fraud, although there is no direct information or evidence to enable estimation of any increase to the size of the illicit market... We conclude that there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification.*"<sup>3</sup>

The Impact Assessment's conclusion appears more consistent with the advice from HMRC that: *"standardised packaging probably does enhance and diversify the existing risks the UK faces but it is very difficult to quantify any changes in risk because there is such a lack of good data".*<sup>4</sup>

It would seem to us that a risk that is 'enhanced' and 'diversified' is a risk that is greater and harder to manage. The Chantler Review appears to ignore this. Despite this flaw, the Impact Assessment cites the conclusions of the Chantler Review on the illicit trade as if its analysis was primary evidence: *"The consultation has identified potential risks of the illicit market increasing if standardised packaging is introduced. Although the consultation has provided no basis to quantify a change (either an increase or decrease) in the tax gap, it is important to consider the potential impacts if it did. However, it should be noted that the independent review led by Sir Cyril Chantler concluded 'I am not convinced by the tobacco industry's argument that standardised packaging would increase the illicit market, especially in counterfeit cigarettes'."*<sup>5</sup>

ASIPU urges the DH to review the underlying evidence on the illicit trade because the Chantler Review's conclusions do not appear to be wholly reliable.

In addition, the basis on which the Chantler Review discounted the KPMG report appears imprudent. The Impact Assessment claims that the effect on the illicit trade cannot be quantified. This caution follows the advice of HMRC that sufficiently robust data is not available.<sup>6</sup> The advice of HMRC is perhaps unsurprising since the illicit trade is inherently covert and difficult to measure. However, in such circumstances the Chantler Review's dismissal of the KPMG study lacks any clear basis. The Chantler Review concluded that the KPMG report was unreliable because it was inconsistent with other studies: *"In a situation where estimates differ by such magnitudes, I do not have confidence in KPMG's assessment of the size of – or changes in – the illicit market in Australia."*<sup>7</sup>

Yet if there is no "good data" it seems rash to disqualify one set of data solely for its inconsistency with another data set that is not considered wholly robust either. It certainly does not seem appropriate to disregard a study by KPMG who have years of experience producing such reports for the European Commission's Anti-Fraud Office (OLAF).<sup>8</sup>

It would be doubly strange for the DH to disregard the KPMG study when a key component (the 'Empty Pack Survey') is endorsed by the Impact Assessment. In the context of monitoring potentially increased cross border shopping and illicit trade the Impact Assessment states that it: *"will need to take account of sources of evidence such as the Empty Packs Survey and data collected by HMRC"*.<sup>9</sup>

<sup>3</sup> Paragraphs 126 and 135, Impact Assessment.

<sup>4</sup> (2<sup>nd</sup>) Meeting with Andrew Leggett, Deputy Director, and Judith Kelly, Tobacco Strategy and Policy Team, HM Revenue and Customs. Location: HMRC at 100 Parliament Street at 10am on Friday 7<sup>th</sup> March 2014

<sup>5</sup> Paragraph 129, Impact Assessment.

<sup>6</sup> (2<sup>nd</sup>) Meeting with Andrew Leggett, Deputy Director, and Judith Kelly (referenced above).

<sup>7</sup> Paragraph 5.6, Chantler Review.

<sup>8</sup> Illicit tobacco in Australia, 2013 Full Year Report, 3 April 2014, page 7, [https://www.imperial-tobacco.com/assets/files/cms/KPMG\\_FY2013\\_illicit\\_Trade\\_Report\\_FINAL\\_11\\_April\\_2014.pdf](https://www.imperial-tobacco.com/assets/files/cms/KPMG_FY2013_illicit_Trade_Report_FINAL_11_April_2014.pdf)

<sup>9</sup> Paragraph 182 of the Impact Assessment.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?

The draft regulations clearly violate Article 20 of TRIPS. That provision states: *"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."*

The drafting of Article 20 TRIPS makes it clear that the special requirements specified in the provision are only examples, and not intended to provide an exhaustive list. The fact that standardized packaging is not mentioned expressly does not therefore make it any less relevant. Paragraphs 3 and 7 of the draft regulations (which mandate the permitted colour or shade of cigarette packaging and hand rolled tobacco packaging respectively), and paragraph 5 (mandating the appearance of cigarettes, including limitations on the text appearing on a cigarette) would almost certainly be considered 'special requirements' for the purposes of Article 20.

These provisions of the draft regulations are also clearly detrimental to the capacity to distinguish one product from its competitors. Indeed, the elimination of brand differentiation is the purpose of the policy according to the Chantler Review: *"The intent of standardised packaging is indeed to remove appealing brand differentiation."*<sup>10</sup>

Finally, if these provisions would encumber the use of trademarks drastically. The meaning of 'encumber' is to impede or restrict.<sup>11</sup> According to these provisions, only the brand name could appear on packs and cigarettes and only in a mandated size, type and colour. Any other use of trademarks would be prohibited.

Although some commentators argue that Article 20 permits encumbrances that are 'justified', this is subject to debate. Even if, for the sake of argument, we accept the proposition that justifiable encumbrances are permitted, it seems most unlikely that the Regulations would meet such a test. Such a drastic interference with the right of a trademark owner would require a clear and compelling public health benefit, with the burden of proof on the DH. However, neither the projected figures in the Impact Assessment nor the conclusions of the Chantler Review (which anticipates only a "modest" impact from standardized packaging) support this.<sup>12</sup> Further, there has been no evidence from Australia to link standardized packaging to lower levels of smoking (among either adults or children).

ASIPf takes this opportunity to remind DH that Article 8 TRIPS does not make the regulations lawful. Article 8(1) states: *"Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition (...), provided that such measures are consistent with the provisions of this Agreement."*

Since Article 8 explicitly states that any measure needs to be consistent with the provisions of this Agreement, Article 8 does not provide a blanket exemption that enables a country to ignore any provision of TRIPS on public health grounds. Such an interpretation would render the entire agreement meaningless. Instead it is declaratory, and permits parties to the agreement to take steps where necessary to protect public health and nutrition which are consistent with other provisions of TRIPS. Not only is there no basis to interpret the text as giving Article 8 priority over Article 20 or

<sup>10</sup> Paragraph 5.2, Chantler Review.

<sup>11</sup> <http://www.oxforddictionaries.com/definition/english/encumber>

<sup>12</sup> Paragraph 18, Chantler Review.

other provision within TRIPS, but even if this was indeed the case, there remains a requirement that the measure be 'necessary'. As mentioned above, the absence of any evidence proving the efficacy of standardized packaging makes it unlikely that this test would be met.

Finally, there is Article 15(4) of TRIPS (and Article 7 of the Paris Convention which it is almost identical to). Article 15(4) states: *"The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark."*

Since 'registration' of a trademark cannot be separated from its 'use', the prevention of rights holders being able to use their trademarks is an effective obstacle to their registration and a further legal issue to be resolved. The inseparability of 'registration' and 'use' is more apparent when read together with the preceding clause (Article 15(3)) which allows parties to *"make registrability depend on use"*.

Although the Paris Convention has no equivalent of Article 15(3) it makes the same connection between registration and use, prohibiting the invalidation or a denial of registration except in limited circumstances including when they are devoid of distinctive character.<sup>13</sup>

Finally, trademark rights being considered as property rights under international IP treaties and national laws, we are surprised that the draft regulations (as well as the Impact Assessment) do not provide for monetary compensation due to the expropriation of the trademark rights.

**4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage Impact assessment?**

ASIPI is concerned that the DH may not completely appreciate the role and purpose of branding and trademarks. This has potential ramifications for how it then values brands.

ASIPI considers it important to remember that trademarks and branding provide important welfare benefits with mutual advantage to rights holders and consumers. It should not be thought that trademarks and branding are mere 'marketing tools' that allow the rights holders to increase their profits (or consumers to adopt an identity).

ASIPI considers that the Impact Assessment could be improved by taking account of the full range of purposes trademarks fulfil. For example, the Impact Assessment focuses on consumers' loss in terms of absence of self-expression. This ignores the fundamental role of brands in denoting a source of origin, quality and helping consumers to easily identify the good they want to acquire and avoid those that they don't. The absence of such recognition is puzzling given that the UK Government's Intellectual Property Office website clearly explains the role of a brand in such terms: *"A brand can be a trade name, a sign, symbol, slogan or anything that is used to identify and distinguish a specific product, service or business. But a brand is much more than this; it can also be a 'promise of an experience' and conveys to consumers a certain assurance as to the nature of the product or service they will receive and also the standards the supplier or manufacturer seeks to maintain..."*<sup>14</sup>

ASIPI would like to understand better how the Impact Assessment determined the loss of brand value to tobacco manufacturers and retailers at £166m.<sup>15</sup> This is a much lower figure than that which independent experts place on some of the largest tobacco brands. For example the Marlboro

<sup>13</sup> Article 6 *quinquies*(B.2.)

<sup>14</sup> <http://www.ipo.gov.uk/types/tm/t-about/t-what-is/t-brands.htm>


<sup>15</sup> Paragraph 19 of the Impact Assessment.



brand alone was recently estimated at \$67.3bn, ranking it the ninth most valuable globally.<sup>16</sup> ASIPI would respectfully submit that such a low value for the industry's combined brands further implies a fundamental misunderstanding which should be corrected.

We remain at your disposal should you need clarifications or additional information.

Yours sincerely,



August 7, 2014

<sup>16</sup> <http://www.businessinsider.com/the-20-most-valuable-brands-in-the-world-2014-5#9-marlboro-12>



Department of Health



Llywodraeth Cymru  
Welsh Government



The Scottish Government  
Rialghaltas na h-Alba



Department of Health, Social Services and Public Safety  
www.dhsspsni.gov.uk

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

**a. Are you responding (required):**

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

**b. Please provide your details and contact information:**

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

**Now go to question f**

**c. Please provide your organisation's details and contact information:**

Name of organisation (required):

Name of person providing submission (required):

Welsh Medical Committee

Job Title (required):

Welsh Medical Committee

Contact address of organisation (required):

Department for Health and Social Services  
Welsh Government

Contact email address (required):

Is this the official response of your organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

- Duty free shop
- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

**e. If you are responding on behalf of an organisation, what type is it?**

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation

University or research organisation

Other (please provide details below)

If other, please tell us the type of organisation:

f. Does your response relate to (required):

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)

No

Yes (please describe below)

If yes, please describe:

- h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box**

### **Consultation questions**

- 1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?**

The Welsh Medical Committee agree with the conclusions of the independent Chantler Review that the available evidence supports the introduction of standardised packaging for tobacco products. There is strong evidence that liveried packaging reinforces brand image and encourages smoking amongst young people as highlighted in the Review. The introduction of standardised packaging should serve to reduce the rate at which children take up smoking. We would therefore welcome the positive impact that this would have on Public Health and it appears to be implausible that standardised packaging would increase tobacco use.

The Chantler Review summarises the best available evidence on the effectiveness of standardised packaging, which together indicates that it would reduce the appeal of cigarettes and smoking and address the use of packaging elements that mislead smokers about product harm.

Whilst the Chantler Review acknowledges limitations in the evidence currently available, we support the assertion that standardised packaging, in conjunction with current tobacco control measures will lead to an important reduction over time in the uptake and prevalence of smoking. Emerging evidence continues to support the positive impact standardised packaging will have on reducing tobacco use.

- 2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?**

Standardised packaging for tobacco products was introduced in Australia in 2012 in conjunction with enlarged graphic health warnings for tobacco products, with the intention of achieving a reduction in youth uptake. These measures were designed to achieve a sustained reduction in tobacco use over the longer term, although emerging data already suggests that standardised packaging may be having an effect on smoking prevalence. Consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, measured by estimated expenditure on tobacco products adjusted for population growth. The evidence also suggests that smoking behaviours have changed since the introduction of

standardised packaging in Australia, with assessments made before and after the introduction of standardised packaging indicating a significant reduction in the number of people observed smoking and people openly displaying cigarette packets. The reduction in the visibility of smoking will also tend to contribute to a reduced uptake. One of the additional benefits of standardised packaging may be to encourage smoking cessation as there appears to be a sustained increase in calls to the Australian National Smokers Association helpline since the introduction of standardised packaging and enlarged graphic health warnings.

Recent evidence from the United Kingdom has demonstrated that standardised cigarette packs are perceived by smokers to be significantly less appealing and less motivating to buy than branded packs.

Current reviews all suggest that standardised tobacco packaging would contribute to improving public health over and above existing tobacco control measures by discouraging young people from taking up smoking, encouraging people to give up smoking, discouraging people who have quit or are trying to quit smoking from relapsing and reducing people's exposure to smoke from tobacco products, as standardised tobacco packaging would deter young people from starting to smoke by removing smoking identity, where personality attributes are attributed to specific brands such as 'cool' and 'popular'. Standardised tobacco packaging can weaken smoking identity to brands and are less appealing in terms of projection of personality attributes. Reviews have all suggested that young adults when using standardised tobacco packs are more likely to think of quitting or increasingly wanting to quit as the branding was removed. A reduction in smoking patterns will also have the impact of reducing people's exposure to smoke from tobacco products.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

The Welsh Medical Committee welcome the draft regulations set out in the Consultation and agree that the proposed tobacco packaging would be sufficiently unappealing to have the desired impact on tobacco uptake and use. We would also support an increase in the size of graphic health warnings on tobacco products to cover 65% of the external front and back surfaces, as required by the revised EU Tobacco Products Directive 2014.

Within Australia legislation on standardised packaging covers all tobacco products. We believe that regulations in the UK should do the same, although as the Consultation acknowledges, very few children or young people use specialist tobacco products, including cigars and pipes, but their use is associated with a substantial risk of harm.

The extension of the regulations on standardised packaging to cover all of the tobacco products would ensure the significant risk to health of using these products not being underestimated and changing to a different tobacco product would not then wrongly be seen as 'safer alternatives' to cigarette smoking. The extension of legislation on standardised packaging to cover all tobacco products would also provide a consistent message about the need to reduce tobacco related harm.

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Systematic reviews suggest that standardised tobacco packaging is helping to reduce smoking rates as part of a comprehensive tobacco control strategy. Standardised tobacco packaging would be able to deter young people from starting to smoke and support the adult smokers who wanted to quit, ultimately reducing the overall consumption of tobacco products. Smoking related diseases are a leading cause of healthy inequality and standardised tobacco packaging may help to reduce these inequalities. Standardised tobacco packaging is expected to reduce the appeal of tobacco products in both adults and children compared to branded packs. Smoking is the primary cause of preventable morbidity and premature death. Treating smoking related illness is costing the NHS billions of pounds each year. Reducing the uptake of smoking is a key public health goal and the introduction of standardised packaging of tobacco products will contribute to the achievement of this goal. We therefore agree, as set out in the impact assessment, that standardised packaging of tobacco products will result in significant health benefits.

The Impact Assessment does however raise concerns over the potential for standardised packaging to facilitate an increase in the consumption of illicit tobacco. We would however agree with the findings of the Chantler Review that, providing HMRCs currently effective actions on tackling illicit tobacco continue, there is no reason to believe that such an increase will occur. The proposal for standardised packaging include all the necessary markings and features required to assist with the identification of genuine products. It is noteworthy in the Chantler Review, customs data from Australia shows no significant increase in illicit tobacco following the introduction of standardised packaging.

Thank you for participating in this consultation.



The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

## **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

### **Completing the online form on the Department of Health website at:**

[http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

[1](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

- **Filling in the response form by downloading it at:**

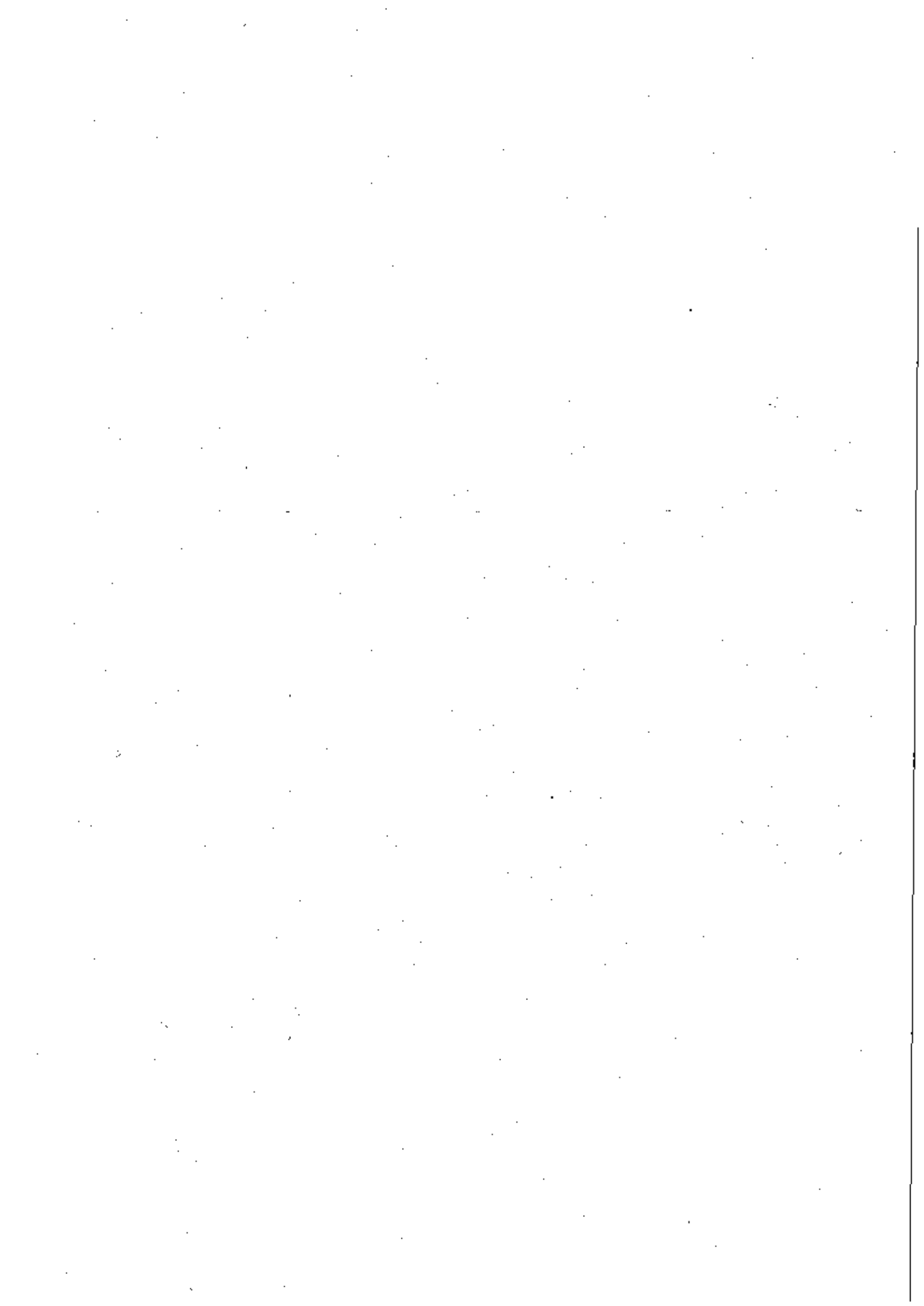
<https://www.gov.uk/government/consultations>

- **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB





Department of Health



Llywodraeth Cymru  
Welsh Government



The Scottish Government  
Riaghaltas na h-Alba



Department of Health, Social Services and Public Safety  
www.dhsspsni.gov.uk

## Consultation on the introduction of regulations for standardised packaging of tobacco products – Response Form

**a. Are you responding (required):**

- As a member of the public (go to question b)
- As a health or social care professional (go to question b)
- On behalf of a business or as a sole trader (go to question c)
- On behalf of an organisation (go to question c)

**b. Please provide your details and contact information:**

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

**Now go to question f**

**c. Please provide your organisation's details and contact information:**

Name of organisation (required):

Name of person providing submission (required):

[Redacted]

Job Title (required):

Senior Policy Advisor

Contact address of organisation (required):

12 Grosvenor Place, SW1X 7HH

Contact email address (required):

[Redacted]

Is this the official response of your organisation? (required):

Yes

No

d. If you are responding on behalf of a business, what type is it?

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Business involved in the design or manufacture of packaging
- Other (please provide details below)

If other, please tell us the type of business:

**e. If you are responding on behalf of an organisation, what type is it?**

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Industry representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)

If other, please tell us the type of organisation:

**f. Does your response relate to (required):**

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

**g. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry? (required)**

No

Yes (please describe below)

If yes, please describe:

ICC UK has three tobacco companies in membership. These firms provide less than three per cent of the organisation's annual turnover. It should also be noted that ICC only engages on public policy issues which are of interest to our membership as a whole; we do not (and cannot) represent individual businesses or sectoral interests

**h. If you do not wish your details to be identified in the summary report of consultation responses, please tick this box**

## Consultation questions

1. Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?

2. Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging that you wish to bring to our attention?

1. The consultation raises a number of trade- and investment-related issues that are of significant concern to international businesses in the UK. Our comments on the consultation are limited to addressing this particular set of issues—rather than, say, considerations related to public health or retail business—in line with the remit of ICC to promote trade-led growth.

2. From an ICC perspective, the key issues that arise from the proposal are as follows:

a. the risk of implementing domestic legislation in contravention of the UK's legal obligations under World Trade Organization rules—not least given the ongoing WTO dispute settlement case involving analogous legislation introduced by Australia in 2013.

b. the risk of (inadvertently) reinforcing the growing trend for governments to apply health-related measures in protectionist manner.

c. a concern that some countries may adopt "retaliatory" trade measures in response to plain packaging legislation—either in advance of or following the conclusion of WTO dispute settlement actions—potentially impacting on other sectors of the UK economy.

3. Each of these issues is dealt with in further detail below.

WTO compliance and possible dispute settlement action

4. We believe that there is a fundamental question as to whether standardised packaging measures—which would result in a total prohibition on the use of all design and composite trademarks for tobacco products to consumers—would represent a breach of a WTO Member State's international obligations.



5. We provided a full analysis of the legal issues raised under WTO rules by standardised packaging in our submission to the Government's 2012 consultation on "standardised packaging of tobacco products". Our concerns in this regard remain extant but are not reproduced here given the focus of this consultation exercise on "new" and "additional" evidence.

6. In this connection, however, the Government will be aware that a WTO dispute was initiated in 2013 by the Governments of the Dominican Republic, Honduras, Indonesia, Cuba and Ukraine against the Government of Australia following its enactment of standardised packaging legislation.

7. In light of this ongoing dispute, we would ask the Government to give due consideration to whether introducing analogous legislation while this dispute is ongoing risks triggering a further legal challenge (against the UK/EU) under the auspices of the WTO. Such a challenge would clearly incur significant costs to the UK Exchequer, as well as placing further strain on the WTO system itself.

8. On this basis, we believe it would be advisable—at a minimum—for the UK Government to wait for the current WTO dispute to be settled before considering the enactment of comparable legislation domestically.

#### Regulatory protectionism

9. Further, we believe that there is a risk that standardised packaging legislation—if adopted without a robust and "water-tight" evidence base—might set a precedent that could be employed by other states for protectionist purposes. In narrow terms, there is a potential danger that some states may use standardised packaging requirements to restrict international competition in key sectors (i.e. outside the tobacco sector).

10. More broadly, however, over the past 18 months we have seen an increased use of public-health and environmental grounds to justify ostensibly protectionist policies in a number of emerging economies. Given the importance of open markets and legal certainty to the UK's economic recovery—and in particular its export performance—we would encourage the Government to ensure that domestic policy making does not inadvertently reinforce these protectionist trends. This should mean ensuring that all regulation, whether justifiable on the basis of public policy or not, appropriately considers the impact on international trade and investment.

11. Such an approach should provide the Government with greater "moral" leverage to challenge the imposition of protectionist barriers in overseas markets; as well as avoiding the need for lengthy dispute settlement proceedings and the direct and indirect costs that accompany this.

12. In this context, we think it would be appropriate for the UK Government to undertake a new regulatory impact assessment of the proposed regulation—taking

into account, inter alia, trade related issues (which appear to have been absent from the initial assessment); as well as the costs to the wider economy from potential spill-over effects (see e.g. paras 7, 13 and 14). Given the precedential nature of this legislation, such an assessment should, in our view, receive a "green light" opinion from the Regulatory Policy Committee.

#### Retallatory measures

13. We are also potentially concerned about the use of retaliatory measures against UK firms in other sectors. We note that such measures have already been mooted by some jurisdictions in response to the corresponding Australian legislation. We would encourage the Government to consider this risk more fully—ideally as part of any further impact assessment exercise.

14. Even if retaliatory measures may be only deployed in the short term, this would still have a detrimental impact on targeted sectors of the UK economy—and may, in fact, increase the risk of potential trade wars. This may be another rationale for adopting a "wait and see" approach in relation to the existing WTO disputes involving Australia.

3. Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations as drafted?

4. Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

## **How to get involved in the consultation**

The consultation will run for 6 weeks, from 26/06/14 to 07/08/14. Responses are invited from any interested group, company or person.

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[1](http://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1)

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<https://www.gov.uk/government/consultations>

- **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

Department of Health  
Standardised Packaging Tobacco Consultation  
PO Box 1126  
CANTERBURY  
CT1 9NB

EL 263

Tobacco Packs Consultation  
Department of Health,  
7<sup>th</sup> Floor,  
Wellington House,  
133-155 Waterloo Road,  
London,  
SE1 8UG

Asian Trader Magazine  
AMG Publications,  
1 Silex Street,  
London,  
SE1 0DW

25<sup>th</sup> July 2014

**Tobacco plain packaging is not the answer to reducing the number of young smokers. Education not legislation is the only answer.**

Asian Trader magazine is the largest independent retail magazine in the country and is read by over 41,000 hard working independent retailers who are predominantly British Asians and the backbone of the British economy. In many parts of the country our readers are the last shops left open in dwindling high streets. Our readers are always at the heart of the local community and have great local knowledge of what is going on in their area.

Our readers are very frustrated and angry that no one in government is listening to them regarding plain packaging for tobacco products. Our readers sell legitimate duty paid tobacco products in store and are at the front line policing and ensuring that tobacco is not sold to anyone under the age of 18 with a strict code of "No ID - No Sale".

Many of our readers work closely with their local police force on crime prevention projects, but robbery and attacks still happen in store and sadly there has been situations where retailers have been killed. Security is a major problem especially late at night when alone in the shop. Every time a retailer has their back turned they are vulnerable in store trying to find a tobacco product so the less time this takes the better. Plain Packaging will mean all packs will look the same and will hugely increase this time.

We are due to have a display ban come into force in April 2015 for our readers meaning that all tobacco products will be behind screens and not be visible to customers. The new TPD has been agreed bringing into force 65% health warnings front and back with only the brand name and colour at the base to enable retailers to find the correct brand for customers. As this is all in place, or on the way, why the need for plain packaging is the question our readers are asking? This does not make any sense, and as one Scottish retailer quipped "It is like putting an ash tray on a motor bike!". Plain packaging seems pointless when these other 2 measures have been agreed and are to be implemented.

Our readers are fully aware of criminal gangs operating in their community either on the street or from a "tab house". These gangs sell smuggled, illicit or counterfeit products to anyone of any age and there is no duty or tax on any of

these products. The current scale of these operations is enormous and from seizures made by customs, trading standards and the police the figure is accepted to be over £3 billion pounds a year in lost duty to the Treasury. Our retailer readers report activity to the correct authorities however they are frustrated that nothing is done, or once one operation is busted another pops up. The authorities cannot deal with the situation currently and this has been highlighted in the national media with the Sun newspaper's sting operation exposing the Indonesian smuggling gangs poised to flood the UK with counterfeit tobacco. CH5 also had a recent documentary called "Black market Britain" about tobacco smuggling and highlighted just how big the situation is, confirming what our readers have been saying.

If standardised plain packaging is introduced for tobacco products then the obvious and clear consequence is that you have just made life a lot easier and more cost effective for counterfeit criminal gangs. This must be a point that everyone agrees on. With branded packs still available in Europe you have also created a new market for smuggled branded cheap packs. There are 10 million smokers in the UK and this opportunity is massive and has not gone unnoticed by smugglers. If plain packaging is introduced many of our high street retailers selling legitimate duty paid products will be unable to compete on price, retailers will close leaving criminal gangs to flourish selling illicit, counterfeit and smuggled tobacco to anyone of any age. Young smokers will have easy unrestricted access to cigarettes.

Why is plain packaging legislation being forced on our readers? What is the objective of plain packaging? If the answer is to reduce the number of young smokers then education is the only answer. At the age of 12 our children should be taught in school about the dangers of tobacco, alcohol, drugs, under age sex and the importance of a healthy diet. Education programmes like these have been proven to work in Germany and Sweden. This is the only way we will improve the situation of young smokers, binge drinking, teenage pregnancy, obesity and experimenting with drugs.

There is also no fact based evidence that standardising plain packaging will work in reducing the number of smokers. Australia introduced plain packaging 18 months ago and it has not worked. I read the recent report released by the Australian government showing that the level of young smokers aged 12-17 has increased from 2.5% to 3.4%. The main point to note in this report is that prior to PP the levels of young smokers had continually decreased each year and now for the 1<sup>st</sup> time there is an increase. Education not legislation is the answer.

In February 2012 I visited Australia and while there I spoke to many retailers to find out how they are coping with plain packaging on tobacco products and the simple answer is that they are not. I wrote an extensive report in Asian Trader and my key findings in Australia were ...

- Plain packaging destroyed brands.
- Smokers started smoking the cheapest cigarettes available.

- Illicit brands like Manchester and Jin Ling appeared from abroad.
- Criminal gangs cashed in on this huge opportunity.
- Some retailers closed down unable to compete with illicit products.
- Retailers still trading are losing revenue and are struggling.
- 1 In 3 purchases are wrong, retailers are having to share this expense.
- Delivery of goods now takes far longer as all the packs look the same.
- Retailers paying for delivery mistakes, often thousands of dollars.
- Retailers are spending a lot of time with their backs to customers.
- Retailers struggling to find the products that customers want.
- Retailers are having to put up with frustrated and angry customers.
- By default & error customers are smoking stronger cigarettes.
- Customers turning to illicit branded packs that are cheaper.
- Illegal bags of "chop chop" RYO tobacco hugely increased.
- Australian authorities can't cope with the organised smugglers.
- Australian authorities lost more duty & tax on lost legitimate sales.

My other clear observations from my time in Australia is how similar the stores and customers are to here in the UK and the readers of Asian Trader magazine. If plain packaging does not work in Australia then it will not work in the UK and the other major problem we have is our proximity to Europe with lots of easy routes for smugglers or criminal gangs to operate in. This has been well documented in the national media and a police survey also shows that 8 out of 10 serving policemen believe that plain packaging tobacco products will "turbo charge" the black market economy. The penalties dished out to criminals caught smuggling illicit and counterfeit products are certainly no deterrent as the rewards and profit to be made are too great.

I would urge you to think carefully about the plans for tobacco plain packaging and consider why it is being introduced. In fact, is it needed at all with the display ban screens and the 65% health warning packs due to be implemented? The consequences are far too dangerous if introduced ....

- The Treasury would lose £billions in lost duty and tax.
- The number of smokers will remain the same as they did in Australia.
- If people can't get what they want they will turn to smugglers.
- Criminal gangs will flourish selling counterfeit goods to anyone.
- My readers would struggle to compete with organised crime.
- Shops will close, my readers will go out of business.
- The High Street will lose more shops making it a bleak place.
- Communities will lose their local shop and post office.
- These stores employ thousands of people who could be unemployed.
- What next for plain packaging Booze? Fizzy drinks? Sweets? Chocolate?

The subject of Tobacco can be an emotional one for people and that is understandable, however we can't let emotions drive this legislation. Any decision must be fact based evidence and a clear understanding of the consequences of implementation. These consequences will be economic, social and criminal. The readers of Asian Trader who are retailers in the community

would like an input into arguably the biggest decision that will affect their business. Only then can an objective decision be made.

I would be more than happy to discuss my findings in Australia or arrange a panel of retailers to discuss their fears and concerns on tobacco plain packaging.

Yours Sincerely,



**AsianTrader**



EL264



# JTI's response to the UK Department of Health's consultation on the introduction of regulations for standardised packaging of tobacco products

*6 August 2014*

Japan Tobacco International (JTI) is part of the Japan Tobacco group of companies, a leading international tobacco product manufacturer.

JTI has its UK headquarters in Weybridge, Surrey, and has a long-standing and significant presence in the UK. Its cigarette brand portfolio includes Benson & Hedges, Silk Cut, Mayfair, Sovereign and Sterling, as well as a number of other tobacco products including roll-your-own tobacco (RYO), also known as hand-rolling tobacco (such as Amber Leaf), cigars (such as Hamlet) and pipe tobacco (such as Condor). JTI manufactures product for the UK market at sites in the UK (in Northern Ireland) and other EU Member States (Germany, Romania and Poland). In the UK alone, JTI employs over 1,800 people. JTI's excise contributions on its tobacco products amounted to around £3.96 billion in 2013. Gallaher Limited is the registered trading company of JTI in the UK.

## EXECUTIVE SUMMARY

Plain packaging is an issue of critical importance to JTI. As the 2014 Impact Assessment (IA) recognises, it would deprive us of the value of our brands – our most valuable assets. It would unjustifiably damage our ability to compete, worsen the illicit trade in tobacco and be unlawful. It infringes our fundamental legal rights without reducing smoking.

This third DH consultation on plain packaging in six years:

- gets no closer to identifying the evidence which would be needed to justify the introduction of such an extreme measure; and
- again fails to consider alternative options that would be more able to reduce underage smoking. For example, better enforcement of the current regulatory regime and tackling further the illicit tobacco trade, reinforcing youth access prevention measures at retail level, and targeted public information campaigns to reinforce messages about tobacco control measures and the health risks of smoking.

Instead, the DH has once again sought to lower the evidential threshold and move the goalposts to try and make the policy fit the weak evidence.

### Moving the goalposts

HM Government's Better Regulation principles demand "*robust and compelling*" evidence before regulating.<sup>1</sup> Successive governments have recognised that no such evidence exists for plain packaging:

- Following the 2008 consultation, the Health Secretary (Alan Johnson MP) commented that there was "... *no evidence base that it actually reduces the number of young children smoking.*"<sup>2</sup>
- In 2009, the new Health Secretary (Andy Burnham MP) recognised the evidence would need to be "*strong and convincing*". Not only did the evidence not meet this threshold, he reiterated that "... *no studies have shown that introducing plain packaging of tobacco would cut the number of young people smoking or enable people who want to quit to do so.*"<sup>3</sup>
- In July 2013, the Health Minister (Anna Soubry MP) said she was: "*quite surprised that even after about three or four months, [one of the "leading experts" who had been involved in the legislation in Australia] could not give [her] a picture of any emerging evidence*" and reiterated that "*all good legislation should be based on firm, good strong evidence.*"<sup>4</sup>
- At the same time, the Prime Minister repeated the statements made by Mr Burnham and said: "*The decision not to go ahead, for the time being, with plain paper packaging for cigarettes is a decision taken by me with the health secretary for the very simple reason that there isn't yet sufficient evidence for it and there is considerable legal uncertainty about it.*"<sup>5</sup>

Even the 2014 Chantler Report, on the basis of which this consultation was launched, recognises that "*there are limitations to the evidence currently available*";<sup>6</sup> the evidence base "*is relatively modest*";<sup>7</sup> the evidence was insufficient to "*quantify the size of the likely impact*"<sup>8</sup> and "*changes in consumption since the introduction of plain packaging [in Australia] are not yet clear.*"<sup>9</sup>

Almost two thirds of over 668,000 respondents to the 2012 consultation opposed plain packaging. The DH chose to focus on the fact that a small majority (53%) of the 2,424 "*detailed responses*" that answered the question were in favour. But it is now clear that these "*detailed responses*" included one-line or one-page emails, and the majority of the published responses in favour of plain packaging appear to be based on "*template documents*" of the kind the DH said it had relegated to the status of "*campaign responses*".<sup>10</sup>

### Lowering the bar

Rather than accept that perhaps plain packaging is not the answer, the DH - under intense pressure from well-coordinated lobbyists, many of whom are DH funded - has repeatedly sought to lower the bar:

- In the 2012 Consultation the DH tried to make the weak evidence base suffice by identifying a series of "mechanisms by which standardised packaging might work", including "reducing the appeal and attractiveness of tobacco..."<sup>11</sup>. At that point the DH appeared to accept these could only be relevant in the context of whether or not this would change smoking behaviour – in the current consultation it tries to portray these mechanisms as stand-alone objectives.
- Despite HM Government deciding (in July 2013) "to wait until the emerging impact of the decision in Australia can be measured before making a final decision",<sup>12</sup> the DH made a U-turn in November. It would no longer wait to see what evidence emerged from Australia. Instead the Chantler Review was commissioned. Realising the evidence was not 'robust and compelling', 'strong and convincing' or 'firm, good and strong', the DH only asked "whether or not the introduction of standardised packaging of tobacco is likely to have an effect on public health."<sup>13</sup>
- Even before Sir Cyril Chantler had reported, the DH did not want to take any chances. A Bill was rushed through Parliament giving the Secretary of State power to introduce plain packaging even if he were merely satisfied that some of the regulations "may contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18", and not all of them even needed to be "capable" of having that effect.<sup>14</sup>
- A crucial opportunity to ensure a more meaningful evidential threshold was then ignored: an amendment to the Bill was proposed to change "may" to "will".<sup>15</sup> Revealing a lack of confidence in the evidence said to support plain packaging, the Health Minister rejected this common-sense amendment. She admitted it would "probably have the effect of stopping the use of the powers altogether."<sup>16</sup>
- Now, in the face of the Health Minister admitting that she is already "minded"<sup>17</sup> to introduce plain packaging, the DH is conducting a "short"<sup>18</sup> 6-week consultation – the shortest period recommended by the Cabinet Office.<sup>19</sup> This is an attempt to do the bare minimum to give the appearance that the DH has examined the 'evidence' before making its decision.

#### No evidence of any positive impact

The Chantler Report suggests that it is "too early to draw definitive conclusions" from Australia.<sup>20</sup> Some lobbyists (including an executive agency of the DH) have even tried to suggest that it will take "many years" to discern the impact of plain packaging.<sup>21</sup> Nevertheless, the DH now seeks to justify regulating based on the results it expects the measure to "generate after two years."<sup>22</sup>

After 18 months, the evidence actually emerging from Australia reinforces the fact that plain packaging does not work:

- studies by the Universities of Zurich and Saarland have found that plain packaging has had no effect on smoking prevalence, either among minors or adults;<sup>23</sup>
- a study by London Economics found that: "the data does not demonstrate that there has been a change in smoking prevalence following the introduction of plain packaging and larger health warnings despite an increase in the noticeability of the new health warnings";<sup>24</sup>
- contrary to misleading claims by the tobacco control lobby, recent Australian government data further reinforces the fact that plain packaging has not had a positive impact. The overall decline in smoking prevalence between 2010 and 2013 is consistent with the continuation of the pre-existing trend, whilst the rate of underage smoking increased in the same period, despite the introduction of plain packaging in December 2012;<sup>25</sup> and
- conversely, illicit trade appears to have benefitted: KPMG reported that the illicit market grew by 2.1% in the year following the introduction of plain packaging,<sup>26</sup> Australian Customs and Border Protection Service (ACBPS) figures show that the number of cigarettes seized increased by over 41% between

2011/2012 and 2012/2013,<sup>27</sup> and new illicit brands, which look like they are legitimate 'plain packs', have now been found in Australia.<sup>28</sup>

### Layering of regulations

In addition, and contrary to Better Regulation principles, this consultation is taking place when:

- the tobacco display ban is yet to be implemented in around 80% of tobacco retailers;
- the revised EU Tobacco Products Directive (TPD2), which includes a ban on smaller pack sizes (which accounted for 45% of cigarette and 93% of RYO pack sales in the UK in 2013 and are often favoured by consumers who are trying to manage their consumption), has yet to come into effect; and
- an unrelated tobacco control measure (smoking in private vehicles carrying children) is being consulted on whilst another is expected to be introduced shortly (a ban on proxy purchasing).

This regulatory layering (on top of the existing, multiple layers of UK tobacco legislation) makes it almost impossible to analyse effectively the impact of individual measures. Worse, it leaves the DH open to criticism that it is deliberately frustrating the requirement that policy impacts are assessed so that their potential effectiveness can properly be understood.

### A failure to assess properly the true impacts

This Consultation's IA cannot properly be considered sufficient. Indeed, by failing adequately to address all the points set out in the Regulatory Policy Committee's (RPC's) 'amber' opinion, the IA is not fit for purpose.<sup>29</sup> Notably:

- TPD2 will change the baseline dramatically. As pointed out by the RPC, plain packaging would, contrary to Government policy, 'gold plate' TPD2.<sup>30</sup> This is even more inappropriate when the EU law being 'gold plated' is itself subject to legal challenge by an EU Member State and, separately, manufacturers.
- The IA accepts that the policy risks increasing the size of the illegal tobacco products market. Applying its own illustration that plain packaging would boost non-duty paid cigarette sales, depriving the Exchequer of £2 billion,<sup>31</sup> this would mean over 8 billion more non-duty paid cigarettes being smoked in the UK over a decade. This concern is then unjustifiably dismissed altogether.
- The IA accepts that this policy would damage the interests of foreign investors in the UK, but then excludes their losses from its calculations,<sup>32</sup> undermining the Prime Minister's assurance that "*Britain is firmly and clearly open for business.*"<sup>33</sup>
- The IA tries to justify not quantifying branding losses as premium brands "*inspire embarrassment and hostility in others not being able to afford such self-branding.*"<sup>34</sup> Embarrassingly for the DH, this ignores the critical importance of branding to consumers and to economic prosperity (or in the case of the UK, its present economic recovery).<sup>35</sup>

### Plain packaging would be unlawful

As recognised by the IA, "*tobacco manufacturers ... would be deprived of the value of their brands.*" These brands are our most valuable assets and are worth billions of pounds. As property rights, these assets are protected by UK, EU and international law. Such a deprivation of these property rights will be unlawful<sup>36</sup> unless JTI is compensated at the full value of its property.

Australia's plain packaging law is being challenged in the WTO. TPD2 is being challenged in the courts (with the DH not disputing the relevance of the outcome to the UK's ability to introduce plain packaging).

With these matters remaining unresolved and plain packaging having failed to have any positive impact in Australia, the only rational decision HM Government could now make is not to introduce it in the UK.

## 1. INTRODUCTION

1.1 JTI has been, and remains, categorically opposed to the plain packaging<sup>37</sup> of tobacco products. Plain packaging is an issue of critical importance to JTI. It deprives us of our most valuable assets and unjustifiably infringes our fundamental legal rights. JTI invests and innovates in its packaging design and quality in order to compete with other products available to existing adult smokers.

1.2 Tobacco products carry risks to health. Appropriate and proportionate regulation is necessary and right. In the UK, those under 18 should not smoke and should not be able to obtain tobacco products. Everyone should be appropriately informed about the health risks of smoking. These core principles are central to our Code of Conduct, Global Marketing Standard, operational policies and the way JTI does business.

1.3 Further UK packaging regulation, however, is neither appropriate nor necessary. JTI has set out alternative options which it considers should have formed part of the Consultation and the 2014 IA, and which JTI supports. Indeed, JTI supports legislative and regulatory measures on tobacco control which meet internationally and nationally accepted principles of Better Regulation, as explained in Section 2 of JTI's 2012 consultation response on plain packaging.<sup>38</sup>

1.4 By contrast, JTI will question, and where necessary challenge (including in the courts), regulation which, like the UK's plain packaging proposal, is flawed, unreasonable, disproportionate and/or without evidential foundation.<sup>39</sup>

1.5 There is still work which can be done to prevent youth smoking. In JTI's 2012 consultation response, JTI suggested five alternative means of achieving the goals it shares with the DH of reducing minors' uptake of smoking, preventing minors from obtaining tobacco products and ensuring that adult smokers are reminded of the health risks of smoking.

1.6 Tobacco is a legal product, and manufacturers compete among themselves for their share of the legal tobacco market. Adults who choose to smoke are entitled to be treated fairly, and have the right to choose the product they prefer. The ability of manufacturers to distinguish their products through packaging provides a key means by which consumers are able to exercise freely economic rights of purchase.

1.7 Since 2008, when the UK first consulted on plain packaging, successive governments have rightly repeatedly rejected the need for it given the lack of evidence that it actually changes smoking behaviour.<sup>40</sup>

1.8 Reflecting this fact, HM Government decided, in July 2013, that it would wait for further evidence from Australia before proceeding further with any policy decision in this respect, and that it would not proceed in the absence of "good, sound evidence" that plain packaging actually works.<sup>41</sup>

1.9 On 12 July 2013, the Prime Minister himself made clear that the evidence for plain packaging was not sufficient to justify the UK moving forwards with it, and that it suffered from considerable legal uncertainty.<sup>42</sup> Neither of these facts has changed. The only real change since then is the willingness of the DH (and Sir Cyril Chantler) to give credence to the views of supporters of plain packaging who rely upon 'evidence' (written largely by a small group of tobacco control advocates whose independence is at best questionable), which is unreliable and unconvincing.

1.10 Consistent with the DH's request that: "...respondents to this consultation ...provide new or additional information relevant to standardised packaging that has arisen since the 2012 consultation",<sup>43</sup> it is not the purpose of this response to repeat the views set out in JTI's 2012 consultation response as to why plain packaging cannot be introduced lawfully in the UK (or elsewhere within the EU), or the many evidence-based reasons why plain packaging has not achieved in Australia (and would not achieve in the UK) public health benefits.<sup>44</sup>

1.11 Despite repeated and sustained attempts by tobacco control advocates to create this evidence, it is still the case that there is no "good, sound evidence" that plain packaging would change smoking behaviour in the UK if introduced here. It is for this reason it has been necessary for the DH repeatedly to move the goalposts and lower the evidential threshold, as it seeks to defend proceeding with introducing plain packaging regulations.

1.12 Enthusiastic support for a policy is no substitute for reliable evidence. Indeed, HM Government has previously said that it will: "resist the temptation for hasty regulation, even under intense media pressure",<sup>45</sup> and that it will introduce regulation only as a "last resort"<sup>46</sup> and in accordance with its Better Regulation principles.<sup>47</sup> In this respect, JTI views with particular concern, statements made by the DH prior to the launch of the Consultation that in respect of plain packaging: "The timetable that the Government are contemplating once a final decision is made should allow us to introduce the measure during this Parliament [i.e. by May 2015]."<sup>48</sup>

1.13 Aside from the lack of an adequate evidential base, JTI also has other serious concerns regarding the regulatory process that the DH has embarked upon. This process has inevitably resulted in a set of Draft Regulations (published as part of this Consultation) which are flawed, unreasonable and disproportionate, and which JTI fundamentally opposes.

1.14 The 2014 IA fails to remedy this position; in fact, it exacerbates it. The reasons for this are considered in more detail in this response, and reaffirm JTI's view that the introduction of plain packaging would be unlawful.<sup>49</sup>

## 2. THE STRUCTURE OF JTI'S RESPONSE AND ITS OVERARCHING CONCERNS

2.1 Appendix A to the Consultation asks the following four questions:

- (a) Question 1 – Observations on the Chantler Review (*Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?*). Our response to this question is contained in section 3 below (paragraphs 3.1 to 3.8), and expanded upon in Annex 1.
- (b) Question 2 – Additional information on the wider aspects of the proposal (*Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?*). Our response to this question is contained in section 4 below (paragraphs 4.1 to 4.25).
- (c) Question 3 – Comments on the Draft Regulations (*Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?*). Our response to this question is contained in section 5 below (paragraphs 5.1 to 5.25).
- (d) Question 4 – Improving the 2014 IA (*Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the*

*consultation-stage impact assessment?*). Our response to this question (and related Better Regulation concerns) is contained in section 6 below (paragraphs 6.1 to 6.26), and expanded upon in Annex 2.

2.2 JTI follows the structure of these four questions in both the body of this response and the more detailed information set out in the accompanying Annexes. In order to answer the four questions set by the Consultation, it has also been necessary for JTI to consider and respond to both the Chantler Report and the 2014 IA. The comprehensive nature of this response, an intentionally detailed and evidence-based document, reflects this fact.

2.3 Before addressing the specific questions set by the Consultation, JTI sets out first, six overarching concerns of relevance to each of the responses provided. We do so because this Consultation proceeds on the wrong basis. It proceeds in a way which amounts to little more than a box-ticking exercise, with the decision to introduce plain packaging having effectively already been made by the DH, without serious regard to the broader implications of this proposed policy. JTI has reached this view as:

2.4 **First**, as was the case previously, many of the 'objectives' stated for the proposed policy are not actually legitimate public policy objectives that can justify further tobacco regulation. They are, as JTI has explained in previous plain packaging consultations: insufficiently articulated and evidenced; insufficiently capable of changing smoker behaviour; and unnecessarily duplicative of existing regulation.

2.5 The behavioural 'objectives' in the first three bullets listed in paragraph 3.5 of the Consultation repeat exactly the same three bullets of paragraph 3.1 of the 2012 Consultation. After that, the list contains a further six 'objectives', including: "*reducing the appeal or attractiveness of tobacco products*", "*having an effect on attitudes, beliefs, intentions and behaviours relating to the reduction in use of tobacco products*" and "*reshaping social norms around tobacco use to promote health and wellbeing*".<sup>50</sup> In JTI's view, these further 'objectives' have been relied upon because, even after the Chantler Review, the DH has moved the goalposts, knowing that it lacks the evidence it would need to show that plain packaging will actually reduce the amount of cigarettes smoked.

2.6 In falling back in this way on policy aspirations (which cannot be self-standing objectives) and seeking to fill the DH's evidential gap, the DH repeats a serious failing which JTI pointed out in both its 2008<sup>51</sup> and 2012 consultation responses.<sup>52</sup> JTI relies upon the points it has made in those responses, including that: reducing the appeal or attractiveness of a product is not a proper policy objective; plain packaging would not enhance the effectiveness of health warnings; and tobacco packaging does not mislead consumers.

2.7 Ultimately, the DH's strategy fails as the DH relies upon all nine of these purported 'objectives' as a means "*to improve public health*", a legitimate goal that can only be achieved by changing behaviour towards tobacco use (actually stopping people from starting smoking or getting them to smoke less) and not "*reshaping social norms around tobacco use*".<sup>53</sup>

2.8 **Second**, the failure by the DH to conduct independent expert reviews into the non-public health impacts of plain packaging.<sup>54</sup> A series of independent reviews by leading experts should have been given the same opportunity (and a similar amount of time) as the Chantler Review to establish if the threshold set by the 2012 IA has been met, namely: "*For tobacco control policies to be justified, the impact on smoking behaviour and the consequent improvement in health need to be sufficiently large to justify the related costs*".<sup>55</sup>

2.9 Significant areas not considered or addressed by the Chantler Report include: "...legal issues, such as competition, trade-marking and freedom of choice" and "the overall economic impact of standardised packaging."<sup>56</sup> Sir Cyril Chantler also specifically recognised that tobacco manufacturers have: "...advanced a large range of counter arguments, many of which do not relate to the public health impact of standardised packaging (e.g. legal issues). I have not considered such arguments..."<sup>57</sup> and that any decision on whether to take forward the policy will need to be taken: "...on the basis of wider considerations than that on which I have been asked to report."<sup>58</sup>

2.10 We have previously explained to the DH the nature of the further stakeholder analysis of the impacts of plain packaging which was required prior to the publication of the 2014 IA:

*"Extensive stakeholder consultation following separate and additional independent reviews of the impacts of plain packaging not being considered by Sir Cyril Chantler has to have taken place before the DH can reach any view as to the status of the broader evidence base relating to plain packaging. The basic precepts of Better Regulation and administrative law make this unavoidable, as does the significant public interest in this issue."*<sup>59</sup>

2.11 JTI's position has not changed. To the extent that these non-public health issues were, partly, considered in the 2012 Consultation, a considered and thorough assessment of new evidence and information clearly is required. Without it, the policy-maker cannot reach an informed and rational view as to the status of the broader evidence base relating to plain packaging. It therefore remains incumbent upon the DH properly and pro-actively to look at and consider these different issues. This is all the more important in circumstances where HM Government had previously and very clearly decided there was insufficient evidence to justify proceeding with such a policy.

2.12 This very general and unduly short Consultation, and the 2014 IA which accompanies it, are entirely inadequate, contrary to principles of Better Regulation, and no substitute for what is properly required. The DH needs to admit that it has not assessed the real cost plain packaging poses to business, the Exchequer or the taxpayer.

2.13 Third, as we have previously made clear,<sup>60</sup> it is a critical Better Regulation requirement for the DH also to determine the views of other government departments and agencies best placed to comment on the likely impact of the proposed regulatory measure, and any unintended consequences which the measure may have. This helps ensure regulation is both consistent and targeted only at cases where action is needed. JTI specifically identified a number of bodies in respect of which it was not made clear from the 2012 Consultation and 2012 IA, whether they had been specifically consulted. It was incumbent upon the DH to determine these bodies' views *before* this Consultation, so that this Consultation and the 2014 IA could reflect these views.

2.14 Despite us expressing this concern in our 2012 consultation response, once again, neither the current Consultation nor the 2014 IA makes clear whether these bodies have in fact been consulted.<sup>61</sup> We therefore set out below those government departments and agencies which must, as a minimum, specifically be (or continue to be) consulted by the DH before any policy decision is made:<sup>62</sup>

- (a) HMRC and the UK Border Agency, given that expert opinion suggests that plain packaging will lead to an increase in the illicit trade in tobacco products, but the 2014 IA is unable to quantify this.<sup>63</sup>



- (b) **HM Treasury**, on the cost to the UK taxpayer and public sector in terms of revenue lost as a result of an increase in both down-trading from premium brands and illicit trade. Discussions are also needed concerning: (i) the potential job losses within the sector;<sup>64</sup> (ii) reductions in economic activity in the UK, which are expected to flow from a plain packaging proposal; and (iii) an increase in resources required to combat the illicit trade in tobacco products (something acknowledged by the 2014 IA).<sup>65</sup>
- (c) **BIS**, on the negative operational and competition impacts not only on tobacco manufacturers, but also on a host of other stakeholders including wholesalers, retailers and suppliers to manufacturers (creative design houses, etc.), many of which are SMEs. As BIS is committed to promoting: "...competition and stability without impinging on businesses' ability to operate...",<sup>66</sup> its involvement in the evaluation of the direct and indirect impacts of the proposal is essential. BIS itself has specifically already recognised the importance of this dialogue.<sup>67</sup> The WTO dispute that the Australian plain packaging measure has triggered will also remain of concern to BIS. Finally, the lack of adherence to Better Regulation procedures pointed out in this document and previous submissions, and the additional imposition of regulatory burdens, will be of particular concern to BIS and its **Better Regulation Executive**. As part of its response to the 2012 Consultation, the Institute of Directors in fact suggested that: "...the Government should give consideration to the most appropriate ministerial responsibility for the industry's regulation and suggest that it would be more appropriate for these responsibilities to be transferred from [the DH] to [BIS]. This would have the additional benefit of ensuring that the responsible department was able to consult and engage with the industry it proposes to regulate, rather than the present situation where the [DH] refuses to engage with the stakeholder community."<sup>68</sup>
- (d) the **UK Intellectual Property Office** (an executive agency of BIS), as plain packaging will deprive JTI of its most valuable assets – its brands and trade marks.
- (e) the **Department for International Development**.<sup>69</sup>
- (f) given that plain packaging is expected to frustrate competition,<sup>70</sup> the **Competition and Markets Authority** should be consulted.
- (g) **Local Government Regulation**, regarding the difficulties in enforcement and how this might be achieved in light of the current tobacco regulation enforcement strategies.<sup>71</sup> Adjusting local government priorities will also necessitate discussion with the **Department for Communities and Local Government**.

2.15 It is only through pro-active, prior consultation with the types of departments and agencies identified above that the DH may be able to produce the type of IA that is fit for purpose and which can better attempt to identify the true costs and unintended consequences of introducing a far-reaching and controversial measure such as plain packaging.

2.16 HM Treasury's Green Book places great emphasis on the importance of consultation with: "...external experts and... those affected..." at the early stages of policy development. In particular, it encourages: "...joining up with other consultations, for instance in other government departments."<sup>72</sup> The requirement for the DH to consult and assemble relevant evidence is all the more critical given the RPC's identification of a: "disappointing reduction in the overall quality of the evidence base underpinning changes in law."<sup>73</sup>

2.17 Despite this, the DH operates independently in the context of tobacco regulation.<sup>74</sup> This has led to a lack of cross-departmental involvement in the formulation of policy; in spite of the

impact tobacco regulation can have on a host of other government and non-government stakeholders. That the DH does so is illustrated by numerous pieces of correspondence from other government departments that JTI has contacted directly regarding our concerns about any plain packaging proposal, which simply confirm our letter has been referred to the DH.<sup>75</sup>

2.18 **Fourth**, the question asked of the Chantler Review was to: "...give advice to the Secretary of State for Health, taking into account existing and any fresh evidence, as to whether or not the introduction of standardised packaging is likely to have an effect on public health (and what any effect might be), in particular in relation to the health of children..." (emphasis added).<sup>76</sup> We remain of the view that this is an unfairly and inappropriately low evidential threshold, with the consequence that the Chantler Report cannot be sufficient to justify action by the DH given the obligations placed on it before making policy. Reasons why include:

- (a) the fact the 2012 IA acknowledged that for tobacco control policies to be justified: "...the impact on smoking behaviour and the consequent improvement in health need to be sufficiently large to justify the related costs...";<sup>77</sup> and
- (b) as JTI noted at paragraph 4.7(b) in its Chantler Submission,<sup>78</sup> the only appropriate interpretation of the wording "...likely to have an effect on public health..." in this (inappropriately low) threshold test is for the Chantler Review to assess whether plain packaging, if introduced in the UK, would be likely to have an actual, quantifiable positive public health effect. Notwithstanding this, the Chantler Report expressly recognises: (i) that: "...research cannot prove conclusively that a single intervention such as standardised packaging of tobacco products will reduce smoking prevalence";<sup>79</sup> and (ii) there is no evidence available: "...to quantify the size of the likely impact of standardised packaging."<sup>80</sup>

2.19 **Fifth**, the inadequacy of the 2014 IA. Its deficiencies are so serious that JTI does not consider that it is, in fact, a meaningful "consultation-stage impact assessment" or that it can now be salvaged by 'improvements' sought pursuant to Question 4 of the Consultation. For example, all of the options considered (including the *status quo* assessment) by the 2014 IA assume the legality of TPD2. This is despite the DH having known, before launching this Consultation, that TPD2 was expected to be the subject of legal challenges in the courts. If, despite JTI's submissions to the contrary, the DH chooses to depart from its previously stated position in respect of plain packaging, it could not do so without first ensuring the impact assessment procedure is repeated in a manner that: (a) takes into account the factors addressed in this response; and (b) is genuinely open-minded and not merely seeking to arrive at pre-determined conclusions.

2.20 **Sixth**, the Consultation asks all respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. Having done so, it says the DH: "...will still carefully consider all consultation responses from the tobacco industry and from those with links to the tobacco industry".

2.21 JTI makes three points in response:

- (a) Article 5.3 of the FCTC is not intended to prevent the views of manufacturers of lawful products or those linked to them from being heard and properly taken into account. On the contrary, Article 5.3 seeks to protect the legislative process from undue influence and provides an opportunity to improve transparency, inclusivity and integrity of the regulatory process by using principles of good governance (principles which JTI supports);

- (b) as Sir Cyril Chantler's method statement notes, this is a "*polarised debate*" and it is right that there are competing views as to what the evidence base shows. The only appropriate way to address this is for the DH to give the same regard to submissions made and evidence provided, irrespective of whether they come from one side of the debate or the other; and
- (c) transparency as to vested interests should be a principle applied equally. The DH has failed to require, but should have required, respondents also to identify if they have "*direct or indirect links to, or receive funding from*":
  - (i) the DH or one of the tobacco control groups who are effectively professional lobbyists employed to create support for plain packaging (by way of illustration, the Systematic Review has been authored by a team of academics "*core funded*" by one of the tobacco control groups (Cancer Research UK), which itself receives funding from the DH);<sup>81</sup> or
  - (ii) the pharmaceutical industry, in circumstances where prominent tobacco control advocates are supported by<sup>82</sup> and have lobbied jointly with that industry in respect of tobacco control regulation;<sup>83</sup> and: "*Health experts who recommended that the Government tighten the regulation of electronic cigarettes failed to declare their financial interests in Big Pharma's rival products.*"<sup>84</sup>

2.22 For example, Public Health England (PHE), an executive agency of the DH, called for plain packaging in its 13 January 2014 submission to the Chantler Review.<sup>85</sup> This submission is likely to have been reviewed by one or both of the DH employees seconded to Sir Cyril Chantler's team before the Chantler Report was presented to the DH (the department determining whether to proceed with such a measure). In this situation, the DH is effectively lobbying itself, and in circumstances where the House of Commons Health Committee has previously expressed concerns about insufficient separation between PHE and the DH.<sup>86</sup> This is made worse by the fact that PHE's response to this Consultation amounts to assertion, not evidence, and repeats claims about the position in Australia which, in our view, are misleading.<sup>87</sup> It also wrongly implies that consultation responses from those who would be directly impacted by a policy should, for that reason, be considered with "*caution*".<sup>88</sup>

2.23 Consistent with Better Regulation principles of openness and transparency, JTI will be uploading this response on our website. The DH should carefully review this document, and all other substantive consultation responses. Such responses should then also be made publicly available at the earliest opportunity, and with far greater urgency than the two years it has taken the DH to publish even just a fraction of the 'detailed' responses it received in 2012.

### 3. QUESTION 1 – OBSERVATIONS ON THE CHANTLER REVIEW

3.1 JTI spent considerable time seeking to assist the Chantler Review Team.<sup>89</sup> In addition, the following expert research / analysis, which was prepared at the request of external legal counsel to JTI, was submitted to Sir Cyril Chantler during the course of his taking evidence:

- (a) a report by Professor Timothy Devinney of the Leeds University Business School (dated 3 January 2014) which specifically addressed the evidence base which the Chantler Review identified for consideration, and which concluded that the: "*...current evidence base is insufficient to justify the conclusion that plain packaging is likely to have any impact on actual smoking behaviour ...*"; and

- (b) Professor Laurence Steinberg's letter (dated 7 January 2014) which explained that: "...measures to prevent or reduce youth smoking are only likely to be effective if they are informed by scientific research on risk-taking and decision-making in this age group. I know of no scientific evidence that suggests, nor would my understanding of the current research on adolescent decision-making suggest, that cigarette packaging is relevant to adolescents' decisions to experiment with or continue smoking."<sup>90</sup>

3.2 It is now apparent, however, that much of the evidence that JTI (and other stakeholders) presented, as well as the concerns that were raised about the process that the Chantler Review was embarking upon, have not been taken into account and/or have been inadequately addressed by the Chantler Report.

3.3 As a consequence, the Chantler Report provides neither an appropriate nor an adequate basis to justify proceeding with plain packaging legislation by reference to perceived public health benefits (even if it was lawful to do so, which JTI does not accept).

#### **The conclusions of the Chantler Report**

3.4 Annex 1 to this response contains the detail of JTI's observations on the Chantler Review. In summary, however:

- (a) the Chantler Report accepts that there are "*limitations*" to the evidence base (an evidence base which Sir Cyril Chantler describes as "*modest*"). This is a serious understatement. There remains no credible evidence that plain packaging would lead to positive behavioural change. Such change has not occurred in Australia, and the Chantler Report's findings spring from the fact that, despite the lack of actual evidence on this fundamental point, Sir Cyril Chantler's opinion is that there is a "*...plausible link to behaviour...*" (emphasis added);
- (b) much of the Chantler Report is spent considering the "*likely impact*" of plain packaging by reference to surveys of views as to perceptions of future behaviour. "*Likely impact*", however, is not cause and effect. It is speculation at best and establishing such a conclusion, which cannot be evidenced, requires a huge leap of faith;
- (c) in the absence of any evidence to support the notion that plain packaging would have any impact at all on actual smoking behaviour, the Chantler Report assumes that "*a reduction in appeal*" of the packaging will cause changes in behaviour. However, this is a false assumption, unsupported by fact or evidence. Only by making this leap of faith is Sir Cyril Chantler able to conclude that plain packaging is likely to affect actual smoking behaviour;
- (d) the "*independent academic review*" of the evidence base, acknowledged by Sir Cyril Chantler as "*central to the debate*", is not independent, particularly as it merely assumes that the Systematic Review, and the studies underlying it, are themselves reliable and independent, which expert analysis has found is not the case; and
- (e) the Chantler Report was "*...not concerned with legal issues...*" or "*...issues such as the overall economic impact of standardised packaging.*" As such, it still needs to be balanced by thorough analysis of wider (non-public health) issues. It also makes a rigorous regulatory impact assessment all the more necessary.

3.5 Of particular importance is the fact that the Chantler Report's conclusion that branded packaging in the UK encourages minors to start smoking is incorrect, as:

- (a) instead of methodically reviewing all, or indeed any, of the evidence on whether branded packaging in the UK has impacted on smoking initiation, it seems to accept particular propositions on the basis of their "intuitive plausibility" (to borrow the Chantler Report's phrase), whilst skimming over conflicting evidence;
- (b) it ignores the principles of marketing theory which demonstrate why tobacco marketing cannot affect the decisions of non-smokers (including minors) as to whether or not to smoke in a mature market such as the UK, where the product and its characteristics are very well-known;
- (c) the decision to begin smoking is influenced by a well-documented set of factors, such as the smoking behaviour of family and friends (which the Chantler Report acknowledges and the DH's own evidence confirms), not branded packaging;
- (d) in giving weight to the argument that "spillover marketing" may influence non-smokers to begin smoking, it assumes that non-target non-smokers are likely to find the marketing appealing, despite elsewhere conceding that the marketing is carefully targeted at a different set of consumers. This conflicts with evidence about the way consumers process irrelevant marketing;
- (e) it also assumes that any appeal of "spillover marketing" will translate into a decision to smoke, despite these non-smokers having previously decided not to smoke even though they were aware of the product, its attributes and characteristics. This assumption ignores the nature of the decision to start using a product for the first time;
- (f) tobacco marketing has not been shown to influence smoking prevalence rates, and certainly not in the way suggested by the Chantler Report; and
- (g) none of the evidence presented deals properly with whether branded packaging in the UK actually causes smoking initiation.

3.6 The net result appears to be that the DH is now "minded" to act not on hard evidence, but on speculative conclusions that are not borne out from the real-world experience in Australia, which remains the only country in the world to have introduced the policy.

3.7 To compound this, the Chantler Report accepts it will not be possible to assess the impact of the measure, thus failing HM Government's own Better Regulation principles that were designed to show legislation was worthwhile because it demonstrably worked. In this respect, JTI supports the World Health Organization International Agency for Research on Cancer's statement:

*"As tobacco policies are formulated and implemented, it is important that they undergo rigorous evaluation... [W]e need to not only consider the size and nature of effects, we also need to consider the possibility that there is no meaningful effect... We recognize that science cannot prove the null hypothesis, but it can and should make statements about interventions where there is a consistent failure to find evidence of meaningful effect."*<sup>91</sup>

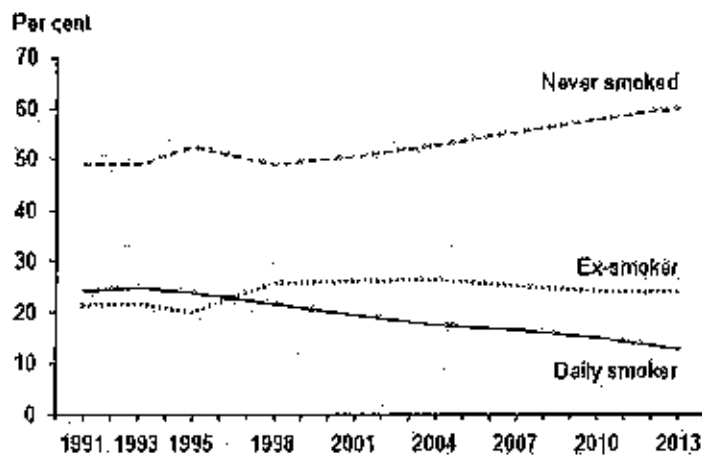
3.8 As a result, no evidence, let alone "...robust and compelling evidence..."<sup>92</sup> is presented by the Chantler Report that plain packaging will actually cause any positive behavioural impact at all in the UK.<sup>93</sup>

#### 4. QUESTION 2 - ADDITIONAL INFORMATION ON THE WIDER ASPECTS OF THE PROPOSAL

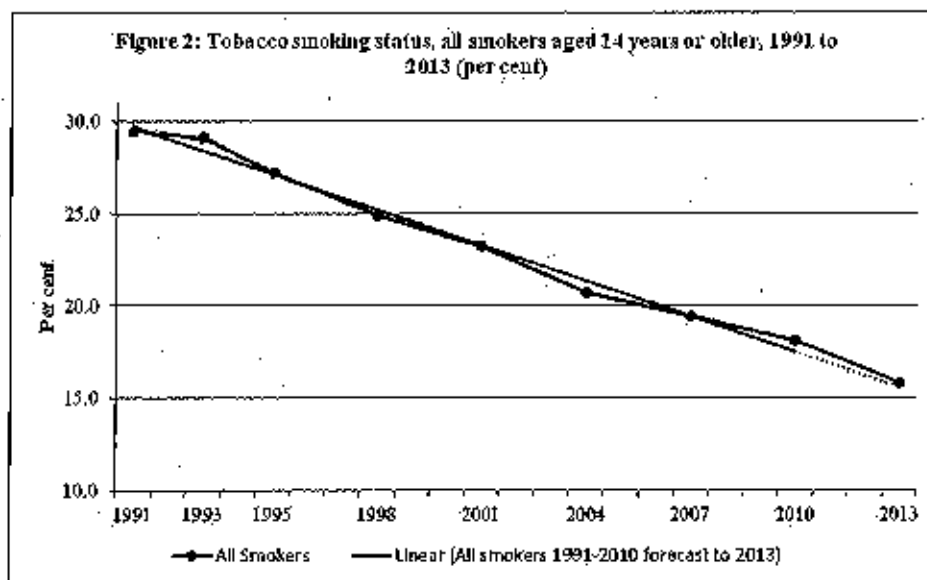
##### Australia -- no public health impacts<sup>94</sup>

4.1 Plain packaging has now been in place in Australia for over a year and a half. The evidence that has emerged does not show that plain packaging has accelerated the rate of decline in smoking, or has had any positive behavioural impact at all.<sup>95</sup> And whilst it is impossible to tell whether plain packaging was causative, data recently published by the Australian Government confirms this, as is illustrated in Figure 1 below.<sup>96</sup>

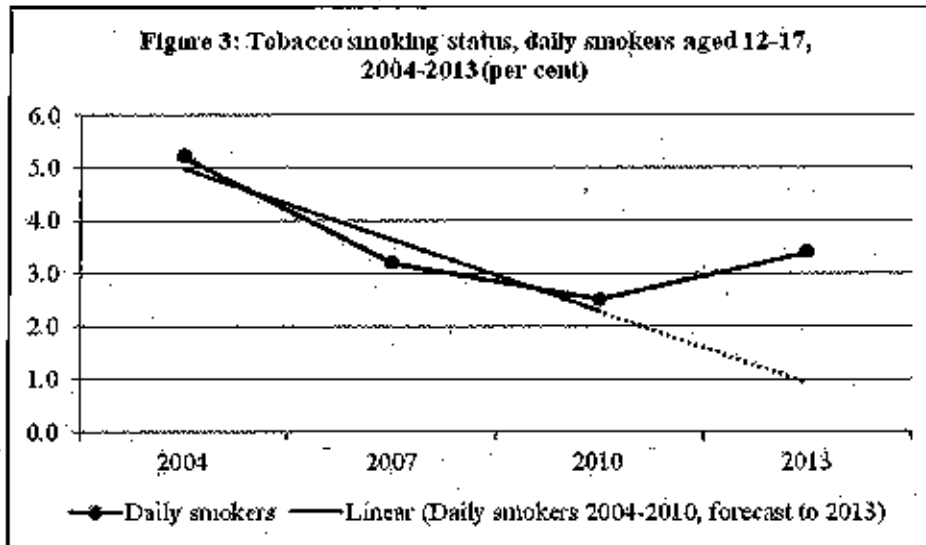
Figure 1: Tobacco smoking status, people aged 14 years or older, 1991-2013 (per cent)



4.2 The pattern of the data observed in Figure 1 above is consistent with a declining linear trend over the period 1991 to 2013. The decline in smoking prevalence between 2010 and 2013 is consistent with the pre-existing linear trend, as illustrated in Figure 2 below,<sup>97</sup> which shows prevalence for all smokers (daily and occasional) from 1991 to 2013, with the linear trend from 1991 to 2010 showing what prevalence would have been expected to be in 2013 had the pre-existing linear trend continued.



4.3 The same data set shows that daily smoking prevalence among 12 to 17 year olds increased in the period 2010 to 2013, reversing previous declines, as illustrated in Figure 3 below.<sup>98</sup> The point in time at which plain packaging was introduced in Australia (December 2012) falls in this period; although, as noted above, the data cannot determine whether plain packaging was causative.



4.4 Furthermore, the Australian Government will not initiate a review of the impact of plain packaging until December 2014.<sup>99</sup> Depending upon its rigorousness and its independence from those with either a vested interest in the outcome or predetermined views, the Australian Government's review can be used by the DH in the future to assess whether there is justification for the UK to depart from the position reached in July 2013, namely that there was not sufficient evidence to move forwards with plain packaging here and that such a measure suffers from considerable legal uncertainty. This would need to be completed alongside the other detailed reviews in the various non-public health disciplines that are still missing.<sup>100</sup>

4.5 The DH should wait for the outcome of such reviews (and the determination of whether the Australian law is WTO compliant) before departing from its previously stated position.

4.6 Conversely, if the UK decided to proceed now with plain packaging, it would need to rely on the available evidence that currently exists (which does not show there has been any effect on smoking prevalence), meaning that the only decision it could legitimately make would be not to proceed with plain packaging.

#### Additional information on illicit trade

4.7 Illicit tobacco has historically been, and continues to be, an extremely serious problem in the UK, both due to its scale<sup>101</sup> and its impacts. The DH has previously stated that: "...a continuing supply of very cheap cigarettes...ultimately presents a significant threat to public health in many countries, including the UK."<sup>102</sup> As confirmed by HMRC: "Unregulated distribution networks associated with smuggling make tobacco more accessible to children and young people and perpetuate health inequalities across socio-economic groups."<sup>103</sup>

4.8 Plain packaging will worsen the trade in illicit tobacco products across the UK, as well as youth access and the social inequalities it causes.<sup>104</sup> Experts have also confirmed that it is: "...highly likely to aggravate the existing negative impacts of the already serious and socially damaging trade in illicit tobacco."<sup>105</sup> By facilitating the trade in illicit tobacco products, the

claimed public health benefits of plain packaging will be undermined. Plus, the loss of tax revenues has: "...a multiplier effect since governments have less funding for healthcare, education, and other public services."<sup>106</sup>

4.9 Despite this, the 2014 IA, like the Chantler Report before it, does not analyse fully the impact of plain packaging on the illicit trade in tobacco products. As recognised by HMRC in their discussions with Sir Cyril Chantler, this impact may be difficult to quantify,<sup>107</sup> but JTI considers that this cannot justify proceeding as if no such risk existed.

4.10 As explained further in Annexes 1 and 2, rather than engaging with the substance of the existing evidence, the 2014 IA (as the Chantler Report did) oversimplifies and generalises, accepting or dismissing views in whole without adequate analysis.

*The significance of an illustration: the 2014 IA's estimated £2 billion Exchequer loss from plain packaging increasing the non-UK duty paid tobacco market*

4.11 The 2014 IA gives £2 billion as an "illustrative estimate" of Exchequer losses for the increase in non-UK duty paid cigarettes caused by introducing plain packaging in the UK.<sup>108</sup> Even if for "illustrative" purposes only, the £2 billion figure must represent a significant underestimate of this estimated impact, as it only:

- (a) includes revenue lost from cigarettes (i.e. RYO is excluded, despite it representing 11.3% of the tobacco excise duty receipts the Exchequer received in 2013);<sup>109</sup> and
- (b) takes into account the direct loss of revenue to the Exchequer (i.e. none of the "multiplier effects" of losses to the Exchequer or the negative effect on those involved in the legitimate supply chain is considered).

4.12 The £2 billion figure is based on the assumption that plain packaging would lead to a 2% "transfer" from the UK duty paid market to the non-UK duty paid market each year.<sup>110</sup> This is said to be due to a "small" increase of up to 1% in the illicit trade of cigarettes, and up to a 2% increase in cross border shopping (CBS) per year.<sup>111</sup> Even if one were to assume that the estimates and the underlying assumptions were reasonable (which JTI does not), what the 2014 IA fails to make clear is that, as a consequence of this 2% "transfer" from UK duty paid to non-UK duty paid, over 8 billion more non-UK duty paid cigarettes would be smoked over a decade in the UK than is currently the case.<sup>112</sup>

4.13 The 2014 IA does not provide such figures for RYO. Applying (for illustrative purposes only) the same 2% "transfer" from the UK duty paid RYO market to the non-UK duty paid RYO market, an equivalent of over 3 billion more non-UK duty paid cigarettes would be smoked over a decade in the UK than is currently the case.<sup>113</sup>

4.14 Together, this amounts to over 11 billion more non-UK duty paid cigarettes being smoked over a decade in the UK than would have been the case if plain packaging was not introduced.<sup>114</sup> Of these, a significant proportion is likely to be a consequence of smokers "switching from standardised tobacco packs to branded packs sourced from other countries".<sup>115</sup> Without accepting the incorrect premise in paragraph 24 of the 2014 IA, if one were, for the sake of argument, to apply the 2014 IA's flawed logic, these packs would undermine further the policy's (perceived) effectiveness, as these branded packs will be seen by others in the UK, supposedly "encouraging" them to smoke.<sup>116</sup> In addition to contraband and CBS being in branded packs, some counterfeits and "illicit whites" will also maintain their branding. The sale of all these additional non-UK duty paid cigarettes will take place outside of the legitimate UK retail channels, with the result that the financial benefits of the sales



relating to these cigarettes on the UK legal supply chain, including footfall generated by smokers entering shops for their tobacco purchase, will be lost.

4.15 In addition, the 2014 IA claims that it is "*not unreasonable*" to assume that plain packaging will result in a "*small*" increase of up to 1% in illicit trade per year, which equates to £120 million in lost duty.<sup>117</sup> However, even this "*small*" increase would equate to **over 450 million more illicit cigarettes being smoked in the UK each year**.<sup>118</sup> To put this figure into perspective, one of the biggest seizures in the UK in 2014 involved about 32 million cigarettes.<sup>119</sup> In other words, the 2014 IA's own (under)estimate suggests that the increase in illicit cigarette trade resulting from plain packaging alone would, in a year, be 14 times larger than this seizure.<sup>120</sup> The additional illicit cigarettes available as a result of the policy are assumed, given the approach of the 2014 IA, to include counterfeit, "illicit whites" and contraband products (purchased overseas and illegally re-sold in the UK). Plain packaging will, therefore, increase the number of unregulated tobacco products available to minors and those in low-income groups.

4.16 Again, while the 2014 IA does not provide an estimate for RYO, illustrating what the same 1% percentage point increase in illicit trade in RYO might represent in practice, it amounts to an equivalent of **nearly 280 million more illicit cigarettes being smoked each year**.<sup>121</sup>

4.17 In the context of a measure that is intended to reduce youth smoking, the 2014 IA – on an illustrative basis – is therefore implicitly acknowledging that the policy will make **nearly 750 million additional illicit cigarettes more accessible, each year, to minors and those in low-income groups**. This further undermines the policy's public health objectives.<sup>122</sup> Moreover, and ironically, while the Exchequer will lose out on £120 million in lost duty every year on the basis of the 2014 IA's estimate, the criminal gangs who are smuggling these products into the UK with the intention of selling them on illegally will actually benefit from plain packaging as a result of the sale of these additional illicit cigarettes. This 'policy windfall' for such gangs could then be re-invested to finance other serious criminal or, in some cases, terrorist activities.<sup>123</sup>

4.18 The examples provided above are inherently simplistic owing to the absence of the methodology behind the estimates provided in the 2014 IA. Indeed, they are illustrations of an illustration. However, they demonstrate the potential significance of the impact of the policy on illicit trade in practical terms, even where the 2014 IA's (under)estimates are used.

#### **New expert analysis since the 2012 Consultation**

4.19 A comprehensive analysis of the potential impacts of plain packaging must also take into account, in particular and in addition to the responses received to this Consultation, the following expert reports which have been made available since the 2012 Consultation:

- (a) Professor Steinberg's report and letter (prepared at the request of external legal counsel to JTI, and referred to at paragraph 3.1 above), and the evidence given by him at his meeting with the Chantler Review Team;
- (b) Professor Devlinney's report (prepared at the request of external legal counsel to JTI, and referred to at paragraph 3.1 above), and the evidence given by him at his meeting with the Chantler Review Team;

- (c) the two studies conducted by the Universities of Zurich and Saarland,<sup>124</sup> at the request of PMI, which undertook a statistical trend analysis to examine the possible effect of plain packaging on smoking prevalence of minors and adults in Australia;
- (d) the study conducted by London Economics, also at the request of PMI,<sup>125</sup> and
- (e) the KPMG Report which has been prepared at the request of Philip Morris Limited, British American Tobacco Australia and Imperial Tobacco Australia Limited.<sup>126</sup>

#### Plain packaging undermines other Government policies

4.20 A plain packaging policy undermines other policies and priorities that have been announced by HM Government since the 2012 Consultation.

4.21 It is at odds with the Prime Minister's comments, as recently as January 2014, that Britain is 'open for business'. He stated that: *"We continue to innovate, introducing new initiatives and incentives to make the UK the most attractive business environment for foreign investors and enabling higher value investments."*<sup>127</sup> He also emphasised that: *"...the welcome we extend to those who invest here [is] critical to securing our country's long term future... Britain is firmly and clearly open for business once again."*<sup>128</sup>

4.22 Plain packaging also undermines claims by the UK that it will ensure firms are not placed at a disadvantage by gold plating of European legislation.<sup>129</sup> In February 2013, the Minister for Business and Enterprise stated his intention to: *"deliver more certainty for business [and to] continue to withhold agreement for any new regulations that gold plate legislation."*<sup>130</sup> The intention of the UK to layer plain packaging on top of TPD2 (and other tobacco control measures) is entirely at odds with such a commitment, and has also been recognised by the RPC, in their opinion on the 2014 IA: *"...by going beyond minimum EU requirements, the [DH] is gold-plating the measure."*<sup>131</sup> TPD2, which includes a ban on smaller pack sizes (which accounted for 45% of cigarette and 93% of RYO pack sales in the UK in 2013) will already create a massive disruption, and has yet to come into effect. Such layering is all the more indefensible in circumstances where the measure being gold plated, i.e. TPD2 is, as identified above, currently subject to legal challenges in the UK.

4.23 The need to avoid unnecessary layering of regulation has also been recognised by others, including the Institute of Directors, who, as part of their response to the 2012 Consultation, rightly identified that: *"The [retail display ban of tobacco products] was developed for many of the same societal benefits that the [2012 Consultation on plain packaging] seeks to address. The possibility of a display ban as well as new standardised packaging requirements is a 'belt and braces' approach to policy making... Since the proposals for standardised packaging seek to address many of the same factors as the display ban, it surely follows that the retail display ban should be thoroughly implemented and assessed before embarking upon more aggressive regulatory impositions."*<sup>132</sup>

4.24 The vital role played by intellectual property rights (IPRs) in the economy and society at a global, EU and UK level has also been repeatedly recognised by numerous institutions, as well as HM Government, since the 2012 Consultation. For example:

- (a) a joint study undertaken by the European Patent Office and the Office for Harmonization in the Internal Market found that: *"IPR-intensive industries generate more than a quarter of employment and more than a third of economic activity in the EU."*<sup>133</sup> Significantly, of IPR-intensive industries, including the tobacco sector, trade

mark-intensive industries represented the highest proportion of employment and economic activity;

- (b) in 2014, the International Chamber of Commerce recognised that the intellectual property system: "...maintain[s] fair competition and encourag[es] the production of a wide range of quality goods and services..." as well as "...sustaining innovation and creation..." and "...promoting technological and cultural advances and expression...";<sup>134</sup>
- (c) HM Government has, in other contexts, rightly identified the central role that IPRs play in the growth of the British economy. For example, the Secretary of State for BIS has said: "*the quality of our IP systems represents a key determinant of economic growth.*"<sup>135</sup> This echoes recent statements made by the UK's Intellectual Property Office (March 2014)<sup>136</sup> and the All Party Parliamentary IP Group (October 2012), which stated that "*IP is a vital foundation of economic growth.*";<sup>137</sup> and
- (d) in a June 2014 Government report,<sup>138</sup> tobacco is identified as the second most common counterfeited item in the UK. As part of his comments on the report, the IP Minister commented that HM Government is committed to making sure that IPRs are "*...understood and respected.*"<sup>139</sup>

4.25 These statements, which rightly identify the importance of protecting IPRs, reveal the extent to which plain packaging is at odds with such commitments (and the reliance placed upon IPRs to drive the UK's current economic recovery). This also evidences the DH's lack of a joined up, inter-departmental approach to dealing with these important issues when pushing ahead with the plain packaging proposal.

## 5. QUESTION 3 – COMMENTS ON THE DRAFT REGULATIONS

### JTI's approach to Question 3

5.1 Question 3 seeks comments on the Draft Regulations. As JTI is fundamentally opposed to the concept of plain packaging for all of the reasons outlined in this response and previously, it has addressed Question 3 by reference to the key points of principle set out below, and not the specifics of the way in which the DH would seek to bring forward this flawed policy.

### The legality of plain packaging and the fundamental importance of IPRs

5.2 Beyond the many reasons why there is no credible evidence that plain packaging will (or is even likely to) achieve public health impacts and the criticisms that can be levelled at the conclusions reached by the Chanler Report, JTI reiterates the very serious concerns which we have previously raised in relation to the legality of any attempt to introduce plain packaging legislation in the UK. The Draft Regulations do nothing to change our views, and we oppose the measure *in toto*.

5.3 As explained in our letter to the Secretary of State for Health dated 10 January 2014, plain packaging would be unlawful and would put the UK in breach of various legal obligations, not least given the lack of credible evidence that plain packaging would have a positive behavioural impact; the existence of better, less restrictive alternatives; and the disproportionate nature of the measure.

5.4 Plain packaging infringes fundamental legal rights, including trade mark rights, property rights, and freedoms of expression and trade that are protected under UK, EU and

international law (including to the extent that international obligations are relevant under EU law). Forcing brand names to be written in a standard type face, colour and size, without any non-alphanumeric elements, except for very limited exceptions, is also a fundamental and entirely unjustified restriction on the normal and fair use of word trade marks.

5.5 Mandating plain packaging would destroy the substance of JTI's property in relation to its IPRs (the fundamental right to which is recognised in the ECHR and EU law) to such a degree that it would constitute a deprivation of that property. A 23 June 2014 report by Exane BNP Paribas also reaches this conclusion about deprivation.<sup>140</sup>

5.6 The 2014 IA itself recognises, at paragraph 85, that: "*Types of business which could be affected by standardised packaging are as follows: tobacco manufacturers who would be deprived of the value of their brands...*" (emphasis added).

5.7 Such a deprivation of property is assumed to be unlawful, unless JTI is compensated at the full value of its property (a cost which, as explained in Annex 2, is not properly recognised by the 2014 IA).

5.8 The proposed new EU Trade Marks Directive reaffirms and highlights the importance of trade marks and their use: "*Trade marks fulfil their purpose of distinguishing goods or services and allowing consumers to make informed choices only when they are actually used on the market.*"<sup>141</sup>

5.9 Moreover, the importance of the essential function of a trade mark to guarantee the origin and quality of goods (and services) is also well established in the case law of the CJEU. A number of expert bodies consistently raise the importance of the origin function of a trade mark. For example, in July 2013 a number of respected experts in the IP field emphasised that:

*"Trademarks and trade dress...are relied upon by consumers as signposts for genuine goods and services. This is true for both word trademarks and figurative (graphic) trademarks... trademarks also indicate the source of goods and services to assure consumers of the quality of the products that they purchase or that they would consider purchasing. This fundamental function cannot be fulfilled if trademarks are not noticeable, or unavailable, to consumers when selecting a product... In fact, the inability to recognise a brand also takes away consumers' freedom of choice."*<sup>142</sup>

5.10 Plain packaging would prohibit fundamental, consumer-facing use of a substantial part of JTI's trade mark portfolio in the UK. The fact that the Draft Regulations purport to amend UK trade mark legislation, in particular, in relation to fundamental use provisions, is further evidence that plain packaging conflicts with core principles of trade mark ownership, and UK and EU law more generally, including to the extent that international obligations are relevant under EU law.

5.11 It is not just JTI that holds these views; they are strongly supported by a number of expert bodies. Since the 2012 Consultation, for example:

- (a) MARQUES has stated that: "*Plain packaging legislation will preclude trade mark owners from the ability of making legitimate use of their trade marks, and in this sense, it would amount to an indirect legislative expropriation of lawful proprietary rights...*" (June 2014),<sup>143</sup> and
- (b) in relation to the proposed Irish plain packaging legislation,<sup>144</sup> the Law Society of Ireland has stated that: "*The Charter of Fundamental Rights of the European Union is*

*binding on Member States under the Lisbon Treaty and Article 17 of the Charter guarantees rights to property, expressly including intellectual property rights... Consequently, the State runs a risk – and it is that, a risk – of going beyond regulation and restricting rights which affect the substance of a trademark, in contravention of our international obligations...*” (February 2014).<sup>145</sup>

5.12 In addition, the DH's proposals would undermine the uniformity of protection of, in particular, trade marks, which has been recognised as being of paramount importance to the functioning of the EU internal market. Trade marks registered at the EU level are unitary in character and protected for the whole of the territory of the EU, including the UK. The current proposals to update the EU Trade Marks Directive and the EU Trade Marks Regulation<sup>146</sup> recognise uniformity of trade mark protection across the EU as fundamental. For example, recital 10 of the proposed Trade Marks Directive recognises that: *“It is fundamental to ensure that registered trade marks enjoy the same protection under the legal systems of all the Member States, and that the protection of trade marks at the national level is the same as the protection of European Union trade marks.”*

#### **Article 24(2) TPD2 / legality issues**

5.13 Recital 53 of TPD2, which refers to Member States introducing *“...further standardisation of the packaging of tobacco products...”*, implies that the purpose of Article 24(2) in TPD2 is, at least in part, to allow for the introduction of plain packaging on a unilateral basis. This is supported by the evidence given by Anna Soubry MP (then Parliamentary Under-Secretary of State for Public Health) and Andrew Black (Programme Manager, Tobacco Policy, the DH) to the House of Commons European Scrutiny Committee on 17 July 2013. In particular, Mr Black stated that:

*“The issue is that this Directive does not bring in plain packaging, and the Government has been very clear about seeking amendments to the wording of Article 24 to enable future Governments to bring in plain packaging, should they wish. That point was included within the Minister's letter to other Government Departments and to other Ministers, so it has been very clear about Article 24 - amending Article 24 to be more acceptable and being more open in terms of allowing for plain packaging in the future. It is certainly a matter that has been exposed throughout Government.”*<sup>147</sup>

5.14 As noted above, TPD2 – including Article 24(2) – is currently being challenged in the UK Courts by tobacco product manufacturers, including JTI. On 30 July 2014, Mr Justice Supperstone granted permission for these judicial review proceedings to proceed. In those proceedings, JTI contends that a Member State which introduced plain packaging would, by doing so, erect a complete barrier to the marketing within its boundaries of tobacco products that were compliant in all respects with TPD2 – including its packaging and presentation requirements.

5.15 Despite receiving letters from PMI and BAT on 6 June 2014 in which those companies expressed a clear intention to challenge the TPD2 (including Article 24(2)), the DH nevertheless proceeded to commence the Consultation on 26 June 2014, the day before PMI and BAT filed their claims. This was despite the DH being aware of the importance of a challenge to Article 24(2) to any plain packaging legislation: letters dated 20 June 2014 from the UK Treasury Solicitor's Department (on behalf of the Secretary of State for Health) to the lawyers for PMI and BAT expressly stated that the Secretary of State had *“...considered the claims contained in your letter...”*; and in the Summary Grounds filed on behalf of the Secretary of State for Health on 18 July 2014 it is acknowledged that:

*"The correct interpretation of Article 24(2) raises a fundamental issue of interpretation which must be determined before the validity of the Directive can be determined, namely, does Article 24(2) permit Member States to adopt more stringent rules in relation to all matters relating to standardisation of the packaging of tobacco products, regardless of whether such matters are within the scope of the Directive or not?"*

*As well as being relevant to the validity of the Directive, the interpretation of Article 24(2) is also relevant to a public consultation being conducted in the United Kingdom in order to decide whether it would be appropriate to adopt more stringent domestic rules in relation to the packaging of tobacco products.*<sup>148</sup>

5.16 It is accepted by the DH that the Court of Justice of the European Union (CJEU) must now be asked to rule on the validity and/or correct interpretation of Article 24(2). The relevance of its future ruling as to whether a Member State is able to introduce plain packaging is clear, and undisputed. If the CJEU finds Article 24(2) to be invalid, it will be struck down, and cannot serve as a basis upon which the UK is "...enabled..." to "...bring in plain packaging..." (in Mr Black's words). Even if the challenge to Article 24(2) is unsuccessful, the UK would still have to show that plain packaging does not breach EU law, or place the UK in breach of its WTO obligations – something which JTI strongly considers the UK would be unable to do.

5.17 TPD2, even if held by the CJEU courts to be valid as a matter of EU law, requires the UK to justify the need for plain packaging: "...on grounds of public health, taking into account the high level of protection of human health achieved through this Directive..." and to demonstrate that plain packaging is: "...proportionate and [does] not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." The recitals clarify that plain packaging must be "compatible with the Treaty, with WTO obligations and [must] not affect the full application of this Directive" (recital 53). In addition to these substantive conditions, which cannot be fulfilled, TPD2 would require the measures to be notified to the European Commission: "...together with the grounds for maintaining or introducing them."

5.18 As a matter of EU law, plain packaging also clearly falls within the prohibition contained in Article 34 of the TFEU. Measures infringing the free movement of goods are unlawful as a matter of EU law unless they can be justified. The burden of justifying the interferences with the right of free movement of goods, again, falls on the UK. JTI notes in this context that detailed opinions have now been issued by three EU Member States in the context of Irish plain packaging proposals<sup>149</sup> and assumes that these opinions raise issues about the compatibility of such a proposal with free movement principles.

#### **Other challenges to the legality of plain packaging**

5.19 JTI and other tobacco manufacturers challenged the Australian Plain Packaging Act 2011 in the Australian High Court. The Australian High Court has, since the 2012 Consultation, handed down its reasoned judgment. It held that there was no "...acquisition of...property...otherwise than on just terms...", as property had not been "acquired" by any third party.<sup>150</sup> Plain packaging did not breach that specific Australian constitutional test. However:

- (a) the Court acknowledged that trade mark rights are property rights of "...great commercial value..."<sup>151</sup> and that plain packaging deprives those rights of their substance;<sup>152</sup> and

- (b) no evaluation of proportionality was carried out (as proportionality was not part of the applicable Australian constitutional test).

5.20 According to the European Parliament's Legal Affairs Committee (*JURI*) the Australian High Court: "...found that plain packaging does indeed "deprive" tobacco manufacturers of their property." *JURI* also noted that: "...if anything, the judgment of the Australian High Court speaks against the admissibility of similar measures under EU law." Such a deprivation would require the UK to make significant compensation payments.<sup>153</sup>

5.21 Separately the same Australian legislation is also the subject of a WTO dispute, relating to whether Australia's plain packaging measures are consistent with international treaties, including TRIPS, the Paris Convention and the TBT agreement.

5.22 As explained in JTI's 2012 consultation response, JTI believes that the adoption of a plain packaging measure in the UK would violate these international obligations.<sup>154</sup> This view is based on, among other things, the expert opinion of Professor Gervais on the interpretation of TRIPS and the Paris Convention.<sup>155</sup> Five countries (Ukraine, Honduras, Dominican Republic, Cuba and Indonesia) have brought challenges against the Australian plain packaging legislation, which is to be settled by the WTO Dispute Settlement Body. Upwards of 30 other WTO members have also joined the five complainants as third parties in their challenges.<sup>156</sup>

5.23 WTO members have urged countries that are in the process of considering the introduction of plain packaging, such as the UK and Ireland, to wait until the WTO dispute has been settled:

- (a) "Cuba expresses great concern over the UK Parliament's decision to move ahead with the process of implementation of plain packaging of tobacco products, without waiting for a settlement of the complaint against Australia before the WTO Dispute Settlement Body",<sup>157</sup>
- (b) Honduras explained to Sir Cyril Chantler that: "the WTO dispute settlement proceeding presents the best opportunity to review and weigh the evidence developed by all the parties." Accordingly, Honduras requested that the UK delay its final decision on plain packaging until: "...it has had an opportunity to review and assess the legal arguments and evidence submitted by all parties in the WTO dispute settlement proceedings...";<sup>158</sup> and
- (c) the Dominican Republic has urged Ireland to withdraw its plan to introduce plain packaging until the WTO challenge is settled. This comment was supported by Cuba, Honduras and Nicaragua.<sup>159</sup>

5.24 In addition, the international law concerns regarding plain packaging have also been expressly recognised by a number of expert bodies.<sup>160</sup>

5.25 It is wrong for the UK to push ahead with plain packaging, pre-empting what its actual impacts might be, until the WTO compatibility of the only plain packaging measure to be adopted (in Australia) is known. This is particularly so when the DH has said that the Draft Regulations are based upon the Australian law being challenged.<sup>161</sup>

## 6. QUESTION 4 – IMPROVING THE 2014 IA

6.1 Over the past decade, tobacco control legislation has been passed with increasing rapidity in the UK.<sup>162</sup> The RPC has specifically commented in respect of previous IAs prepared by the DH that:

*“We have seen a wide range of proposals from DH, a high proportion of which received a Red rating. Many of these proposals were highly sensitive and complex measures for which we would therefore expect a high level of evidence and analysis in order to accept with the impacts presented. The most common flaw in these IAs was that analysis of wider economic impacts was incomplete. For example, tobacco IAs tended to provide a full analysis of the benefits, but failed to estimate the full economic costs to producers and retailers”* (emphasis added).<sup>163</sup>

6.2 The DH's 2012 IA on plain packaging was only awarded an 'Amber' rating by the RPC,<sup>164</sup> which acknowledged that more analysis was needed: *“...to support the claim that the proposal will have an overall neutral effect on business.”*<sup>165</sup> The 2012 IA also acknowledged that: *“...for tobacco control policies to be justified, the impact on smoking behaviour must be sufficiently large to justify the related costs.”*<sup>166</sup>

6.3 Given this context, it is unfortunate, but not perhaps surprising, that the 2014 IA repeats many of the same errors displayed in previous IAs, and fails to meet the legitimate concerns previously expressed by the RPC and other stakeholders. Once again (and despite the criticisms of the 2012 IA and previous recommendations of the RPC), it has only achieved an 'Amber' rating, indicating that HM Government's own regulatory experts had concerns with elements of the 2014 IA that needed (and still need to be) addressed.

6.4 According to the RPC, IAs that receive Amber ratings (such as the 2014 IA) are only: *“...fit for purpose provided the department responds to the concerns raised in the opinion.”*<sup>167</sup> The RPC, in their opinion on the 2014 IA, stated, amongst other things, that: *“...the [DH] should provide a fuller discussion of a number of costs, along with some indication of their likely extent where possible.”*<sup>168</sup> As any full discussion regarding the costs of the proposal and their extent is still lacking, the 2014 IA is, for this reason alone, not fit for purpose.

6.5 The continued failure to articulate adequately relevant costs is particularly significant given that a general meeting of the RPC on 16 June 2014, specifically identified the 2014 IA's: *“...treatment of impact on sales and profit, and whether this should be treated as direct or indirect...”* as something that required further analysis. It was agreed at the general meeting that a position paper on the subject was to be presented to the RPC by the RPC Secretariat. Again, it is not clear that these concerns have been properly addressed in the 2014 IA.

6.6 Key failings of the 2014 IA are set out in Annex 2, but, in summary, it provides an inadequate basis for proceeding with plain packaging as it:

- (a) is detached from commercial reality, demonstrated by the fact that, in its final estimation, tobacco manufacturers are set to make a net gain from plain packaging;
- (b) should have assessed the policy by reference to 'objectives' that are actually legitimate public policy goals;
- (c) overestimates and speculates as to the benefits that the introduction of plain packaging would have. It unquestioningly adopts conclusions from the Chantler Report and, in some cases, places reliance on documents which are decades old, and which have no



relevance to the current regulatory environment in the UK, let alone the position in 2017 (when it is said full compliance with the policy would be required);

- (d) drastically underestimates the true cost the introduction of a plain packaging measure would have on manufacturers, in particular by depriving them of their property. The fact of a deprivation is recognised, but the true economic consequences of doing so are ignored;
- (e) should have assessed meaningfully and/or taken into account the many other negative impacts and costs plain packaging would have, including the complicated issue of illicit trade (a cost which the 2014 IA recognises could be significant, but which it does not adequately quantify). Its failure to do so is simply not good enough given this is the third major DH consultation which has considered this policy;
- (f) should have addressed JTI's (and other stakeholders') previous concerns about the incessant layering of tobacco control regulation. The 2014 IA does not make clear how plain packaging would have impacts beyond those deemed attributable to existing initiatives and pre-existing (and projected) public health trends, and fails to justify, therefore, why more layers are required; and
- (g) should have considered alternative means of achieving those policy goals of the DH which are legitimate, and which should have formed part of this Consultation. As identified in Annex 2, alternative means which the 2014 IA ought to have considered include:
  - (i) better enforcement of the current regulatory regime;
  - (ii) reinforcement of youth access prevention measures at a retail level;
  - (iii) more effective and targeted enforcement to tackle the illicit tobacco trade; and
  - (iv) targeted public information campaigns to reinforce messages about tobacco control measures, and the health risks of smoking.

6.7 It is particularly remarkable that as part of its justification for not quantifying branding losses, the 2014 IA cites the fact that premium brands: "...inspire embarrassment and hostility in others not being able to afford such self-branding". This is itself an embarrassingly inappropriate excuse for avoiding necessary analysis, given that it actually embraces concepts of a command economy, rather than seeking to ensure the UK's standing (and branding) as a leading global free market economy.<sup>169</sup> Such a statement would be unthinkable in a UK impact assessment in any other FMCG or luxury goods context; for example, asserting that losses in relation to Burberry, Smythson, Diageo, Mulberry, Jaguar Land Rover or Barbour (all proud owners of premium iconic British brands) need not be quantified as use of their brands: "...inspire embarrassment and hostility in others not being able to afford such self-branding."

6.8 Adopting such a position means the 2014 IA is brushing aside, without credible reasoning, the critical importance of branding both to consumers and to economic prosperity (or in the case of the UK, its present economic recovery), which has been confirmed, and reconfirmed, over time.<sup>170</sup> The remoteness of the 2014 IA's position from mainstream political and economic thinking in the UK about the concept of branding and its significance is revealed by contrasting it to the following statements made by the Prime Minister:

- (a) *"We weren't the world's first industrial power just because of the coal and the iron ore beneath our soil. It was because we had secure property rights, relatively open and flexible markets for labour and capital, and a system in which innovation, investment and enterprise could thrive"*;
- (b) *"In short, we need to campaign for capitalism. To promote profit. To fight for free trade. To remind, indeed to educate, our citizens about the facts of economic life"*;
- (c) *"...the world over the letters 'UK' stand for unique, brilliant, creative, eccentric, ingenious. We come as a brand – and a powerful brand... If... the UK changed, we would rip the rug from our own reputation"*; and
- (d) *"Aspiration is the engine of progress. Countries rise when they allow their people to rise. In this world where brains matter more, where technologies shape our lives, where no-one is owed a living ...the most powerful natural resource we have is our people... That's why the mission for this government is to build an aspiration nation ... we just get behind people who want to get on in life... The young people who dream of their first pay-cheque, their first car, their first home – and are ready and willing to work hard to get those things. While the intellectuals of other parties sneer at people who want to get on in life, we here salute you... we are the party of the want to be better-off, those who strive to make a better life for themselves and their families – and we should never, ever be ashamed of saying so"*.<sup>171</sup>

6.9 It would be an astonishing capitulation to the 'politics of envy' if the heterodoxy of the 2014 IA was allowed to form the basis of policy-making by a government led by a Conservative Prime Minister who is fully committed to and passionately in favour of free trade and an open economy.

6.10 In summary, the 2014 IA's deficiencies are so serious that it cannot now be salvaged by the future 'improvements' sought by Question 4 to this Consultation.<sup>172</sup> It is not enough for the DH to take the same approach with any future IA, as this would involve the same mistakes being repeated once again. A decision in favour of plain packaging cannot be taken until an adequate consultation-stage impact assessment is prepared and published, which addresses properly the concerns and shortcomings which stakeholders have (previously) identified.

#### **Other Better Regulation failings**

6.11 The deficiencies in the 2014 IA are compounded by the fact that it has been conducted in the context of other Better Regulation failings by the DH. Therefore, we address these failings below as part of our response to Question 4.

#### ***The DH has already made its mind up***

6.12 Whilst it may be the case that: *"The Government has not yet made a final decision on whether to introduce standardised packaging of tobacco product"*<sup>173</sup> a number of indications have been given in recent months that this Consultation is, in fact, highly unlikely to change the mind of the DH, at least.

6.13 Instead of embarking upon this Consultation with an open mind, the clear impression is that the steps now being taken are essentially part of efforts by the DH - under pressure from tobacco control groups who are effectively professional lobbyists employed to support tobacco control measures such as plain packaging - to avoid allegations of procedural irregularity and an attempt to defend the robustness of their Consultation process. For example:

- (a) even before the Chantler Report had been published, the Parliamentary Under Secretary of State for Public Health commented that: *"The power to make regulations is being proposed in the other place [i.e. the House of Lords] so that we may move quickly at the point we receive Sir Cyril's review"* (28 November 2013).<sup>174</sup> The Minister for Government Policy also stated (just prior to the launch of the Consultation) that: *"...plain packaging is proceeding; it is not in the long grass at all. The measures are now under way..."*.<sup>175</sup>
- (b) the legislative history surrounding the plain packaging provisions of the Children and Families Act 2014 reveals the DH's recognition of the need to maintain an inappropriately low evidential threshold before the making of Regulations by the Secretary of State. The Government's amendment on plain packaging for tobacco products, which was introduced at the House of Lords' Report Stage of the Children and Families Bill (as it then was), was considered in the House of Commons on 10 February 2014. Ahead of this, an amendment to the Government's amendment was tabled by Philip Davies MP. The effect this proposed amendment would have had is set out in full in Annex 3. As can be seen, the amendment proposed changing the word "may" to "will" in sub-clauses (1) and (4), and the phrase "at least some" to "each" in sub-clause (3)(a). That amendment, which was unsuccessful, would have introduced a requirement for a slightly more meaningful (although still very low) evidential threshold before the making of Regulations. It is apparent that this more meaningful threshold would not have been met by the conclusions reached in the Chantler Review in respect of the predicted effect of a plain packaging measure on public health. What is telling is that the DH had in fact already anticipated that such a higher threshold could not be met. The Parliamentary Under-Secretary of State for Health recognised, during the debate in the House of Commons on 10 February 2014, that: *"Constraining Ministers' decision making in that way would probably have the effect of stopping the use of the powers altogether"*.<sup>176</sup>
- (c) in her letter to the DH dated 2 April 2014, the Chief Medical Officer for England noted that prior to the Chantler Review, she was: *"...already of the opinion that we had the evidence to suggest that implementation of plain packaging should save some children and young adults from smoking"*.<sup>177</sup> and
- (d) finally, as soon as the Chantler Report had been published, and despite the fact that: (i) the Chantler Report only considered a narrow range of issues; and (ii) the clear indication had previously been given that *"Ministers will take all other factors into consideration..."*,<sup>178</sup> the Parliamentary Under Secretary for Public Health stated that she was: *"...minded to proceed with introducing regulations to provide for standardised packaging."*<sup>179</sup> She acknowledged that all that was left was for there to be *"...a final, short consultation."* It was then confirmed that this would be a: *"...a six-week consultation to ensure that our decision is properly and fully informed by any further relevant views and, very importantly, that it will be capable of withstanding the greatest scrutiny, including in the courts."* (3 April 2014) (emphasis added). Similarly, it was recognised that: *"...if the Government did not consult properly on the regulations, far from speeding up matters, it would delay them...My colleagues in the Temple would be over the road with an application for judicial review before one could say ban on anything"* (3 April 2014).<sup>180</sup>

6.14 Also indicative of the DH's determination to proceed with a plain packaging policy, irrespective of the evidence base and proper Parliamentary procedure, is the evidence given to the House of Commons European Scrutiny Committee by the then Parliamentary Under-

Secretary of State for Public Health in July 2013. When explaining why that Committee had not been kept sufficiently informed of important legislative developments in respect of TPD2, the Minister explained that: *"I took the very firm view that not just this Government, but any Government, would not want to be in a position whereby its hands were tied by a Directive that would preclude it from taking more actions, should it so choose, on standardised packaging, or indeed the amount of health labels and other matters on tobacco."*<sup>181</sup>

### *Inappropriate use of statistics*

6.15 Following the publication of the Chantler Report, the Public Health Minister stated that: *"Sir Cyril points out that if this rate of smoking by children were reduced by even 2%, it would mean that 4,000 fewer children took up smoking each year."*<sup>182</sup> She went on to say *"...even a modest impact on a major killer is really important."* The "4,000 figure" was then (wrongly) apparently portrayed or accepted as fact by some MPs during Parliamentary debate.<sup>183</sup>

6.16 It is in fact apparent from paragraph 6 of the Chantler Report that this 2% figure was a hypothetical one as far as the effect of an introduction of a UK plain packaging measure is concerned: *"If this rate [smoking prevalence] were reduced even by 2%, for example, it would mean 4,000 fewer children took up smoking each year..."* (emphasis added).<sup>184</sup>

6.17 Whilst accepting that this figure is presented as a hypothetical (even if it appears to have been subsequently accepted as a fact by some), there is no detail in the Chantler Report on which to base the assumption that the introduction of a domestic plain packaging measure would result in such a reduction or, indeed, any reduction. Indeed, Sir Cyril Chantler acknowledges that: *"...I have not seen evidence that allows me to quantify the size of the likely impact of standardised packaging..."*<sup>185</sup> and that *"...research cannot prove conclusively that a single intervention such as standardised packaging of tobacco products will reduce smoking prevalence."*<sup>186</sup> There is therefore no basis on which to propose this figure.

6.18 Similarly, it has also been necessary for JTI publicly to respond to ASH's misleading claims (made in July 2014)<sup>187</sup> that evidence has emerged showing that plain packaging has caused a "huge drop" in smoking in Australia. Contrary to claims made by ASH and others, the numbers that the Australian Government has produced do not show that plain packaging has had a positive impact on smoking behaviour (see paragraphs 4.1 to 4.3 above). Instead, as we were required to point out in a press release of our own,<sup>188</sup> daily smoking prevalence in Australia declined by 2.3% between 2010 and 2013, consistent with the pre-existing trend. The decrease in prevalence between the introduction of plain packaging in December 2012 and December 2013 is not capable of being measured in this data set, because that level of detail is not available.

### *Length of the Consultation period*

6.19 As JTI advised the Secretary of State for Health in a letter dated 17 April 2014, a six week consultation is clearly inadequate given the wide-ranging and controversial nature of the proposed measures.<sup>189</sup>

6.20 It is concerning that the Consultation has been portrayed as a straightforward exercise in: *"...seek[ing] new, or additional, information relevant to standardised packaging that has arisen since the 2012 consultation."*<sup>190</sup> The 2014 IA, and the three policy options now being considered, do not simply represent straightforward, comparative extensions of the policy options considered in 2012. The 2012 Consultation purported to assess the relative costs and benefits of introducing a plain packaging measure against the status quo that existed at that time. By contrast, the baseline against which plain packaging is now being assessed, two years

on, has changed materially. An environment in which a form of pack standardisation has already been effected by TPD2 is assumed in respect of the policy options presented in the 2014 IA (which themselves differ from the policy options presented in the 2012 IA). Consequently, the 2012 and 2014 IAs proceed from two very different starting points, meaning comparisons between them are highly complex. This makes inappropriate the characterisation of this Consultation as a simple updating exercise, and the six week consultation period more unfair. The brevity of the Consultation will, undoubtedly, have frustrated a number of stakeholders from responding at all, or responding fully.

6.21 Moreover, the RPC's opinion, explaining why it was only able to award the 2014 IA an Amber rating was only published on 25 July 2014. This was almost two months after the opinion (dated 29 May 2014) was issued, and less than two weeks before the end of the six week consultation period. This opinion, which allows stakeholders to understand more fully the concerns the RPC has with the 2014 IA, could and should have been published by the DH alongside the other Consultation materials on 26 June 2014. At the very least, and consistent with Better Regulation principles of openness and transparency, the 2014 IA should have made clear the RPC's concerns, and the extent to which they had or had not been addressed.

#### *Inadequate treatment of previous consultation responses*

6.22 Having taken almost a year to review the responses to the 2012 Consultation, the DH published its summary report in July 2013.<sup>191</sup> On publication of the summary report, the Secretary of State's ministerial statement failed to mention or acknowledge that of the total 668,000 responses, almost two thirds were opposed to plain packaging. Instead the summary report relegated 665,989 responses to the status of "campaign responses" which "used identical template documents (typically a postcards [sic], emails or letters), a single letter signed by multiple people or petitions" or "where the respondent did not attempt to address more than a handful of consultation questions". This allowed the DH to focus on the fact that a small majority (53%) of the 2,424, "detailed responses" that had answered the relevant question were in favour of plain packaging.<sup>192</sup>

6.23 Almost a year after the publication of the summary report (and on the same day the Consultation was launched), the DH announced that it had: "published the detailed responses that were received to the 2012 consultation."<sup>193</sup> In fact, the DH has only uploaded 105 of the "detailed responses" (representing just 4%). A rudimentary examination of these (which is all that has been possible in the "short" consultation period) reveals that these "detailed responses" included one-line or one-page emails that did not attempt to answer more than a handful of questions. Indeed, nearly 91% of those in favour of plain packaging are no more than two pages long and 68% are based on "template documents" of the kind the DH said it had classed as "campaign responses" (so as to relegate them from the analysis of "detailed responses").<sup>194</sup> An example of such a "campaign response" that has been published by the DH, apparently as a "detailed response", can be seen from the extract below:<sup>195</sup>

INSERT ORGANISATION NAME

## SUBMISSION SUPPORTING PLAIN, STANDARDISED PACKAGING OF TOBACCO PRODUCTS

To: [tobaccopacks@doh.gov.uk](mailto:tobaccopacks@doh.gov.uk)

I would like to express my strong support for measures to introduce plain, standardised packaging for all tobacco products in the UK as part of the current Government consultation.

We fully support introducing here in the UK the same type of plain packaging that is being implemented in Australia in December 2012 - tobacco products with no branding, a uniform colour and standard font and text for writing on the pack. We believe these would bring public health benefits ever and above those from current initiatives in the UK.

Around 340,000 children in the UK try their first cigarette every year. Smoking starts not as an adult choice but in

6.24 The fact that it has taken the DH over two years to publish even just a small fraction of the responses received means JTI and other stakeholders have, until very recently, been unable to respond to or meaningfully comment on certain evidence put forward by others as part of the 2012 Consultation.

6.25 The DH has not made clear why it has published only 4% of the responses, or indeed the basis upon which it has decided to publish the particular responses that it has done. What is apparent, however, is that the DH has failed to publish detailed responses which do address the major issues. For example, JTI's comprehensive and evidence-based 2012 consultation response - whilst available on our website - has, inexplicably, not been published by the DH. By contrast, the following, apparently "*detailed response*" (replicated in full), has been published:<sup>196</sup>

[REDACTED]

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From: [REDACTED]@gmail.com  
Sent: 19 June 2012 10:18  
To: Tobaccopacks  
Subject: Plain packaging of tobacco products

Tobacco Packs DoH Tobacco Packs DoH

I support the plain, standardised packaging of tobacco products to protect our children.

I confirm I do not have any links with or receive funding from the tobacco industry.

[REDACTED]

6.26 In the light of the various statements discussed at paragraph 6.13 above, in conjunction with the brevity of this present Consultation period and the inadequate treatment of the 2012 consultation responses, it is clear that the DH is not proceeding with an open mind or wishing seriously to consider the broader implications of this proposed policy. They are, instead, indicative of the DH simply going through the motions in an attempt avoid allegations of procedural irregularity.

## **Conclusions**

6.27 For the reasons set out in this consultation response, JTI remains categorically opposed to the introduction of any plain packaging measure in the UK. As the 2014 IA recognises, plain packaging would deprive us of the value of our brands – our most valuable assets. It would unjustifiably damage our ability to compete, worsen the illicit trade in tobacco and be unlawful. It infringes our fundamental legal rights without reducing smoking.

6.28 This third DH consultation on plain packaging in six years gets no closer to identifying the evidence which would be needed to justify the introduction of such an extreme measure and again fails to consider alternatives. Instead, the DH has once again sought to lower the evidential threshold and move the goalposts to try and make the policy fit the weak evidence. The only rational decision HM Government could now make about this policy is not to introduce it in the UK.

JTI

6 August 2014

## ANNEX 1: OBSERVATIONS ON THE CHANTLER REVIEW

### 1. INTRODUCTION

1.1 Even within Sir Cyril Chantler's narrow remit, the flaws which JTI has identified within the Chantler Report make it an inappropriate and inadequate basis to justify proceeding with plain packaging legislation. Further, many of these concerns relate to issues which JTI had previously identified as needing to be properly addressed and explained to the DH.

#### Background to the Chantler Review

1.2 On 12 July 2013, HM Government announced that it had decided to wait until the emerging impact of plain packaging in Australia could be measured before making a final decision on whether to introduce plain packaging in the UK.<sup>197</sup> On 28 November 2013, less than five months later, a Ministerial Statement announced the setting up of the Chantler Review to examine any public health evidence for plain packaging.<sup>198</sup> It was asked to operate according to a Terms of Reference, and produced its own method statement (included as Annex A to the Chantler Report).

1.3 The Chantler Review Team comprised the Chair, Sir Cyril Chantler (a paediatrician), together with two DH employees seconded to the team.<sup>199</sup>

1.4 The Chantler Review Team heard evidence from various stakeholders between the end of November 2013 and the end of March 2014, and also received "...50 new [written] submissions...",<sup>200</sup> as well as follow-up responses to various of the meetings.

1.5 JTI made its concerns about the process which the Chantler Review was to embark on known in a letter to the Secretary of State for Health on 10 January 2014.

1.6 Notwithstanding these concerns, JTI sought to engage constructively with the Chantler Review, and sought to assist the Chantler Review Team via:

(a) its detailed Chantler Submission, which also reiterated many of the concerns JTI had previously expressed with the process being embarked upon by the Chantler Review, as well as other concerns likely to be of relevance to the Chantler Review Team's review; and

(b) JTI's Head of UK Corporate Affairs' attendance at a meeting with the Chantler Review Team on 29 January 2014, as a member of the TMA.

1.7 Beyond this, and in terms of engaging with the DH more generally:

(a) JTI has provided detailed evidence-based submissions<sup>201</sup> to the DH's 2008 and 2012 Consultations which also addressed plain packaging; and

(b) JTI met with the DH in 2013 in order to provide further information on the operations of its businesses and to seek to address the information gap at the heart of the 2012 IA. This was the first time JTI was given the opportunity to meet with the DH in the context of plain packaging, despite the various offers made by JTI before then to meet.<sup>202</sup>

1.8 On 3 April 2014, the Chantler Report was published. In the light of Sir Cyril Chantler's conclusion that, in his view, it is: "highly likely that standardised packaging would serve to reduce the rate of children taking up smoking", the DH stated that: "Health Ministers [are]



currently minded to proceed with introducing regulations" in respect of the plain packaging of tobacco products.<sup>203</sup>

## 2. NO EVIDENCE OF ACTUAL SMOKING BEHAVIOUR

2.1 The Chantler Report presents no evidence that plain packaging would have any impact on actual smoking behaviour, if introduced in the UK, as:

- (a) the "clear plausible link" to a behavioural change asserted by the Chantler Report is unfounded and unsubstantiated;
- (b) both the Systematic Reviews, and the studies underlying the Systematic Reviews, are methodologically flawed and incapable of determining whether plain packaging will have any impact on actual smoking behaviour; and
- (c) the existing data from Australia is acknowledged as being "inconclusive".

### No link between a reduction in appeal and changes in behaviour

2.2 The terms of the Chantler Review's own method statement stated that Sir Cyril Chantler was to assess whether: "...the introduction of standardised packaging is likely to lead to a decrease in the consumption of tobacco."<sup>204</sup> Therefore, Sir Cyril Chantler was to determine whether the evidence suggested that plain packaging was likely to result in people not taking up smoking, smoking less or being more likely to quit.

2.3 This focus on behaviour is consistent with NICE Guidance. It recognises that: "...there is overwhelming evidence that changing people's health-related behaviour can have a major impact on some of the largest causes of mortality and morbidity"<sup>205</sup> and recommends: "...changes in behaviour...be at the heart of all disease prevention strategies."<sup>206</sup> It also goes on to acknowledge that: "...attempts to change behaviour have not always led to universal improvements in the population's health..."<sup>207</sup>

2.4 By contrast, the Chantler Report does not convincingly establish any link between the introduction of plain packaging and any change to actual smoking behaviour as a result. Nor does the evidence considered provide any real indication that plain packaging would ultimately lead to such a change. Indeed, Sir Cyril Chantler largely ignored the advice from a leading academic in youth behaviour (with specific expertise in adolescent decision-making and risk-taking) who appeared before him. This is despite Professor Steinberg having explained to Sir Cyril Chantler that, in his long professional experience, the introduction of such a measure was unlikely to lead to changes in youth smoking behaviour.<sup>208</sup>

2.5 In the absence of such evidence, Sir Cyril Chantler adopts a two-step approach to make the link between plain packaging and smoking behaviour. He first states that: "...the aim of standardised packaging is to reduce the tobacco package's visual identity and appeal as an advertisement for the product..." (emphasis added) and then assumes, without basis, that: "...by reducing its appeal, standardised packaging would therefore affect smoking behaviour..." (emphasis added). To conclude there is a causal link between reduction in "appeal" and behavioural change, Sir Cyril Chantler takes a leap of faith. The Chantler Report suggests that "intermediate outcomes", such as reduced appeal, are likely to eventuate in changes to behaviour (and could be, he says, seen as benefits in themselves, in any event).

2.6 As noted above, however, and as explained in JTI's 2012 consultation response, reducing the "appeal" of tobacco products to consumers *per se* is not, and cannot be, a self-standing justification for tobacco regulation.

2.7 It does not follow that any reduction in the "appeal" of tobacco packaging would result in smoking behaviour change. Studies in support of plain packaging frequently conclude that when asked a direct question, respondents generally say they find plain packaging less attractive (or appealing) than branded packaging. Such reported reductions in "appeal" are only an indication of the respondents' perceptions. They are subjective, self-reports of future intentions (i.e. what the respondent says he would do rather than evidence of what he actually did) in response to a direct question. As the Chantler Report concedes: "...*stated intentions are generally weak predictors of behaviour*".<sup>209</sup>

2.8 These studies do not address whether reported reductions in "appeal" have any relevance to the actual decision to start (or continue) smoking. Absent such evidence, there is no basis to assume reducing the appeal of tobacco packaging is relevant to the factors that contribute and determine an individual's attitude to smoking and becoming a smoker. The Chantler Report does not address this, let alone provide robust evidence in support of this conclusion.

2.9 No link to actual smoking behaviour has been established in any of the studies relied upon in the Chantler Report. Such a link is assumed without justification.

2.10 Instead, the Chantler Report seeks to support its conclusions by referring very generally to: "...*evidence linking concepts such as 'appeal' to behaviour which exists elsewhere in the literature and wider fields such as contemporary theories of behaviour psychology...*"<sup>210</sup> (citing Webb et al. (2006)).<sup>211</sup>

2.11 However, Webb et al. actually test discrepancies between an individual's *behavioural intentions* and their behaviour (and not the effect of "appeal" on actual behaviour).<sup>212</sup> The authors do not make any connection whatsoever between appeal and behaviour (intended or actual). Nor do they attempt to define what "appeal" is, or its effect on behaviour. It is wrong for the Chantler Report to rely on this scientific evidence on an apparently crucial point in this way.

2.12 The Chantler Report states further that these: "...*contemporary theories of behavioural psychology...*" (evidenced by a single citation to Webb et al.) "...*stress the importance of non-conscious processes in determining behaviour rather than conscious statements of intent...*"<sup>213</sup> Although non-conscious processes are referred to in Webb et al.,<sup>214</sup> they are not the focus of the article nor is it apparent that they relate to appeal. It is clear, however, from a review of the cross-referenced articles cited in Webb et al. and the article itself, that considerable uncertainty remains over the role conscious and non-conscious processes play in determining behaviour. For example:

- (a) in 2006, Webb et al. state in relation to studies where participants undergo a behavioural intervention to evaluate its impact only that: "...*it is possible that interventions directly affected behaviour because goal activation occurred outside the participants' awareness...*" (emphasis added), concluding "...*that future behaviour change efforts might do well to give greater consideration to nonintentional routes to action...*"<sup>215</sup> without specifically referring to the question of appeal at all;
- (b) in 2013, Sheeren et al.<sup>216</sup> underline the still untested status of non-conscious processes in their discussion of "*implicit attitudes*", stating that: "*Further tests—that move beyond*

*merely comparing the effects of implicit attitudes versus explicit attitudes—are crucial in order to make the case that implicit attitudes constitute important additional predictors of health behaviors.*<sup>217</sup> Again, the authors do not make any connection at all between appeal (reduced or otherwise) and behaviour, instead observing (with respect to implicit attitudes) that: “...the mechanisms underlying these effects are not yet clear”,<sup>218</sup> and

- (c) Marteau et al. (2012)<sup>219</sup> similarly acknowledge that non-conscious process: “...remains an elusive concept, difficult to understand and identify.”<sup>220</sup> Professor Marteau gave evidence to the Chantler Review Team, and her work is extensively relied on in the Chantler Report.

2.13 Despite this, the Chantler Report inappropriately seeks to use non-conscious processes to posit that “intermediate outcomes” are likely to result in changes to behaviour (and could be, he says, seen as benefits in themselves, in any event). This, it is said, is compatible with known risk factors for smoking uptake such as peer pressure and parental smoking.<sup>221</sup>

2.14 It is similarly inappropriate for the Chantler Report to support this position by reference to studies where it is simply assumed that “intermediate outcomes” like those identified in the Chantler Report will ultimately result in reduced consumption, when those studies do not say that this would be the case.

2.15 Even given the limited conclusions that the Chantler Report could properly draw from the studies it cites, any finding that reductions in the “appeal” of tobacco products influence actual smoking behaviour would still require a leap of faith. For example, the Chantler Report refers to Marteau et al. where the authors aspire to various “interventions” targeting automatic/non-conscious behaviour. Interventions provided as examples by Marteau et al. in this context are designed specifically to target automatic processes by “...presenting a stimulus that activates or inhibits an associated mental representation (a concept, action or goal).”<sup>222</sup> This is called “priming”.

2.16 There is a significant distinction between using priming interventions to affect behaviour in a certain environment and causing a “change in the physical environment”,<sup>223</sup> in this case by banning branded packaging, in order to effect a behavioural change.<sup>224</sup>

2.17 Even if priming studies were relevant to the effect of appeal on behaviour (which they are not), the studies cited in the Chantler Report do not link appeal to reduced consumption; they broadly focus on the effects of advertisements. The studies presented in this area relate to TV advertisements which, by their very nature, can include a wide range of concepts that stimulate, interact with and influence emotions and perceptions about a brand.<sup>225</sup> However, by virtue of previous regulatory interventions in the UK, the advertisement of tobacco products on TV has long been prohibited. Reference to such studies in the Chantler Report is indicative of the mistaken conflation between branding, packaging and advertising.

2.18 The Chantler Report nevertheless relies on the following two priming studies to support assertions that: “...it has been proven that appealing branding does influence consumption...”<sup>226</sup> and “...theories of ‘unconscious’ or ‘automatic’ behaviour demonstrate a causal pathway between concepts such as appeal and behaviour, and are supported by evidence from fields such as food and alcohol...”<sup>227</sup>

- (a) a study by Robinson et al. (2007)<sup>228</sup> which concludes that children prefer the taste of food which they believe has been bought from McDonald’s (i.e. children’s taste perception is affected by priming). The study indicates that branding can influence young children’s

taste perceptions, in particular those children with more television sets in their home, but does not link perception to consumption. However, Robinson et al. were prepared to accept in their study that each instance of direct and indirect exposure to McDonald's marketing, food and packaging was: "...a complex whole of both independent and interacting influences on emotions and perceptions about the brand."<sup>229</sup> Robinson et al., like Sir Cyril Chantler, do not adequately define what causes the observed effect on preference (or, in the Chantler Report, behaviour), and whether this is in fact linked to packaging, the product itself or something else; and

- (b) participants in Harris et al. (2009)<sup>230</sup> were primed by way of television advertising to consume snack foods, the authors concluding that food advertising can influence how much food is consumed (namely, it increased the immediate consumption of both healthy and, more so, snack foods). However, the authors, as did Robinson et al., note in respect of their findings that: "...the specific mechanisms through which food advertising increased automatic eating behaviour cannot be identified with certainty".<sup>231</sup> This is consistent with Marteau et al., who state in respect of studies on the effect of advertising on consumption that: "...the potential of using priming interventions to reduce consumption is promising but little studied so far."<sup>232</sup>

2.19 Such priming studies cannot tell us if plain packaging would affect actual behaviour. It follows that it is insufficient and overly simplistic for the Chantler Report to support the link between "appeal" and actual behaviour by observing that: "...humans are generally predisposed to approach positive stimuli (those we anticipate as being rewarding) and avoid negative stimuli (those we anticipate as being unrewarding or even punishing)."<sup>233</sup>

2.20 There is also little clarity whether or to what extent changes to a physical environment can affect actual behaviour, or the durability of such interventions.<sup>234</sup> This was confirmed in Hollands et al. (2013), where the authors, including Professor Marteau, state that: "The idea that behaviour can be influenced at population level by altering the environments within which people make choices (choice architecture) has gained traction in policy circles. However, empirical evidence to support this idea is limited, especially its application to changing health behaviour."<sup>235</sup>

2.21 In summary, the Chantler Report erroneously adopts a two-step approach to try and make the link between plain packaging and smoking behaviour. First, it states that: "The aim of standardised packaging is to reduce the tobacco package's visual identity and appeal as an advertisement for the product"<sup>236</sup> and concludes (wrongly) that plain packaging would reduce the "appeal" of smoking. Second, it then makes the assumption that, if "appeal" is reduced, this in turn must affect actual behaviour. However, this is an assumption unsupported by fact or evidence. Only by making a leap of faith is Sir Cyril Chantler able to conclude that plain packaging is likely to affect actual smoking behaviour.

#### The existing studies on plain packaging are flawed

2.22 Absent evidence to demonstrate that plain packaging would change smoking behaviour, the Chantler Report turns to studies which: "...show outcomes that support likelihood of behaviour change, including increased calls to quitting helplines, hiding packs in social situations, smoking less around others, and smoking fewer cigarettes overall."<sup>237</sup> Doing so is unreliable because:

- (a) although no reference is provided, the studies to which this statement is attributed are understood to be Young et al. (2013),<sup>238</sup> Wakefield et al. (2013)<sup>239</sup> and Zacher et al.

(2013).<sup>240</sup> Both Young et al. and Wakefield et al. test only perceptions, attitudes and recall, namely whether participants thought they had smoked less or reported that they had called the Quitline more often post plain packaging. This is not a direct measurement of behaviour, as acknowledged by the studies' authors;

- (b) Young et al. (2013) does not show causality between increases in calls to the Quitline and plain packaging. All it is able to demonstrate is that calls to the Quitline have generally decreased over time, but that fluctuations at certain periods occur. Of course, the fact that someone has called a Quitline does not mean they will in fact quit or otherwise change their smoking behaviour; and
- (c) Zacher et al. (2014) only suggest that, in certain cafes, restaurants and bars in selected suburbs in Melbourne and Adelaide, more patrons appeared to conceal their tobacco packaging immediately after the introduction of plain packaging than in previous months. The authors acknowledge limitations in their research and that other variables (e.g. the presence of children) may have been a factor in any reduction in the display of tobacco packaging. Moreover, at his meeting with Sir Cyril Chantler, Professor Devinney outlined that, while he considered the design of this study to be more methodologically robust than other studies he has considered in this area because it at least sought to examine smoking behaviour: "...the implication of that behaviour in terms of smoking outcome was not clear, as it was never established."<sup>241</sup>

2.23 It is difficult to understand how Sir Cyril Chantler could reliably conclude that it is "...highly likely that standardised packaging would serve to reduce the rate of children taking up smoking...";<sup>242</sup> given how the Chantler Report acknowledges the limitations of the existing evidence base. For example:

- (a) "...the Stirling evidence has been criticised for relying on stated intentions in hypothetical situations. I recognise that stated intentions are generally weak predictors of behaviour (regardless of whether the situation is hypothetical or not). I see the importance of Stirling as being the consistency of its results on appeal, salience and perceptions of harm, most notably that standardised packaging is less appealing than branded packaging...";<sup>243</sup>
- (b) "the specific evidence base, centred on the Stirling Review and update, is relatively modest and put forward awareness of its limitations due in particular to constraints on study design...";<sup>244</sup> and
- (c) the Chantler Report acknowledges the warning in the Systematic Review for the need for "some caution" in interpreting these findings as: "expressed smoking-related intentions are not always representative of future smoking behaviour."<sup>245</sup> One of the authors of the Systematic Review herself accepted that: "...the systematic review had not, in fact, drawn firm conclusions about behaviour."<sup>246</sup>

2.24 That there is no evidence that plain packaging would have any impact on actual smoking behaviour is also entirely consistent with the views of other experts who met with the Chantler Review Team, including Professor Devinney, whose reports address specifically the evidence base considered in the Chantler Report.<sup>247</sup> When Professor Devinney met with the Chantler Review Team, he explained that: "Because of the well-known lack of a link between surveyed attitudes and intentions and behaviour (known as the attitude-behaviour gap in the literature), the burden of proof falls onto the researcher to show that a relationship exists between their survey responses and actual behaviour (or behaviour in circumstances that mimic the decision

models individuals will be using in reality).<sup>248</sup> He has previously concluded that: "a systematic review of fundamentally invalidly conducted research will amount to little more than "garbage in, garbage out".<sup>249</sup> Others have said that: "...we need to recognise that enthusiastic support for a policy is no substitute for good evidence."<sup>250</sup>

### **The way in which Australian data is selectively used in the Chantler Report**

2.25 Sir Cyril Chantler states that "it is too early to draw definitive conclusions"<sup>251</sup> from the only country in the world to have introduced plain packaging to date, Australia.

2.26 In doing so, Sir Cyril Chantler appears to accept that there are limitations in the current evidence base. But, he then considers he is nevertheless able to use this limited evidence base to reach a conclusion that plain packaging is likely to have an impact on smoking behaviour, which is unproven in any of the studies or in existing data from Australia.

2.27 Despite these reservations and acknowledged difficulties of currently being able meaningfully to rely upon certain information emerging out of Australia, the Chantler Report nevertheless dismisses a number of concerns raised by opponents of plain packaging on the basis that such concerns have not been borne out in Australia.

2.28 For example, in respect of the impact of plain packaging on prices in Australia, the Chantler Report states that: "Prices have generally increased in the data available to date, with most leading brands in Australia increasing prices by more than the inflation tax rises since plain packaging was introduced. This is a continuation of the trend for prices of leading brands to increase by more than tax rises which has occurred for several years in Australia. This provides evidence that the widespread price reductions predicted by some opponents of plain packaging have not materialised to date."<sup>252</sup>

2.29 Also, the Chantler Report dismisses the risk, previously recognised by the DH, that: "Children may be encouraged to take up smoking if plain packages were introduced, as it could be seen as rebellious", simply by stating that: "I am not aware of any suggestions that this effect has been seen to date in Australia."<sup>253</sup> Since the Chantler Report, Australian Government data has been released which, as discussed at paragraph 4.3 of the main body of this response, shows that daily smoking prevalence among 12 to 17 year olds has increased in the period 2010 to 2013, albeit the data cannot determine whether plain packaging was causative.

2.30 The status of the Australian evidence is further discussed in paragraphs 4.1 to 4.5 in the main body of this response.

### **3. THE CHANTLER REPORT'S TREATMENT OF THE EVIDENCE RELIED UPON**

3.1 Sir Cyril Chantler asked himself the question whether "...the introduction of standardised packaging is likely to lead to a decrease in the consumption of tobacco..."<sup>254</sup> but ultimately concludes that the existing research cannot prove that plain packaging will reduce smoking prevalence. This, he says, is because this is "...not an issue capable of scientific proof..."<sup>255</sup> and that he "[Does] ...not consider it to be possible or ethical to [undertake] a [randomised control] trial..."<sup>256</sup> to test the impact of plain packaging. While not commenting on its content, JTI notes the recent publication, by authors of previous studies considered in the Systematic Reviews, of "Plain packaging of cigarettes and smoking behavior: study protocol for a randomized controlled study",<sup>257</sup> which would indicate the authors believe that collecting evidence seeking specifically to test smoking behaviour is, in theory, possible.

3.2 Having identified that the question cannot be resolved through scientific proof, the Chantler Review Team was instead ultimately reliant upon their own consideration and assessment of: *"The best available evidence."*<sup>258</sup>

3.3 As explained below, JTI has a number of serious concerns about the way in which the evidence base has been considered, and conclusions drawn, given that:

- (a) the "independent academic review" of the evidence base is flawed;
- (b) the evidence base is not "the best available";
- (c) the Chantler Report wrongly dismisses or ignores evidence "pointing the other way";
- (d) the Chantler Report uses the available Australian plain packaging evidence selectively; and
- (e) the Chantler Report accepts studies without assessing their reliability.

#### **The 'independent academic' review of the evidence base is flawed**

3.4 Unable to reach a determinative conclusion on the evidence base himself, Sir Cyril Chantler "...decided to commission analyses of the quantitative and qualitative elements from independent academics."<sup>259</sup>

3.5 The commissioning of an independent and critical review of the evidence base is consistent with Better Regulation principles. But, such a review should be conducted by those who have appropriate expertise to conduct the analysis, and the assessment itself should follow a robust and methodologically sound approach.

3.6 In its Chantler Submission, JTI stated that, according to best practice guidelines, any independent review of the evidence should draw upon a range of appropriate expert sources that should be sufficiently wide to reflect the diversity of opinion among experts in the appropriate fields and in a balanced way. This view was reiterated by Professor Devinney at his meeting with the Chantler Review Team. While recognising that plain packaging was related to public health, he pointed out that the vehicle by which that health issue was going to be addressed was fundamentally via consumer choice and that the authors of the various studies may not have properly recognised that the issue was essentially one of individual consumer behaviour. Hence, they did not take into account research that could have informed them both theoretically and in the structure of their studies.<sup>260</sup>

3.7 Contrary to this, Sir Cyril Chantler commissioned the review of the evidence base by Dr Yanzhong Wang and Professor Catherine Pope, both of whom specialise in the area of public health.

3.8 Further to concerns around the suitability of the individual reviewers, JTI is particularly concerned that the methodology adopted by the reviewers is flawed. Best practice guidance on undertaking a review of the evidence base in the context of public health measures, co-authored by Professor Pope herself,<sup>261</sup> states that a systematic review has to meet a number of criteria in order to be effective, including: "...a critical appraisal of studies and grading of evidence."<sup>262</sup> The guidance goes on to state that: "Knowing that the individual components are of good quality does not itself indicate that the overall review meets quality criteria"<sup>263</sup> and puts an onus on the reviewer to determine this against a number of key criteria.

3.9 Unfortunately, this approach is not adopted by Dr Wang and Professor Pope, as they simply assume that the studies are “good quality” and conclude that: “*In the absence of population studies or experiments, this is probably the best evidence available.*” (emphasis added).<sup>264</sup> This is a low threshold to apply to a review of the evidence base, given its “centrality to the debate” on plain packaging.

3.10 Indeed, their analysis amounts to a relatively scant review of certain of the “stronger and weaker” studies and, of more concern, accepts wholesale the quality ratings for each study as determined in the Systematic Review. It is not – as it claims to be – an independent appraisal of the evidence base, nor does it undertake a comprehensive review of each of the studies underlying the Systematic Review to determine if they are methodologically sound. Rather, it assumes that the Systematic Review, and the studies underlying it, are reliable, which expert analysis has found is not the case.

3.11 In any event, Dr Wang and Professor Pope merely repeat the conclusion of the Systematic Review and state that the evidence: “...provides a reasonable summary of attitudes and perceptions regarding plain packaging.”<sup>265</sup> Ultimately, however, they acknowledge that there is: “...an absence of strong experimental or quantitative analyses of actual behaviour...”<sup>266</sup>

#### The evidence base is not ‘the best available’

3.12 The Chantler Report seeks to fortify the Systematic Review, the limitations of which are acknowledged by Sir Cyril Chantler, by stating that: “...the methods employed by the Stirling Review, such as the search protocol, were appropriate and as close as could be achieved to a Cochrane standard given the particular circumstances and nature of the problem being considered.”<sup>267</sup> The position adopted by Sir Cyril Chantler appears to be that as the Systematic Review was close to the standards set by the Cochrane Collaboration, this forgives it of any of its (acknowledged) limitations.

3.13 The Cochrane Collaboration is: “...a global independent network of health practitioners, researchers, patient advocates and others, responding to the challenge of making the vast amounts of evidence generated through research useful for informing decisions about health”.<sup>268</sup> The researchers are solely made up of a community of public health professionals, and the standards applied by these researchers are unique to the Cochrane Collaboration. In measuring the reliability of the Systematic Reviews only against standards applied by the Cochrane Collaboration, the Chantler Review fails to consider methodologies in other fields which are equally or, arguably, more relevant to the issue of plain packaging, such as consumer behaviour. Professor Devinney discussed this issue with the Chantler Review Team, indicating that he was a founding member of an “evidence-based” collaboration in his own field, and that, in reviewing studies from an angle not rooted in public health methodologies, such as the Cochrane Collaboration, he was: “...applying a different lens to the research – an example of ‘methodological pluralism...’”<sup>269</sup> Concerns have also been raised regarding the methodologies adopted by the Cochrane Collaboration.<sup>270</sup>

3.14 In sum, even if the Systematic Reviews broadly followed the standards of the Cochrane Collaboration, this does not, of itself, make them, or the studies underlying them, reliable evidence.



### **The Chantler Report wrongly dismisses or ignores evidence "pointing the other way"**

3.15 The Chantler Report seeks to mitigate the limitations of the evidence base by pointing to its consistency in findings, stating that: "...it [the evidence base] *points in a single direction, and I am not aware of any convincing evidence pointing the other way.*" Further, it states that: "*Contrary to the criticisms made, the authors [of the Systematic Review] rightly place emphasis on the overall consistency of results collected through multiple study designs and across several countries (and the absence of evidence pointing in the other direction).*"<sup>271</sup>

3.16 These statements, however, dismiss, a number of studies / important data / expert analysis "*pointing the other way*"<sup>272</sup> often with no or very limited explanation, including for example:

- (a) Professor Steinberg's Report and Letter to Sir Cyril Chantler (the detail of which was set out in paragraph 2.8 of JTI's submission to the Chantler Review) where, in respect of the question of whether plain packaging is likely to have any actual positive public health impacts and the evidential position on the same, Professor Steinberg explains that "*...measures to prevent or reduce youth smoking are only likely to be effective if they are informed by scientific research on risk-taking and decision-making in this age group. I know of no scientific evidence that suggests, nor would my understanding of the current research on adolescent decision-making suggest, that cigarette packaging is relevant to adolescents' decisions to experiment with or continue smoking...*"<sup>273</sup>
- (b) Professor Deviney's Reports, and the evidence given by him at his meeting with the Review Team. The Chantler Report concludes that: "*I have come to the view that the criticisms made [of the studies] rarely go beyond the limitations recognised and described in the Stirling Review by its authors*"<sup>274</sup> and that "*the criticisms of the primary research have a tendency to take a 'binary approach', dismissing studies in their entirety on the basis that each has some (usually identified) limitations.*"<sup>275</sup> In fact, this statement is at odds with the discussion which took place between Professor Deviney and the Review Team, in which Professor Deviney "*...noted that he had limited a number of his criticisms, while at the same time acknowledging where the studies had done things well.*"<sup>276</sup> As discussed in detail at paragraph 2.23 above, the Chantler Report itself acknowledges weaknesses in the evidence base;
- (c) the Universities of Zurich and Saarland studies,<sup>277</sup> which undertake a statistical trend analysis to examine the possible effect of plain packaging on smoking prevalence of minors and adults in Australia. The studies related to data from pre and post the introduction of plain packaging in Australia, and found that plain packaging had no effect on smoking prevalence, either among minors or adults. Professors Wolf and Kaul met with one of the members of the Chantler Review Team to discuss the results of their study in relation to minors (as their study in respect of adults was not published at the time), but no reference to this study or their meeting is included in the Chantler Report; and
- (d) the study by London Economics, which found that: "*...the data does not demonstrate that there has been a change in smoking prevalence following the introduction of plain packaging and larger health warnings despite an increase in the noticeability of the new health warnings.*"<sup>278</sup> Again, this study is not referred to in the Chantler Report.

3.17 The Chantler Report does not deal with the contention raised by Professor Steinberg that: "*...there is no evidence that changes in cigarette packaging affect adolescents' experimentation*

with or use of cigarettes... The impact of changes in cigarette packaging on adolescent smoking is, at best, likely to be very small",<sup>279</sup> and his conclusion that "[o]verall, it is unlikely that standardized packaging will affect underage smoking at all, either in terms of initiation or progression..."<sup>280</sup> As Professor Steinberg sought to clarify in his meeting with the Chantler Review Team, the "very small" effect of plain packaging (if it exists at all) would be in relation to any single adolescent's decision to take up smoking: i.e., for some individual adolescents, plain packaging may, at best, play a marginal role in his or her decision to experiment with cigarettes. He was also clear that he was not saying that plain packaging would cause any adolescent (or small group of adolescents) to start smoking.<sup>281</sup> Professor Steinberg had explained that, by contrast, at a population level, plain packaging is not likely to have any effect on underage smoking.<sup>282</sup> The note of this meeting, however, erroneously portrays Professor Steinberg's views as being that plain packaging will deter a small number of people from taking up smoking, such that "...small effects mount up at a population level."<sup>283</sup> This is not a justifiable interpretation given both the remainder of the findings in Professor Steinberg's Report and Letter to Sir Cyril Chantler, and the clarification he provided to the Chantler Review Team on this point.

3.18 In addition, the Chantler Report does not adequately respond to the contention raised by Professor Devinney in his meeting with the Chantler Review Team, and by JTI in paragraph 2.32(a) of its Chantler Submission, that the consistency of findings in the survey research is likely to be a result of the authors applying the same fundamentally flawed methodologies time and time again. This is despite Professor Devinney explaining to the Chantler Review Team that: "...it remained possible for an accumulation of studies pointing in one direction to show a false conclusion if all that researchers did was continue to use the same basic measures in the same basic way."<sup>284</sup>

#### The Chantler Report accepts studies without assessing their reliability

3.19 The Chantler Report appears to rely, at paragraph 4.15, on a study by Hatchard et al. (2014)<sup>285</sup> which criticised the evidence submitted to the Chantler Review by tobacco manufacturers. The statement is simply made that the study was published and found that the tobacco product manufacturers "...misrepresented the evidence base".<sup>286</sup> As an independent reviewer, it is surprising that Sir Cyril Chantler did not comment upon why he found the study / criticism made to be sufficiently reliable to justify such reliance on it.

3.20 This is even more disappointing because the study itself makes unfounded and unreasonable statements about the "quality" of certain tobacco manufacturers' previous submissions on the issue of plain packaging (including JTI's 2012 response) and expert reports commissioned on behalf of tobacco manufacturers, despite these experts being leading individuals in their fields. One of the criticisms made of JTI's submissions is of "misleading quoting of evidence". However, on review of each of the alleged instances, it is clear that each amounts to no more than the exclusion of words which do not have any material impact on the meaning of the sentence. By way of illustration, an example given in the study of such "misleading quoting of evidence" in JTI's 2012 consultation response is as follows, with the word complained of identified in bold / square brackets:

*"[Yet] in nearly every study of experts carried out within the judgment and decision-making approach, experience has been shown to be unrelated to the empirical accuracy of expert-judgments."*

#### 4. THERE IS NO LINK BETWEEN MARKETING AND ADOLESCENT SMOKING INITIATION

##### Introduction

4.1 Paragraph 7 of the Chantler Report states that: *"There is very strong evidence that exposure to tobacco advertising and promotion increases the likelihood of children taking up smoking. Industry documents show that tobacco packaging has for decades been designed, in the light of market research, with regard to what appeals to target groups."* The Chantler Report also concludes that: *"...the appeal of branded packaging acts as one of the factors encouraging children and young adults to experiment with tobacco and to establish a continuing habit of smoking."*<sup>287</sup>

4.2 No evidence that branded packaging has actually been shown to cause minors to start and/or continue smoking is put forward to support either of these statements directly. Instead, the Chantler Report reveals that this conclusion has been reached on the basis of three unsubstantiated and false premises: (a) marketing cannot only affect brand switching; (b) marketing "spillover" can affect people (e.g. minors) outside the target audience sufficiently to cause them to alter their behaviour; and (c) advertising increases smoking prevalence. For the reasons explained in paragraph 3.5 of the main body of this response, the Chantler Report is wrong to reach such conclusions.

4.3 No evidence is put forward by the Chantler Report to substantiate how exposure to advertising and promotion could increase the number of minors deciding to become a smoker and when that decision is a complex one engaging the decision-making processes of minors regarding risky products and the role that advertising, a medium that induces scepticism from audiences from an early age, can play. In any event, the fact that, even if true, tobacco manufacturers have designed packaging to "appeal" to its target audience is neither controversial, nor does it follow on in any way from the prior statement. The target audience of JTI is existing adult smokers. It is not minors or non-smoking adults.

4.4 The Chantler Report also cites "industry documents" which refer only to adults. It is entirely legitimate and appropriate for tobacco product manufacturers who are in direct competition with each other (as accepted by the 2014 IA), in a declining market like the UK, to encourage brand loyalty among its users in its target market of existing adult smokers and to encourage brand switching by existing adult smokers.<sup>288</sup>

##### Failure to take into account basic marketing theory

4.5 The Chantler Report fails to take into account basic marketing theory. It employs instead an 'intuitive' approach,<sup>289</sup> weighing up the apparent plausibility of contrasting arguments. At the heart of the Chantler Report's conclusions about the effect of tobacco marketing is the belief that: *"...it is not plausible that the effect of branded packaging is only to encourage brand switching amongst adult smokers, and never to encourage non-smokers from taking up smoking."*<sup>290</sup> This intuition is misplaced given the very different nature and context of the two decisions. It is not only plausible, but it is the case, that branded packaging only influences brand choice amongst existing smokers. Once these erroneous assumptions are stripped away, there is in fact no basis for the Chantler Report to conclude that branded packaging encourages minors to start or continue smoking, even if the Chantler Report was right to equate branded packaging in the UK to advertising (which it was not).<sup>291</sup>

4.6 First, the Chantler Report argues that even if tobacco marketing is only targeted at existing adult smokers, manufacturers: *"...cannot explain how it would only ever attract*

*switchers from one brand to another, and would never encourage initiation...*<sup>292</sup> On the contrary, if the Chantler Review had commissioned evidence on the fundamental principles of how marketing works in a mature market, the ability of tobacco marketing only to affect brand choice amongst existing smokers (including retention of existing customers and price support) would have been readily explained. It is a basic tenet of marketing that it performs different functions at different stages of a product's "life cycle".

4.7 It is well accepted that when a product<sup>293</sup> is first introduced (such as the launch of smartphones), promotional marketing can communicate the product's attributes and benefits to persuade people to use that product (as well as to buy a particular brand). However, by the mature and declining stages of a product's life, consumers are aware of the product and its attributes, so marketing has a negligible impact on the consumer's decision to start using that product category. External factors become more important in deciding whether a consumer will participate in the category or not. Instead, the role of marketing is to differentiate brands, reinforce brand loyalty, limit price erosion and encourage switching behaviour (which is hugely important to all tobacco manufacturers in the UK).

4.8 Brand advertisements do not promote the generic act of product consumption, nor can they persuade someone to join a mature, known category. They promote the brand. Tobacco packaging is described in the Chantler Report as having a promotional role, and acting as a "silent salesman".<sup>294</sup> The defect in this analysis is that the report does not clarify *what* the packaging is "selling" – the brand or the activity. JTI does not agree that branded packaging acts as an advertisement, but in any event, there is a significant difference between acting as an advertisement for a cigarette brand, and as an advertisement for the activity of smoking. The branded packaging conveys and builds upon the brand identity, and so can only be meaningful in differentiating brands, which is irrelevant to non-smokers.

4.9 This so-called "mature market theory" is a very well-known pillar of marketing.<sup>295</sup> It is not mentioned by the Chantler Report at all in considering what tobacco marketing can be expected to achieve in a mature, declining market like the UK. This market has existed for many decades and smoking prevalence in the UK has been in decline for some time. In addition, the product is well established with widely known attributes and uses. This means advertisements, even if they were possible in the UK in the future, could not communicate anything about smoking to the consumer which is at all likely to influence initiation, when the significant external factors which influence the decision to smoke are considered.

4.10 By contrast, many studies have shown (using statistical and empirical evidence) that tobacco advertising has an effect on building market share for a brand (from among existing smokers) and on brand choice.<sup>296</sup> Given the impossibility of marketing to change non-smokers' decision not to participate in the category in this mature market (not to mention the lack of any intent to change non-smokers' minds), manufacturers focus on winning share within the existing market. This is of huge commercial significance to tobacco manufacturers in the UK.

4.11 The Chantler Report also fails to differentiate between the decision to start smoking and the choice between different brands of cigarettes for an existing smoker. This failing is significant because these are very different types of consumer decisions. The process of becoming a regular smoker happens over a prolonged period of time and involves significant emotional involvement. The factors which influence the two decisions are also therefore significantly different. The decision to smoke or not to smoke is influenced by a range of well-documented external factors, such as parental influence and peer behaviour and not by brand imagery.

4.12 - This is confirmed by the DH's own evidence on the predictors of smoking, and corroborated by the expert research on which JTI relies.<sup>297</sup> The controversy of smoking as an activity, and minors knowing that smoking is an activity met with disapproval by many adults only adds to the significance of the decision. By contrast, the decision for a smoker as to which brand to smoke is a habitual purchase decision often made quickly, which means that pre-existing knowledge of a product's brands and characteristics can play an important role in this simple decision.

4.13 The Chantler Report asserts that it is "*not plausible*" that branded packaging only influences brand choice amongst smokers, and never causes initiation among non-smokers. This disregards the differences between the ways that smokers and non-smokers process tobacco advertising (insofar as advertising exists) and packaging. It also ignores the different ways in which advertising and packaging are regulated.<sup>298</sup> When consumer psychology is taken into account, it is not only plausible, but it is the case that a factor (such as packaging) which can play a part in a decision as to brand choice, will have no influence upon the decision to start (or continue) smoking.

#### "Spillover"

4.14 The second basis for the Chantler Report's conclusion that packaging is a factor encouraging smoking initiation is the importance attributed to: "...a '*spill-over*' effect, whereby products aimed at young adults could also, albeit inadvertently, appeal to children."<sup>299</sup> Although this spill-over effect is not actually demonstrated, the Chantler Report finds that this is "*extremely plausible*". This fails to take into account the way that consumers have been shown to process marketing, and the possible effects of marketing on non-smokers (whether minors or adults). Clearly it is true that non-smokers may see tobacco packaging (even in a display ban environment), but the question is what effect (if any) is this likely to have on them? More specifically, will this lead to them becoming smokers when they would not have otherwise become so?

4.15 The Chantler Report repeatedly acknowledges the careful research underlying marketing decisions. Manufacturers of FMCG go to great lengths to ensure that their marketing is targeted to the correct segment to avoid inefficiency and wasted marketing spend. This obviously greatly reduces the likelihood of the packaging being "attractive" to people outside the target segment (so this cross-segment appeal is not "*highly likely*" as the Chantler Report suggests). That said, even if the "*colours, size, shape*" of a specific pack are proven to be "attractive" to a 16 year old (as implied by paragraph 3.6 of the Chantler Report), this is irrelevant when the 16 year old (who had previously decided to be a non-smoker) does not start smoking as a result. As set out above, standard marketing theory indicates that packaging is not capable of influencing a non-smoking consumer's decision to smoke. Further, finding an aspect of a product's packaging attractive is not the same as finding the actual product (and its use) attractive. In any event, no 16 year old can lawfully purchase, or should otherwise be able to access a tobacco product in the UK.

4.16 As evidence that minors have been shown to make choices influenced by brand imagery, paragraph 3.18 of the Chantler Report points out that children have been shown to be influenced by fast food branded packaging. This illustrates well how marketing can influence the brand choice of existing consumers who are already lawfully buying the product or lawfully having it bought for them. In the study relied upon, minors are exposed to television advertising and are already consumers of the fast food in question, so the McDonald's packaging in the study cited is effective in influencing minors to choose the branded carrots over the non-branded carrots. This also illustrates how people, including minors, process marketing which is relevant to them.

### The "likelihood of smoking"

4.17 The third and final premise which the Chantler Report relies upon for its conclusion that marketing causes smoking is that, "...exposure to tobacco advertising and promotion increases the likelihood of smoking."<sup>300</sup>

4.18 First, the Chantler Reports overlooks the point that, by virtue of a suite of previous regulatory interventions (most notably the Tobacco Advertising and Promotion Act 2002), tobacco product manufacturers have effectively been stopped from advertising their products in the UK for over a decade, and will be entirely stopped from April 2015 when the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004 are fully revoked.

4.19 Second, this statement is misleading, as it is far from proven that advertising increases smoking prevalence, and the Chantler Report seems to ignore substantial evidence to the contrary.<sup>301</sup> The vast majority of published studies conducted to understand why minors take up smoking fail to identify tobacco marketing as a primary or meaningful/significant cause.<sup>302</sup> Studies show that the primary causes of smoking initiation are social (e.g. peer pressure, parental or sibling influence) or psychological (rebellion and risk-taking). This is true of the DH's own evidence on the predictors of smoking.<sup>303</sup> Certain personality factors have also been shown to be significant risk factors for future smoking behaviour.

4.20 There is extensive literature on the subject of tobacco advertising bans' effect on tobacco consumption, which mostly concludes that laws prohibiting or significantly curtailing tobacco advertising in numerous countries have not had an effect on the overall demand for tobacco.<sup>304</sup> This evidence is noticeably absent from the Chantler Report.

4.21 In any event, this literature looks at the effect of tobacco advertising (in the traditional sense) upon smoking. The Chantler Report provides no evidence at all that branded packaging in the UK, where manufacturers have effectively been stopped from advertising their products, increases tobacco consumption.

### The Chantler Report's reference to the Australian litigation

4.22 JTI also wishes to put into its correct context a statement which the Chantler Report apparently relies on (on at least three occasions) to sustain the argument that tobacco product manufacturers align packaging and advertising. The Chantler Report (repeated at paragraph 69 of the 2014 IA) seemingly attaches considerable weight to the point that:

*"Branded packaging is seen by the industry as an important way to communicate the quality and product characteristics to consumers, to encourage smokers to maintain their identification with their chosen brand. This appears to be particularly important in the absence of advertising or point of sale display. This is borne out by legal representatives of Japan Tobacco International in proceedings in the Australian High Court, stating that the Commonwealth 'is acquiring our billboard', your Honour, in effect."*

4.23 During the full court hearing from which the quotation was taken (namely a challenge brought by manufacturers regarding the Australian Tobacco Plain Packaging Act 2011), Counsel for JTI used a 'billboard' analogy in the context of the argument that the manufacturers' ability to control the space on the pack, in particular the space not used for health warnings, was extinguished by the Act, as it prescribes how that remaining space must be used (i.e. with a drab brown background, standardised font for the brand name, etc.). To put the quote in its proper context, therefore, Counsel used the analogy in the following way:

*“For example, were it our billboard, we could put any message on our billboard. What the Commonwealth has done is to prescribe the message that the Commonwealth desires to have put on that billboard and that message does not have to be a message such as this one, the Pantone colour with our trademark on it. It could be any message whatsoever. What the Commonwealth’s law does, and within the ambit of the argument presented here, says that under the Commonwealth law, this packet, which remains our packet, is appropriated for whatever message the Commonwealth seeks to apply to that product.”<sup>305</sup>*

4.24 It is clear that the analogy was not being used to equate packaging with advertising, and that the references to the analogy both in the Chantler Report and the 2014 IA unfairly take the quotation out of the specific context in which it was being used.

## 5. TREATMENT OF THE ILLICIT TRADE ISSUE BY THE CHANTLER REPORT

5.1 Despite the gravity of this issue, the DH has consistently failed to analyse meaningfully the impact plain packaging would have on the illicit trade in the UK.<sup>306</sup> The lack of an adequate or fair analysis in respect of illicit trade by the Chantler Report represents yet another example of such a failure.<sup>307</sup>

5.2 There are inherent difficulties in understanding the workings of the illicit trade due to its clandestine and complex nature in the UK. In cutting through the layers of complexity, however, the Chantler Report relies on oversimplification and generalisation, which allows it to arrive at a conclusion that assists its broader views in support of the introduction of plain packaging.

5.3 The review poses the question of whether it is likely that plain packaging will lead to an increase in tobacco consumption by increasing the consumption of illicit products. It attempted to tackle this issue by seeking responses to the following questions:

- (a) Is it easier to counterfeit plain packaging?
- (b) Are consumers duped by counterfeits?
- (c) Will plain packaging boost demand for illicit branded products?

5.4 The Chantler Report’s response to each question above was an unqualified and resounding “no” – despite previous indications to the contrary by the DH itself<sup>308</sup> and specialists in this field (including academics<sup>309</sup> and those with valuable first-hand experience, such as packaging manufacturers and enforcement agencies<sup>310</sup>). The highly intricate workings of this illicit trade and the significance of its impact merit a more thorough analysis than the one provided in the Chantler Report. This lack of analysis has meant that the conclusions reached in the Chantler Report and the reasoning behind such conclusions conflict with the reality of the evidence put forward by those with relevant expertise.

5.5 The 2014 IA suffers from the same weaknesses as those of the Chantler Report, as the 2014 IA largely relies on the “findings” of the Chantler Report, rather than carrying out its own assessment of the impact of plain packaging on illicit trade. The ways in which the Chantler Report and, in turn, the 2014 IA failed in their analysis of illicit trade issues are dealt with in greater detail in Annex 2.

## ANNEX 2: QUESTION 4 – IMPROVING THE 2014 IA

### 1. INTRODUCTION

1.1 In light of Question 4 of the Consultation, we set out below some of the key failings of the 2014 IA which, in the limited time available, JTI has identified. A more comprehensive analysis would require more time. As identified in the main body of this response, the 2014 IA's deficiencies are so serious that it cannot now be salvaged by the future 'improvements' sought as part of this Consultation. In this Annex we explain why this is the case by reference to:

- (a) general failings which permeate the 2014 IA;
- (b) the 2014 IA's inadequate assessment of illicit trade issues;
- (c) the 2014 IA's failure to consider alternative means of achieving its objectives; and
- (d) issues raised by the 2014 IA of relevance to the Equality Act 2010.

### 2. GENERAL FAILINGS OF THE 2014 IA

2.1 JTI acknowledges that it is not always possible to pinpoint the exact costs and benefits that a regulatory proposal is likely to have. In circumstances where it is not possible to do this, however, it is incumbent upon the regulator to take all reasonable steps to estimate credibly the true value of a given proposal. In doing so, they must give equal regard to both the costs and benefits that are likely to accrue over and above the existing regulatory environment, i.e. the baseline. The importance of conducting this process objectively and with an open mind is all the more important when controversial and complex measures, such as the plain packaging of tobacco products, are under consideration,<sup>311</sup> and previous consultations have failed to conduct the process in this way.

2.2 Far from adopting an impartial and balanced approach, the document appears to reflect a political (rather than evidential) approach to regulation.<sup>312</sup> Throwing 'good after bad' in the way that the DH appears to be proposing will not salvage the 2014 IA. Nor will it serve as an adequate platform for the future impact assessment(s) that it concedes will be required. If, despite JTI's submissions to the contrary, the DH chooses to depart from its previously stated position in respect of plain packaging, it could not properly do so without first ensuring the impact assessment procedure is repeated in a manner: (a) that takes into account the factors addressed in this response; and (b) which is genuinely open-minded and not merely seeking to arrive at pre-determined conclusions.

2.3 JTI identifies in this Annex those concerns that it has with the 2014 IA. The RPC shared a number of JTI's concerns regarding the quality of the 2014 IA. As with the 2012 IA, the 2014 IA was only awarded an Amber rating by the RPC, indicating that HM Government's own regulatory experts were concerned by it.

2.4 One of the RPC's principal concerns was that: "...the Department [of Health] should provide a fuller discussion of a number of the costs along with some indication of their likely extent where possible" (emphasis added). We agree, but as explained in this Annex, the 2014 IA has not done this. Instead, the authors have sought to do the bare minimum to address the RPC's concerns, and the 2014 IA continues to lack a thorough assessment of the likely costs of plain packaging, despite the RPC's recommendation. This is despite the fact that: (a) there



were almost four weeks between the date of the RPC's opinion (29 May 2014) and the publication of the 2014 IA (26 June 2014); (b) the 2014 IA, as noted by the RPC, does attempt, unlike for the costs: "...a full assessment of the wide health benefits associated with the measure"<sup>313</sup>; (c) two years previously the RPC identified similar concerns in relation to the 2012 IA; and (d) JTI has previously identified to the DH, including in its 2012 consultation response, many of the errors of methodology and substance that are now repeated in the 2014 IA.

#### Lack of meaningful objectives

2.5 The 2014 IA states that a plain packaging measure would have no fewer than nine 'objectives'. As JTI explains at paragraphs 2.4 to 2.7 in the main body of this response, many of these stated goals are not legitimate policy objectives capable of justifying further tobacco regulation. Lacking the evidence to pursue a meaningful target, the DH has settled for an assortment of objectives to reflect the 'evidence' it does have. Favouring 'quantity over quality' in this way to justify desired policy is against Better Regulation principles, and does not remedy the lack of evidence to justify plain packaging.

#### Flawed baseline scenario

2.6 A clear, credible and meaningful baseline scenario is the indispensable starting point for any impact assessment. As explained in the Government's "IA Toolkit: How to do an Impact Assessment", it is essential to: "...present only the costs and benefits that are additional (i.e. incremental or marginal costs and benefits) to those that would have been incurred if no action were taken (i.e. versus the baseline, counterfactual or 'do nothing')".<sup>314</sup> An analysis of any additional costs and benefits is only possible once the baseline itself is adequately understood.

2.7 Professor Martin Cave OBE (an expert in regulatory economics who has specialised knowledge in the design of regulatory policies to achieve economic and also social objectives, including expertise in the field of IAs), has previously, in an expert report for JTI, identified the OECD Checklist for Regulatory Decision-making's requirement that: "...regulators must review and evaluate existing legislation (including whether it is being effectively enforced) and other options before regulating further."<sup>315</sup>

2.8 Properly understanding the baseline scenario (and therefore whether further regulation is capable of delivering a material net benefit to the status quo) is vital so that the unnecessary 'layering' and gold plating of regulatory measures can be avoided. Regulators should seek to avoid this for a number of reasons, including that:

- (a) once markets adapt to regulatory changes, the costs of compliance are much less than the costs of compliance in the period of adjustment. A constant churn of new regulations therefore increases the overall regulatory costs of firms impacted by regulatory change relative to a situation in which they are permitted to adapt to one regulatory measure before its impact is properly evaluated and, if required, the next is introduced;
- (b) regulation often raises barriers to entry (e.g. by raising the costs of building compliance systems and training staff to use such systems). A small increase in barriers to entry from any one regulation might not materially damage the effectiveness of competition in a market. However, successive small increases in barriers to entry caused by the

layering of regulatory measures may do so. Where barriers to entry are large, competition can be impaired; and

- (c) two or more regulations that attempt to address the same issue might not produce benefits equal to the sum of the benefits each would produce in isolation.

2.9 In the context of tobacco regulation, the baseline must determine how pre-existing declines in tobacco consumption and/or prevalence in the UK are likely to continue, absent the proposed regulation. It is from this essential foundation and reference point that the 2014 IA's costs/benefit analysis should flow. In the context of the 2014 IA, any such credible analysis is frustrated by a baseline analysis which is ambiguous, inconsistent and, in places, misleading.

#### *What is the baseline employed in the 2014 IA?*

2.10 The answer to this important question is not particularly clear. Paragraph 15 of the 2014 IA summary states that "...intervention would be expected to generate after two years:

*a decline in the proportion of 11-15 year olds who have ever smoked of three percentage points (from a baseline of 27% at the time of the research); and*

*a decline in adult smoking prevalence of one percentage point (from a baseline of 21% at the time of the research), as more people find themselves able to quit." (emphasis added).*

2.11 The "the time of research" referred to is 2010. Given that the DH contemplates plain packaging being introduced in 2016, these figures cannot constitute a meaningful baseline. Towards the end of the 2014 IA, this point is effectively conceded when the authors provide what they consider to be up to date baseline figures: "around 21%" (not 27%) for 11-15 year olds 'ever smokers' and "about 19.7%" (not 21%) for adult smokers.<sup>316</sup>

2.12 As the Green Book states, an impact assessment:

*"...should provide an easy audit trail for the reader to check calculations, supporting evidence and assumptions...This should help to ensure that decision makers understand the assumptions underlying the conclusions of the analysis, and the recommendations put forward."<sup>317</sup>*

2.13 The lack of clarity surrounding the 2014 IA baseline deviates from this requirement, which precludes a proper assessment of the supposed incremental impacts of plain packaging.

#### *Detailed baseline analysis only comes after assessment of costs*

2.14 The purpose of a baseline scenario is to understand the costs and benefits that are additional to the status quo. Delaying any serious consideration of the baseline scenario until after an assessment of the costs of a plain packaging measure, as the 2014 IA does, defeats this purpose.

2.15 The 2014 IA, places the 'cart before the horse'. It seeks to determine the costs of a plain packaging measure before understanding the starting point from which those costs should be measured. Worse still, the estimation of costs does not even cross-refer to the subsequent analysis of the baseline. This makes the 2014 IA's costs analysis inaccurate as it is not - as it is required to be - clearly and consistently benchmarked against the baseline.

*In any event, the calculation of the baseline is deeply flawed*

2.16 The resultant calculation of the baseline is unclear, inaccurate and incomplete. These shortcomings are largely derived from the 2014 IA's failure to forecast adequately how the "tobacco market" might be expected to evolve (absent a plain packaging measure) in light of:

- (a) the current underlying downward trend in smoking prevalence;
- (b) trends in other markets, such as e-cigarettes; and
- (c) the impact of other regulatory measures.

*Failure to take account of the existing trends in smoking prevalence*

2.17 It is essential that any IA considering plain packaging should clearly articulate how it expects such a measure to accelerate the UK's existing downward trend in smoking. This is only possible once the reduction in prevalence in recent years is properly understood.

2.18 In this context, the 2014 IA makes the following assertion at the outset:

*"Tobacco use remains one of the most significant challenges to public health across the United Kingdom and is the leading cause of premature death in the UK. While rates of smoking have declined over past decades, in recent years this decline has lost momentum."*<sup>318</sup> (emphasis added)

2.19 It is not apparent that any meaningful attempt (quantitative or qualitative) has been made to incorporate this assertion into the baseline analysis. In fact, the notion that the decline in smoking rates has lost momentum appears to be directly contradicted elsewhere in the 2014 IA. Not least, paragraph 149 states that the impact of the display ban alone will lead to the number of 11-15 year old "ever smokers" falling from 27% in 2010 to 21% in 2016.<sup>319</sup> If it occurs as predicted, such a continued decline cannot fairly be described as "lost momentum".

2.20 The 2014 IA relies upon the Health & Social Care Information Centre's (HSCIC) "Smoking, drinking and drug use among young people in England" data series. A "key finding" of the 2013 data set of this series, made available to the public in July 2014, is that:

*"In 2013, less than a quarter of pupils reported that they had tried smoking at least once. At 22%, this is the lowest level recorded since the survey began in 1982, and continues the decline since 2003, when 42% of pupils had tried smoking."*<sup>320</sup>

2.21 This new data therefore further casts doubt on the suggestion that the decline in smoking prevalence is losing momentum. It is convenient for the 2014 IA to propose that such momentum has been lost and, as a result, claim that yet further regulation is required. But this assertion is not adequately substantiated. Instead, it appears to be excluded from the baseline analysis and even contradicted elsewhere in the 2014 IA where the authors state:

*"In England, we anticipate that legislation to end the open display of tobacco in shops and the revised TPD will help to sustain the medium to long-term downwards trend in smoking prevalence among the adult population."*<sup>321</sup>

### *Failure to take account of the e-cigarette market*

2.22 The market for e-cigarettes has grown in recent years and this growth is projected to continue.<sup>322</sup> In May 2014, for example, PHE which, as noted above, is an executive agency of the DH, acknowledged that the market for e-cigarettes is expected to continue to grow from £193 million in 2013, to £340 million in 2015.<sup>323</sup> Despite this, the DH does not include this significant growth – or even account for the possibility – in its baseline projection. This is a serious omission, particularly given that: (a) PHE also claims that: “Most users use [e-cigarettes] to either replace cigarettes in places where smoking is prohibited or discouraged, to cut down on smoking, to reduce harm from smoking, or to quit smoking”;<sup>324</sup> and (b) the 2014 IA states that plain packaging may: “...encourage innovation in the wider market for nicotine products that would not be subject to standardised packaging, such as e-cigarettes.”<sup>325</sup>

### *Failure to take account of other regulatory measures*

2.23 The 2014 IA’s baseline does not take sufficient account of all recent tobacco regulatory initiatives (referred to at paragraph 6.1 in the main body of this response) that the DH has stated will have a positive effect on smoking prevalence and/or consumption.<sup>326</sup> As far as JTI is aware, there has been no independent evaluation of whether any such measures have actually achieved their stated objectives.

2.24 Additionally, on 15 July 2014, the DH published an entirely separate consultation in relation to its proposal to ban smoking in private vehicles. Yet the 2014 IA makes no reference to this further regulatory proposal, let alone how it anticipates such a measure might affect its baseline projections. This is despite the fact that the 2014 IA asserts, at page 3, that plain packaging: “...may have benefits... due to second hand smoke exposure in homes and cars.”

2.25 In fact, the only regulatory measures that the 2014 IA does seek to incorporate into the baseline are the display ban and TPD2. It does so by reference to the estimated impacts of those measures as stated in the relevant impact assessments. To understand properly the 2014 IA’s baseline analysis it is therefore necessary to re-visit these impact assessments and the calculations they made regarding, respectively, the likely impact of the display ban and TPD2.

2.26 In relation to anticipated impacts of the display ban on smoking initiation among minors, the 2014 IA states that: “By the time both the TPD and standardised packaging policies are to commence (2016), we expect the result of the display ban to be a reduction in the proportion of ever smokers [aged 11-15] to around 21%. To reach this figure, we have applied the estimate of effectiveness data cited in the IA on the prohibition of tobacco displays at the point of sale for the effectiveness of this intervention, to a baseline of 25%”<sup>327</sup> (emphasis added).

2.27 The “effectiveness data” from the 2009 display ban IA appears to be (albeit the 2014 IA does not specify this) a Californian study conducted more than a decade ago by Henriksen et al. The study suggested that amongst schoolchildren: “...exposure to retail tobacco marketing resulted in a 50% increase in the odds of ever smoking.”<sup>328</sup> The 2009 IA noted the severe limitations of this study: “Clearly, the effect size in the Henriksen study is very large – and, as stated above, UK point-of-sale advertising is already quite restrictive, so the comparison is not entirely fair. The effect size in the UK could not reasonably be expected to be of this magnitude.”<sup>329</sup> Recognising these weaknesses, the 2009 IA suggested: “...that advertising and display of tobacco products yields only a 1-5% (instead of 50%) increase in the number of ‘ever smokers’.”<sup>330</sup> No reasoning or evidence was presented to substantiate this assumption; it

was merely put forward as an alternative to the untenable proposition that the UK display ban might lead to a 50% reduction in youth smoking.

2.28 The 2014 IA appears to take, from the 2009 IA, the mid-point of this unsubstantiated range (3%) and compounds that figure over a period of five years to predict the impact of the retail display ban on smoking prevalence (i.e. 25% in 2011 to: "around 21%" in 2016). Such an analysis, even if it was founded upon an evidence-based assumption, would be entirely without merit. Neither the Henriksen study nor the 2009 IA suggested that the impact of the display ban can be multiplied in this way.

2.29 In any event, the use of the 2009 IA as the basis of calculating any current or future impact of the display ban in the UK is misguided because:

- (a) expert analysis of smoking data for young people in other countries indicates that such bans have had no discernible impact in accelerating the already existing decline in smoking,<sup>331</sup> and
- (b) the display ban took effect in large shops in England, Wales, Northern Ireland and Scotland at various points in 2012 and 2013. In order to make the figures in the 2014 IA more robust, the DH could and should have undertaken an analysis of any actual impact of the display ban in the UK rather than rely on the 2009 IA, which is five years out of date (and which itself relies on an irrelevant American study more than a decade old). For reasons unknown, it did not do this.

2.30 The determination of the baseline in relation to anticipated adult quitters is similarly problematic. The 2014 IA states that: "*The decrease in prevalence due to the display ban is taken from the IA for the ending of tobacco displays. This gives us an initial baseline prevalence of around 19.8% in 2016.*"<sup>332</sup> The reticence in specifying the precise amount by which the 2009 IA would decrease quit rates is presumably because that document modestly predicted that the display ban "...*may also make it easier to successfully quit smoking*" (emphasis added). Given that the 2009 IA provides no specific figure or range to quantify the impact of the UK display ban on quitters, it is difficult – if not impossible – to imagine how the DH meaningfully used that document to calculate accurately the 2014 IA's baseline for quitters.

2.31 The 2014 IA's analysis of the baseline concludes by attempting to incorporate the predicted impact of TPD2 (as set out in the TPD2 impact assessment) on smoking prevalence. The analysis in the TPD2 impact assessment is therefore relevant to understanding the baseline scenario presented in the 2014 IA.

2.32 The 2014 IA, both in relation to initiation and quitters, states that: "*We assume the TPD is expected to reduce tobacco consumption by a factor of 2.15% over five years...*" When predicting this impact on prevalence in the EU, the European Commission was clear that: "*It has to be stressed that this figure is a best effort estimate.*"<sup>333</sup> The 2014 IA makes no recognition of this qualification, let alone examining how this uncertainty affects the baseline.

2.33 Nor does it seek to address the various flaws that undermine the European Commission's assumption that TPD2 will lead to 2.15% reduction in consumption. First and foremost, the TPD2 proposal to which that assumption relates differs significantly from the TPD2 that has now actually been adopted. Moreover, the TPD2 IA also misquotes data from an Australian IA.<sup>334</sup> It fails to acknowledge that evidence it cites from a DH IA<sup>335</sup> on the

introduction of pictorial warnings is derived from an untested assumption made by the DH to assess the impact of the tobacco advertising ban in 2001.<sup>336</sup> In short, the prediction made by the European Commission as to the likely impact of TPD2 on prevalence is not reliable, even if TPD2 (as adopted) is upheld by the courts. By simply 'copying and pasting' this assumption the DH has ensured the 2014 IA suffers from the same fundamental failings.

#### **Beyond the baseline: "best guesses" as to impacts on prevalence**

2.34 In relation to Option 2, the 2014 IA speculates as to the future impact that a plain packaging measure will have on smoking prevalence over and above its already flawed baseline.

2.35 In predicting impacts on prevalence, the 2014 IA refers to work commissioned by the DH, which asked experts in tobacco control to provide "best guesses" as to the likely percentage reduction in smoking prevalence among adults and minors two years after the introduction of the measure. The median estimate given in this study, a three percentage point reduction, is then used in the 2014 IA as a central figure in the costs / benefits analysis. For example, in relation to smoking initiation, the 2014 IA states that: "*On the basis of Pechey et al. (2013) findings, we use the reduction in prevalence of 3 in 27, or around 11 %, to represent the impact of standardised packaging given existing tobacco control measures.*"<sup>337</sup>

2.36 JTI has previously raised detailed concerns on this study,<sup>338</sup> and does not repeat them here. In summary, however, reliance on this study (acknowledged guesswork) to determine the impact of plain packaging on smoking prevalence is inappropriate given that:

- (a) expert analysis concludes that it is: "*...seriously flawed and its conclusions cannot be considered to have much, if any, validity.*"<sup>339</sup>
- (b) there is a wealth of evidence on the use of expert judgements which shows clearly that experts invariably (and overwhelmingly) underperform statistical models;<sup>340</sup>
- (c) so far as JTI is aware, neither the DH nor Pechey et al. has been prepared to identify publicly the names of the individuals whose best guesses form the basis of the study. As a result, consultation respondents are prevented from assessing whether these individuals have the necessary academic expertise and independence (both from the DH and plain packaging as a policy). Given that this study's guesswork now forms the basis for a highly controversial and restrictive policy proposal, this represents a troubling lack of transparency. The DH justified the approach of the Pechey et al. study on the basis that it followed academic best practice on the use of expert judgment panels (and cited guidance in that regard). However, one of the authors of that guidance has raised specific concerns with the DH about such an approach, stating in a response to the 2012 Consultation that: "*the list of potential experts would seem to favour those that would have an economic / political view against tobacco use. Drawing experts from this pool and not considering motivational bias to be a disqualifying factor would seem to invite biased results. This is essentially an economic issue and I wonder if these organizations can provide well qualified economists*"<sup>341</sup> and
- (d) the 2014 IA claims elsewhere it is unable (or unwilling) to undertake what would essentially be equivalent or similar analysis in respect of other crucial issues. For example, in respect of the impact of plain packaging on the illicit trade in tobacco products, the 2014 IA states that: "*We conclude that there is likely to be an increase in*

*the UK duty unpaid segment but we have no means of quantification.*<sup>342</sup> Irrespective of the appropriateness of relying on guesswork, it is noteworthy that the 2014 IA is content to rely on guesswork in respect of the purported evidence of plain packaging (something which Sir Cyril Chantler identified as not being capable of quantification), but at the same time does not take a similar approach to calculate the very significant costs of such a measure.

### **Failure to quantify significant impacts**

2.37 The 2014 IA adopts a ‘cherry-picking’ approach to the quantification of costs. Consequently, and as the 2014 IA concedes, “*potentially significant*” impacts of plain packaging are omitted from the balance sheet of costs and benefits altogether.<sup>343</sup> JTI recognises that quantifying precisely every potential cost of a policy proposal may not always be possible. However, omitting significant costs, when, for example, an estimate or range might have been provided, inevitably creates a misleading impression of the true value of the measure under consideration.<sup>344</sup> If key costs cannot be assessed, that of itself may mean the prudent policy-maker should not proceed with the policy.

2.38 The extent to which the 2014 IA’s costs-benefit analysis is detached from commercial reality is demonstrated by the fact that, in its final estimation, tobacco manufacturers are said to make a net gain from plain packaging.<sup>345</sup> This is clearly nonsensical, and an oversimplified estimate used to justify the preferred policy option.

2.39 By its own admission, the 2014 IA fails to quantify or provide any monetary assessment of:

- (a) “*...lost consumer surplus...*”;
- (b) “*...a rise in legal cross-border importation of legal branded tobacco from other countries in the European Union...*”;
- (c) “*...a rise in consumption of illicit tobacco products...*”; and
- (d) “*...[r]econfiguration of machinery (eg plates) to comply with new packs.*”<sup>346</sup>

2.40 These omissions cannot be rectified simply by acknowledging the fact of them. As guidance issued by BIS makes clear, the point of any IA is: “*...to enable the Government to weigh and present the relevant evidence on the positive and negative effects of such interventions*”<sup>347</sup> (emphasis added). The approach adopted is not good enough, especially given this is the DH’s third major consultation on this policy.

### ***The IA’s failure to understand the impact on “branding”***

2.41 As the 2014 IA concedes, plain packaging would deprive JTI and other manufacturers of the value of their brands (which, being these manufacturers’ most valuable assets, are worth billions of pounds).<sup>348</sup> In fact, the summary of quantified costs itemised at paragraph 19 of the 2014 IA refers only to three costs: (a) manufacturing costs; (b) Exchequer losses; and (c) “*...loss of brand value to manufacturers and retailers...*” The 2014 IA fails even to attempt a proper quantification of the property being deprived.<sup>349</sup>

2.42 The £166 million “*...one-off loss of value to tobacco manufacturers and retailers resulting from standardised packaging in the base case...*”<sup>350</sup> attributed to this third and

confusingly described cost is not in any sense an estimation of the value of tobacco manufacturers' deprived IPRs, despite the 2014 IA recognising in paragraph 89 that: "[T]he impact... is therefore best expressed as a one-off decline in the value of the assets..." (emphasis added).<sup>351</sup> Rather, this £166 million "one-off loss of value" figure appears to be an estimation of the costs to both manufacturers and retailers of: "[R]educed profits attributable to the reduction in brand value due to increased downtrading and due to reduced prevalence...". Even if this was the correct measure of loss to "...tobacco companies' UK shareholders..." and retailers "...discounted over the ten year time horizon of the IA" (and it is not), this assessment is undermined by the following incorrect assumptions in paragraphs 89 and 90 of the 2014 IA:

- (a) *"Any impact on profitability for manufacturers will over time be eroded as investors move capital between investment opportunities" and "[i]n the event that revenues fall... and lower profits are expected, capital will be re-allocated elsewhere."*

These assumptions ignore, amongst other things:

- (i) the fact that it is impossible to re-allocate elsewhere capital which has been eroded by the measure;
  - (ii) some capital is non-transferrable; the expense of moving remaining capital; and
  - (iii) the fact that in a free market, it is for the investor to choose where to invest their capital. Put simply, if the investor considered the alternative investment opportunity to be more advantageous it would not be the alternative to investing in tobacco product manufacturers.
- (b) *"Reduced profits resulting from reductions in demand will be offset by increased profits on goods and services purchased in place of tobacco."*

This assumption ignores:

- (i) the fact that any redistribution of profits away from tobacco products in favour of other goods and services will not be spent to the benefit of those whose property would be deprived by plain packaging (i.e. tobacco manufacturers);
- (ii) the risk that the benefits of any such "off-setting" would be lost to the real economy. As explained in section 3 of this Annex, the 2014 IA concedes that it is not "unreasonable to assume" that plain packaging will lead to a rise in the illicit trade of tobacco. By the 2014 IA's own analysis, a proportion of any "...offset... increased profits..." would therefore be expected to be received by organised criminals who may use it to subsidise a whole range of criminal activities;
- (iii) the role of tobacco as a main driver of footfall (i.e. the number of people entering a shop). In May 2014, the *Convenience Store* magazine, for example, stated that the average convenience store retailer receives 152 tobacco shoppers a week.<sup>352</sup> Small retailers, in particular, benefit from ancillary purchases (which may carry a higher profit margin for retailers) being made by purchasers of tobacco products, as was noted by Lord Howe when he served as the Conservative Party spokesperson for Health in the House of Lords in 2009:



*"People who come in to buy cigarettes typically buy other things as well, which carry a higher profit margin. If those people cease to patronise small shops, the effect on trade in those outlets could well be terminal."*<sup>353</sup>

The 2014 IA assumes that a plain packaging measure will reduce tobacco consumption but fails to address how the loss of such footfall purchases will affect such retailers as trade shifts to larger shops/there is less reason to make regular trips to a local shop; and

(iv) even assuming the 2014 IA's offsetting analysis is correct, such a process would only take place following a sustained period of transition during which lost profits would not be fully materialised elsewhere in the economy.

(c) *"...all cigarette packets cost broadly the same to produce..."*

JTI can confirm that this is not the case. Of JTI's UK brands, the most expensive pack to produce costs us over three and a half times more than the least expensive.

(d) *"...the excess revenue [i.e. 65p] on a higher price [brand] as opposed to a lower price brand is split between manufacturer and retailer."*

No evidence is put forward to support this claim on the basis of the 65p value relied upon. Again, JTI can confirm that it is incorrect. Not least, the 2014 IA – illustrating a broader lack of understanding of tobacco markets – ignores, amongst others, wholesalers and distributors from its profit split.

(e) *"...10% of the profits of multinational tobacco companies are received by UK shareholders."*

This inference is methodologically and commercially flawed, as explained further at paragraphs 2.61 to 2.67 below.

(f) *"...100% of the retailer's [profit] share is retained in the UK"*

Self-evidently, this assumption is incorrect. In June 1999, for example Asda – one of the UK's largest tobacco retailers – was bought by Wal-Mart Stores Inc. (an American multinational, listed on the New York Stock Exchange).<sup>354</sup> Further, Tesco, Morrisons and Sainsbury's (all major tobacco retailers in the UK) are publicly listed companies whose shares can be and are owned by international investors. Sainsbury's, for example, is over 25% owned by a subsidiary of the Qatar Investment Authority.<sup>355</sup>

(g) *"...there are no extra profits for a Premium/Midprice pack above an Economy/ULP pack for the wholesale sector."*

No evidence is presented to substantiate this assumption which, for the reasons set out in paragraphs c and d, above, is flawed. To the extent that there are extra profits, the wholesale sector would typically receive a share of such extra profits.

(h) *"...these combined effects [should be treated] as a one-off loss of value to tobacco manufacturers and retailers..."*

It is incorrect to assume, as the 2014 IA does, that the costs to manufacturers and retailers are limited to a "one-off loss of value". Even if it is the case that the

deprivation of property effected by plain packaging is correctly analysed as a "one-off" event (an issue on which JTI does not comment), it is unclear why the 2014 IA rules out further, incremental value losses over time. This is particularly so when expert evidence submitted in response to the 2012 consultation concluded that there would be severe impacts from plain packaging over time: "*...as brand awareness degrades, competition initially becomes fixated on one or two brands for most price segments (damaging within-price-segment competition) and eventually there is large-scale down-trading into lower quality products.*"<sup>356</sup>

2.43 In calculating losses to "branding" in this way, the 2014 IA is effectively repeating the mistakes that were made in the 2012 IA. In its 2012 consultation response, JTI explained how the 2012 IA massively underestimated the true loss to JTI of a plain packaging measure because it failed to assess:

- (a) what tobacco product manufacturers' brands are worth;
- (b) how these brands are valued; and
- (c) the loss to JTI caused by the inability to use its branding and the deprivation of its trade marks.<sup>357</sup>

2.44 The £166 million "*...one-off loss of value to tobacco manufacturers and retailers...*" is orders of magnitude away from the true loss that plain packaging would cause to those negatively impacted (including packaging suppliers, designers, manufacturers, distributors, wholesalers and retailers) and is not offset, as the 2014 IA suggests, by: "*...cost-saving to business associated with the loss of scope for branding...*"<sup>358</sup>

2.45 JTI has invested very substantially in its IPRs, brands and products, and this is reflected in the strong brand equity of JTI's brands in the UK. Plain packaging would destroy the substance of our intellectual property. A 23 June 2014 report by Exane BNP Paribas also reaches this conclusion about deprivation.<sup>359</sup>

2.46 The 2014 IA's failure to quantify this impact is indefensible, especially when JTI and other respondents to the 2012 Consultation alerted the DH to the potentially substantial losses in their responses. A major food manufacturer, for example, emphasised the: "*...overwhelming value of trade marks and other rights for brand owners, in particular those which have been used for many decades and which have come to be uniquely associated in the minds of consumers with that brand owner...*" and the "*dramatic*" consequences of plain packaging for brand owners and consumers.<sup>360</sup>

2.47 The other reasons given in the 2014 IA for not attempting to quantify this loss are inadequate (including the fact that "*it is hard to assess*").<sup>361</sup> The value of this loss is one of many that must be addressed properly, or at least estimated, in order to quantify the overall impact of plain packaging on branding.

2.48 As explained above, the DH is content to rely on the "*best guesses*" of experts to determine the impacts of plain packaging on prevalence. Contrary to JTI's views, the DH appears to accept that this is an approach which is useful to predict policy impacts. If so, it is unclear why it has not attempted an equivalent analysis in respect of the real impact on manufacturers' brands.

2.49 It is incumbent on the DH either to: (a) estimate that loss in order to assess meaningfully the real costs and impacts of the proposed measure; or (b) admit that it has not assessed the real cost plain packaging poses to business, the Exchequer or the taxpayer (particularly in relation to the compensation that will be required for the property rights deprived).

#### *The 2014 IA ignores impacts on SMEs, jobs and competition*

2.50 Despite what is stated in the 2014 IA, it is not clear how any decision to proceed with a plain packaging proposal satisfies HM Government's 'One-in, Two-out' rule,<sup>362</sup> which was introduced in January 2013 as a drive to end red tape. Similarly, plain packaging would force HM Government again to ignore its Small Business Moratorium as thousands of small retailers and other SMEs would be affected by plain packaging proposals.

2.51 The 2014 IA is dismissive of the concerns of SMEs, stating that small retailers: "... in order to thrive in this changing world, already need to be planning their future business strategies, considering diversifying, and thinking about how to cope with all the trends and shocks that are likely to affect them."<sup>363</sup> This is a remarkable statement. That retailers currently face many challenges is no reason simply to add another to the list. On the contrary, it means that further regulatory burdens should be avoided wherever possible.

2.52 The 2014 IA costs analysis also says nothing about potential UK jobs losses, including at distributors, design agencies and packaging companies. In circumstances where the UK continues to suffer from an unemployment rate of over 6%, this is a regrettable omission.<sup>364</sup> The very real threat that plain packaging poses to jobs is widely recognised. Unite (the UK's largest trade union), for example, has recently explained that:

*"Around 6000 high-valued jobs in UK manufacturing and 53,000 more employed by businesses throughout the supply chain, such as packaging manufacturing, printing design, origination, cylinder production, engraving, embossing and creasing could be threatened and also the distribution, palletising and transportation companies involved in the sector."<sup>365</sup>*

2.53 The 2014 IA notes that: "*An additional benefit is the possible enhancement of price competition between tobacco companies and the potential for accelerated product innovation to exploit other avenues for product differentiation.*"<sup>366</sup> It appears that the 2014 IA wrongly assumes that the competition driving this innovation might generate jobs. This would be mistaken for two reasons:

- (a) TPD2 will (even if found to be lawful) all but end innovation vis-à-vis traditional tobacco products; and
- (b) TPD2's impact would be compounded by the fact that plain packaging will frustrate remaining innovation in the sector generally. The DH makes its flawed assumption despite detailed statements in previous JTI submissions on the current inter-brand and intra-brand competition in the UK tobacco market,<sup>367</sup> and expert analysis by Dr Lilico (at the request of JTI) which found both that: "... a plain packs requirement should be expected to have very significant negative competition effects in the UK" and would "... totally eliminate pack innovations."<sup>368</sup> The 2014 IA is silent as to how the potential for product innovation and differentiation could be enhanced by banning branding and creativity.

2.54 The 2014 IA adds that: "...an additional benefit is the possible enhancement of price competition between tobacco companies..."<sup>369</sup> In fact, the DH has elsewhere rightly recognised such competition as a potential disadvantage of plain packaging.<sup>370</sup> Not least, cheaper prices risk causing an uptake in smoking initiation among minors given that lower prices may increase availability and access for minors to tobacco products.

2.55 In light of the concerns previously raised by the RPC in respect of the 2012 IA and its failure to engage with the potential competition impacts of a plain packaging measure, it is disconcerting that the 2014 IA has essentially repeated the same (flawed) analysis. This is contrary to generally recognised best practice: "*The benefits for citizens and consumers are potentially largest where markets are open, new entrants can compete against incumbents, investment is encouraged and innovation flourishes. For this reason, we are committed to promoting open and competitive markets. Where appropriate, therefore, Impact Assessments need to show the extent to which the options under consideration would have an impact on competition.*"<sup>371</sup> Similarly, Professor Cave has previously identified the need for regulators to take into account: "...potential impacts on competition, including any distortionary effects of the proposal..."<sup>372</sup>

#### *The IA ignores any losses to adult smokers*

2.56 The 2014 IA acknowledges that: "*those who continue to smoke may also feel as though they have suffered a restriction in freedom*", but ultimately ignores this loss on the basis that "*the freedom to have branded tobacco...carries a cost to others.*"<sup>373</sup> In short, the DH accords no value (or loss as a result of plain packaging) to adult smokers who have chosen not to quit.

2.57 Despite paragraph 24 of the 2014 IA contending that: "*society arguably need not accord value to a freedom that involved inflicting harm on others,*" the DH cannot justify a measure on the basis of a reduction in harm to third parties without properly considering also the negative impacts on those that wish to lawfully use, make and/or sell the product. By way of analogy, it is widely recognised that the consumption of alcohol has serious societal impact, including a negative impact upon third parties (for example, by way of anti-social behaviour).<sup>374</sup> Similarly, being able to drive cars results in serious road traffic accidents. However, it is implausible that a policy maker proposing to ban alcohol products or cars would do so without at least attempting to assess any losses accruing to those informed adults who want to continue buying alcohol or drive.

#### *Failure to consider consumer surplus*

2.58 The 2014 IA acknowledges: "*...a consumer surplus loss to those who do not give up as a consequence of the packaging change.*"<sup>375</sup> There is, however, no attempt made to quantify this loss.

2.59 The 2014 IA justifies its position owing to the uncertain role of "*addiction*"<sup>376</sup> in smoking behaviour.<sup>377</sup> But such uncertainty is irrelevant to understanding the scale of consumer surplus loss to those that would choose to continue to smoke in a plain packaging environment. A calculation estimating such loss could have been made using consumer surplus loss analysis techniques that are used in other sectors. This omission places the 2014 IA squarely outside regulatory best practice and seriously undermines the relevance of its entire cost-benefit analysis.

## Miscalculation of costs of plain packaging

2.60 As well as excluding significant costs, the 2014 IA underestimates those costs that it does attempt to quantify.

### *Exclusion of non-UK shareholders*

2.61 In particular, the 2014 IA disregards the very significant losses that will accrue to non-UK shareholders as a result of plain packaging. Not only does this effectively make the calculation of the costs of plain packaging meaningless, it is also unjustified and contrary to the principles set out in the Green Book, which state that:

*“All impacts (including costs and benefits, both direct and indirect) on non-UK residents and firms should be identified and quantified separately where it is reasonable to do so, and if such impacts might affect the conclusions of the appraisal.”<sup>378</sup>*

2.62 The 2014 IA makes no such attempt. It arbitrarily eliminates from its calculations 90% of the losses to tobacco manufacturers caused by plain packaging because it wrongly assumes that only: “10% of the profits of multinational tobacco companies are received by UK shareholders...” This approach is both methodologically unsound and commercially naïve.

2.63 Methodologically, it is inappropriate to exclude costs to shareholders simply because they are located outside of the UK. The relevant issue is whether the affected activity, in this case the production and sale of tobacco products, is located in the UK. To assume otherwise (as the 2014 IA does) would mean that a regulatory measure that only affected UK businesses with non-UK shareholders could never give rise to relevant costs. This is clearly illogical, particularly given that one or more of those businesses could eventually be purchased by UK shareholders, thereby creating benefits that may require the regulation to be repealed (or at least re-assessed).

2.64 The 2014 IA's disregarding of impacts on non-UK shareholders has negative implications for UK businesses operating overseas. For example, earlier this year GlaxoSmithKline (a British multinational) purchased the vaccine division of Novartis (a Swiss multinational) for an initial \$5.25 billion. UK policymakers, presumably, would not welcome a move by the Swiss authorities to disregard losses to GlaxoSmithKline when regulating in the Swiss pharmaceutical sector.<sup>379</sup> However, opposition by a UK business to such a move by an overseas policy-maker is made less tenable by the analysis adopted in the 2014 IA.

2.65 Also, from a methodological perspective, even if the approach taken were the correct one, there is no reason for the 2014 IA simply to guess at a figure of 10%. Key tobacco product manufacturers operating in the UK (or their ultimate parent companies) are publicly listed<sup>380</sup> and research could have identified with greater precision the extent of their UK and non UK-based institutional investors.<sup>381</sup> The failure of the 2014 IA to undertake this basic analysis reflects its generally lacklustre consideration of the costs of the preferred approach.

2.66 By ignoring the damage that a regulatory measure of this magnitude will have upon foreign investors in the UK, the DH is sending a clear message that the UK is not, as HM Government claims, ‘Open for Business.’<sup>382</sup> The approach taken is particularly egregious to investors based elsewhere in the EU given the EU's commitment to the freedom of establishment (supposed to enable: “...an economic operator... to carry on an economic activity in a stable and continuous way in one or more Member States...”<sup>383</sup>) and the free

movement of capital (supposed to enable: "...integrated, open, competitive and efficient European financial markets and services..."<sup>384</sup>), all of which are intended to buttress the EU Single Market.

2.67 The benefits that are claimed for plain packaging are extensively surveyed in the main body of the 2014 IA. Additionally, calculations behind the benefit analysis are explained at length in Annex A to the 2014 IA. There is no such annex to explain the calculation of costs and, to a significant degree, the reader must simply rely on the figures presented by the 2014 IA. This asymmetry of information frustrates the ability of respondents to test the assumptions the DH relies upon. It also belies the DH's claim that its final views on plain packaging are not yet determined.

#### ***Flawed analysis of health inequalities***

2.68 The 2014 IA's assessment of the impact of a plain packaging measure on health inequalities states that: "...we expect a greater impact of standardised packaging on smoking prevalence among smokers of high price than low price brands..."<sup>385</sup>

2.69 It is reasonable to assume, and the 2014 IA does concede, that higher priced brands are generally smoked by higher income groups. However, the 2014 IA (in the same paragraph) goes on to state that the: "...health gain amongst lower income groups is likely to be more important than the corresponding gain amongst higher income groups..."

2.70 This is not supported by quantitative or analytical bases and runs counter to the 2014 IA's own conclusions regarding the impact of plain packaging (i.e. that it will affect higher price brands which are more likely to be smoked by higher income groups). As such, this view is, contrary to regulatory best practice, little more than an unsubstantiated assertion.

#### **Improper formulation and inadequate consideration of Options**

2.71 The 2014 IA proposes three regulatory options in relation to plain packaging:

- (a) "*Option 1: Require changes to legislation to bring the UK in line with the European Tobacco Products Directive in 2016 (i.e. go no further than the UK's Legal requirements)*";
- (b) "*Option 2: Go beyond the European Tobacco Products Directive in 2016 and require standardised packaging*"; and
- (c) "*Option 3: Defer a decision pending collection of evidence from experience in Australia.*"<sup>386</sup>

2.72 The Green Book emphasises that the: "...relevant costs and benefits to government and society of all options should be valued, and the net benefits or costs calculated."<sup>387</sup> As explained above, these costs and benefits should be measured against the baseline. The 2014 IA, particularly in relation to Options 1 and 3 (the policy alternatives to introducing plain packaging now), fails to complete this analysis.

2.73 Contrary to what is stated in the 2014 IA, Option 1 does not constitute a "do nothing" option.<sup>388</sup> The DH wrongly assumes the legality of TPD2, despite having known, before launching the Consultation, that TPD2 was expected to be the subject of legal challenges in the

UK Courts. The 2014 IA should have considered the extant *status quo* (through an independent evaluation of the impact of tobacco-control measures already introduced to date), together with an assessment of the potential evolution of the baseline both with and without the implementation of TPD2. The assumption that the appropriate figure for both the costs and the benefits of Option 1 is zero is, therefore, flawed and overly simplistic.

2.74 The Option 3 ('wait and see') analysis is equally flawed. Whilst paragraph 28 of the 2014 IA sets out the claimed benefits of regulating immediately, nothing is said of how these claimed benefits might be affected by waiting to understand and learn from the Australian experience. Similarly, the costs that would be incurred under Option 3 if a decision were eventually taken to regulate are also ignored. The 2014 IA may be assuming that any costs under Option 3 would be exactly the same as under Option 2, but this would not necessarily be the case given the constant evolution of, amongst other things, the tobacco market and regulation in this sector.

2.75 It is surprising that the 2014 IA is so dismissive of Option 3 given that the DH's July 2013 summary report on the 2012 Consultation recognised that many of those who responded to the 2012 Consultation identified that there may be merit in this approach.<sup>389</sup> Reasons given included that such an approach would allow HM Government to: (a) evaluate the impacts of plain packaging on businesses; (b) identify unintended consequences; (c) ascertain whether there are any public health benefits; (d) assess whether there is any increase in the illicit tobacco trade; and (e) consider the outcomes of legal challenges against the Australian Government. These are important issues (the costs and benefits of which are ignored by the 2014 IA), which are central to the question of whether plain packaging is necessary and proportionate. Indeed, this ultimately was the considered view of HM Government last year, making it all the more surprising that this Option has been all but written off without any analysis in the 2014 IA.

### 3. THE 2014 IA'S INADEQUATE ASSESSMENT OF ILLICIT TRADE ISSUES

3.1 The 2014 IA fails to give adequate consideration to the impact of plain packaging on illicit trade and CBS.

3.2 The 2014 IA correctly identifies this as being a risk: "*The two key risks associated with introducing standardised packaging are a potential increase in the illicit market and a potential increase in the cross border shopping. Both risks may have wider implications for the Government's strategy in limiting tobacco consumption.*"<sup>390</sup> The 2014 IA also recognises that even a small increase in illicit trade and CBS would be significant, as every percentage point increase in the size of the illicit cigarette market would, alone, result in a revenue loss of around £120 million per annum to the Exchequer.<sup>391</sup>

3.3 Acknowledging that there is a risk is insufficient, however. Indeed, the 2014 IA acknowledges this somewhat: "*We recognise that using an (unquantified) increase in the UK duty unpaid segment for this IA is not ideal.*"<sup>392</sup> Determining the impact of illicit trade is a difficult exercise, given the clandestine and complex nature of the activities involved. However, the 2014 IA makes no real effort even to attempt to quantify this acknowledged increase in the illicit tobacco trade, despite the potentially huge sums involved. This failure is unacceptable, given that this is the third major IA on the plain packaging policy. The incomplete nature of the 2014 IA is highlighted by the fact that the illicit trade analysis is described as being for "*illustrative*" purposes only, and that a later impact assessment could

"differ significantly" from the 2014 IA.<sup>393</sup> Further, the 2014 IA seeks to avoid committing to any meaningful conclusions on illicit trade by referring to a "later consultation."<sup>394</sup>

3.4 More could and should have been done by way of quantification. The 2014 IA, for instance, could have reviewed the evidence arising out of Australia to consider what impact plain packaging has had on illicit trade in Australia, and then sought to assess the extent to which those changes may or may not be replicated here (recognising that there are differences in dynamics between the UK and Australian markets, and therefore the nature of the illicit trade problem). Doing so would have provided a platform for a more informed analysis as to the true likely cost of plain packaging.

3.5 For example, KPMG's 2013 full-year report, which was published in April of this year,<sup>395</sup> shows, amongst other things, a significant increase in the size of the illicit tobacco market since the measure has been in place. According to this report, over the course of the year that the measure has been in place, the illicit tobacco market in Australia grew by 2.1%.<sup>396</sup> This is consistent with other information available from Australia which was not available at the time of the 2012 Consultation. For example, the ACBPS's figures show that the number of cigarettes seized increased by 41.8% between 2011/2012 and 2012/2013.<sup>397</sup> As shown in paragraph 3.16 below, new illicit brands which look like they are legitimate 'plain packs' have been found, since the introduction of plain packaging.<sup>398</sup>

3.6 The 2014 IA appears to have resigned itself from the outset to the conclusion that: "...there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification."<sup>399</sup> Accordingly, the 2014 IA simply adopts the Chantler Report's findings for the most part, despite the flaws in those findings (as explained in Annex 1).<sup>400</sup> Even when the Chantler Report is not specifically cited as the source, it is apparent that the 2014 IA's analysis depends upon the assertions made in the Chantler Report. In consequence, what the 2014 IA provides is a series of observations and assertions, which are largely reiterations of what had previously been said in the Chantler Report, and which are often inconsistent with actual evidence pointing the other way.

3.7 In the limited time that it has had available to respond to the 2014 IA, JTI has identified a number of key problems in respect of various assertions made in the 2014 IA, which are then used to form the basis of that document's conclusions.

**The 2014 IA mistakenly argues that the supply of illicit tobacco products can be "capped"**

3.8 The 2014 IA claims that plain packaging "...may introduce an additional incentive..." for consumers who "wish to" increase their illicit tobacco consumption. The 2014 IA refers to this being a "wish", because it assumes that such a "wish" will not in fact be fulfilled, as the supply can be "capped" through enforcement.<sup>401</sup> This leap of faith is unjustified, and demonstrates a lack of understanding as to the dynamics at play in the UK illicit tobacco market.

3.9 Echoing arguments made in the Chantler Report, the 2014 IA makes the following claims in order to conclude that any impact that plain packaging would have on the supply of illicit products could be mitigated:

- (a) tobacco products in plain packaging still need to carry health warnings and "authentication markings" in colour;



- (b) counterfeiters are already able to copy existing branded tobacco packaging in the UK market, including sophisticated ones; and
- (c) the cost of producing illicit whites and counterfeits is already so low that further reduction in cost is unlikely to provide additional incentives to illicit traders.

3.10 Taking each of these points in turn, below, it is clear that the 2014 IA overestimates the likely extent to which the acknowledged effects on illicit trade could be mitigated, were plain packaging to be introduced.

#### *Health warnings and "authentication markings" in colour*

3.11 From the notes of the meetings with Sir Cyril Chantler, it is apparent that a number of tobacco control advocates have continued to argue that security markings, in particular, will ensure that tobacco products in plain packaging will not be easier or cheaper to counterfeit than existing branded packs.<sup>402</sup> In adopting this view,<sup>403</sup> the 2014 IA ignores the fact that while security markings may provide useful means of verifying whether, for instance, a pack is genuine and/or is intended for that particular market, it is unlikely to act as a meaningful disincentive to counterfeiters unless the cost of copying the markings outweighs the cost savings resulting from the plain pack design. The reality is that counterfeiters will have less to duplicate when counterfeiting a plain pack and counterfeiters will only do what is necessary to 'fool the consumer'. The same applies to health warnings in terms of their ability to add to the complexity of counterfeiting tobacco products in plain packaging.

3.12 The ability of coloured health warnings to act either as a meaningful deterrent or an effective obstacle to illicit trade is also significantly undermined by the fact that the colour designs are easily accessible to counterfeiters in electronic form,<sup>404</sup> including having been placed online by one leading tobacco control advocate: <http://www.tobaccolabels.ca/countries/united-kingdom>.

#### *Counterfeiters' ability to copy existing branded tobacco packaging in the UK market*

3.13 The 2014 IA, as the Chantler Report had done, treats the fact that illicit traders are currently able to copy certain branded packs as evidence that plain packaging will make little difference to their ability to manufacture/supply illicit tobacco products.<sup>405</sup> As such, the 2014 IA provides no further analysis and appears to conclude that there is no risk in this regard. As a result, the 2014 IA understates the impact plain packaging is likely to have on the supply of illicit tobacco trade.

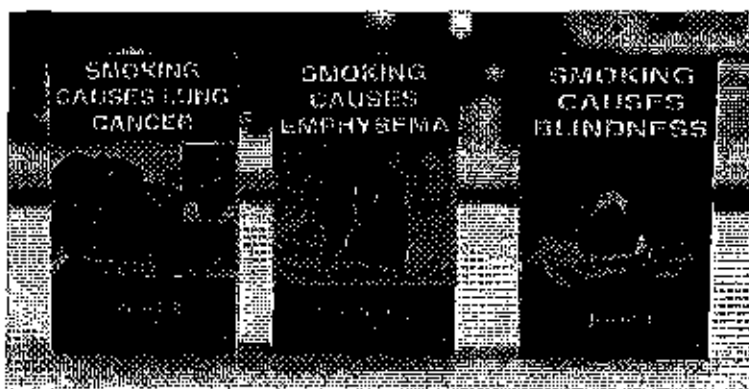
3.14 Pack complexity (starting at the raw material level),<sup>406</sup> and the use of specialist manufacturing processes, present technical and financial barriers to counterfeiting. The level of complexity involved in counterfeiting a branded pack of tobacco products goes far beyond 'pack design'. In fact, it includes ink colour and embossing on cartons, inner frame, overwrap film, tear tape and cigarette tipping paper, for example. To the extent that such elements are taken away over and above the requirements of TPD2, counterfeiting of tobacco products in plain packaging will make it that much easier and cheaper to counterfeit. A recent article in the UK press shows this very point has already been recognised by certain overseas illicit traders supplying the UK market: "We will make more money. We can make it cheaper but sell for the same price."<sup>407</sup>

3.15 Whilst counterfeiters can undoubtedly already copy some of the packaging in the UK market, the 2014 IA does not address the crucial point that plain packaging makes it easier and cheaper to counterfeit *all* packs, as:

- (a) illicit traders are given a significant amount of information on *'how to make the pack'* (for example, the Draft Regulations stipulate that specific text on external packaging must be in Pantone Cool Grey 2 C with a matt finish, and that the external packaging itself must be in Pantone 448C with a matt finish).<sup>408</sup> Currently, design specifications and colours are deliberately kept confidential in order to deter counterfeiters;<sup>409</sup>
- (b) *static packaging reduces future cost burdens* for illicit traders as they no longer need to keep up with the legitimate packs' evolving innovations and developments;
- (c) plain packaging *allows for cigarette packs to be printed on offset machines that are significantly cheaper than gravure machines* which currently print around 90% of UK cigarette packs,<sup>410</sup> and
- (d) plain packaging creates *economies of scale in production*. Plain packaging, as envisaged by the Draft Regulations, limits numerous aspects of packaging above and beyond what is required by TPD2. Once a counterfeiter copies a plain pack, he can reproduce packaging of many other brands with minimum effort.

3.16 By failing to engage with the ways in which plain packaging might open up new illicit market opportunities, and how they might be exploited by savvy illicit traders, the 2014 IA underestimates the true cost of plain packaging. For example, in recent months, Australia has seen 'new' illicit brands in circulation, such as Spoonbill, products which JTI understands are not available legally anywhere (see Figure 4 below).<sup>411</sup>

**Figure 4: 'New' illicit brands that have emerged in Australia since the introduction of plain packaging**



3.17 In a plain packaging environment, some smokers may mistakenly purchase packs of illicit whites under the assumption that they are lawful products outside the UK. In these circumstances, illicit whites in plain packaging may further their legitimacy in the eyes of the consumer over time, which would work against the objectives that the Draft Regulations set out to achieve.

### *Counterfeiters' ability to fool consumers*

3.18 JTI is concerned that plain packaging would make it easier for criminal gangs to 'fool' consumers both in relation to illicit tobacco products in branded and plain packaging. For example, as consumers become increasingly less familiar with the appearance of genuine branded products over time, it will become easier to pass off counterfeit products as contraband.

3.19 The 2014 IA states that price is an important indicator of "...a pack's legal status" and, in doing so, seeks to dismiss the point that consumers will find it more difficult to detect a genuine plain pack from a counterfeit pack.<sup>412</sup> Plain packaging will allow illicit traders to produce better copies of genuine products than has previously been the case. In these circumstances, JTI is concerned that unscrupulous retailers and illicit traders would be able to get away with charging full price for counterfeits masquerading as a legitimate product, on the basis that they are sold in packaging virtually indistinguishable from genuine packs. At full price and in indistinguishable packaging (without the visual cues currently available to smokers), the price will not necessarily enable a purchaser to discern "a pack's legal status" as the 2014 IA suggests.

3.20 If the 2014 IA is right and some counterfeit packs currently sell for half the price of a legitimate pack,<sup>413</sup> the unscrupulous retailer's margin would be doubled for each pack sold in this way, making this type of illicit sales to unsuspecting smokers more lucrative to such a retailer. Given the profit incentive, it would be unsurprising if sophisticated illicit traders started to focus their efforts on improving the quality of the products so as to make these high-quality copies even more difficult to differentiate for the smoker. Were this to happen, a smoker may be less likely to complain to legitimate manufacturers or enforcement authorities if they believe that they have purchased a genuine pack, at an ostensibly legitimate shop, at full price. This would make detection less likely.

### *The cost of producing illicit whites and counterfeit products*

3.21 The 2014 IA's position that any further reduction in production cost will not make a difference to illicit traders because it already costs so little to produce counterfeits and illicit whites, is also misguided.<sup>414</sup>

3.22 The 2014 IA uses Jin Ling as an example, and explains that the manufacturing cost of a packet of Jin Ling is estimated to be €0.16, with the rate of profit as high as 900%.<sup>415</sup> Assuming, however, that approximately 450,000 packs fit in a 40ft shipping container, even if the reduction in production cost resulted in only a small amount per pack (and JTI questions whether the degree of reduction would be quite so modest, given that counterfeiters would no longer have to copy various pack elements for each brand and one prototype would suit all brands of the same pack shape), the potential saving could be significant for a counterfeiter with a large portfolio of brands. For example, a recent undercover journalistic investigation has revealed that an illicit trader investigated in Indonesia would charge £75 for 500 packs of counterfeits. The price was reduced to £56.60 for the same product in plain packaging. This difference would mean that an illicit trader would pocket approximately £215,000 more in illegal profit per year by bringing in just one container per month into the UK.

3.23 In addition, a reduction in cost of production could have two further consequences (neither of which is either identified or quantified in the 2014 IA):

- (a) *Diversification* – a counterfeiter who previously only had the resources to invest in a few brands could diversify their 'portfolio', adding many brands at minimum cost (and potentially drawing in a more diverse 'customer base'); and
- (b) *Cost savings trickling down to the consumer* – illicit traders could choose to generate greater demand by lowering the price of their offerings, which could increase the availability/accessibility of illicit product to minors and economically deprived groups in the UK.

### **The 2014 IA's reliance on enforcement as the solution**

3.24 The 2014 IA, like the Chantler Report, presents enforcement as the paradigm solution for all present illicit trade issues, as well as all future issues, were plain packaging to be adopted.

3.25 It is, however, too simplistic to suggest that such a serious and complicated problem can be resolved simply by placing "restrictions" on borders. In this respect, the 2014 IA belies a lack of understanding as to the supply and demand dynamic of illicit tobacco products in the UK. As a result, it overestimates the extent to which effective enforcement would mitigate the illicit trade problem.

3.26 Over the last decade or so, HMRC has made significant progress in combating illicit trade. However, the recent Home Affairs Select Committee Report (2014)<sup>416</sup> raises the concern that, in their view, the falling numbers of prosecutions and convictions for organised crime cases involving tobacco appears to be due to a reduction in enforcement action rather than a reflection of a fall in this type of crime.<sup>417</sup> JTI agrees, and does not believe that (even currently) enough prosecutions are pursued against criminal gangs, given the scale of the problem.<sup>418</sup>

3.27 Even if better enforcement of border restrictions, for example, were to provide part of the solution to the problem, the 2014 IA recognises that: "...these stronger measures are likely to involve additional resources and funding which cannot be assumed or guaranteed."<sup>419</sup>

3.28 If additional resources and funding were guaranteed, as explained by Professors Zimmerman and Chaudhry,<sup>420</sup> there are a number of other variables at play that would still affect the supply side of the UK illicit tobacco market, including:

- (a) the affordability of legitimate tobacco products;
- (b) geographical vulnerabilities i.e. the UK is porous, with multiple entries and proximity to mainland Europe with many markets selling tobacco products at significantly lower prices;
- (c) profit incentives for criminals;
- (d) consumer complicity;
- (e) the fact that cigarettes are 'ideal smuggled product' as they are extremely valuable for their size / weight, and are easy to transport;<sup>421</sup> and
- (f) weak sanctions and enforcement.

3.29 Therefore, even if the UK were to find the optimal enforcement regime and appropriate sanctions, it would only address one of the contributing factors listed above i.e. (f).

3.30 The 2014 IA also fails to recognise that while plain packaging makes life easier and cheaper for counterfeiters, it may make life more difficult for those – including HMRC, Trading Standards, police and retailers – who are required to differentiate between genuine and fake packs. The loss of the visual/tactile cues that are currently used to assess the authenticity of a tobacco product by retailers and enforcement agencies alike will mean that even industry experts may have to resort to more resource-intensive and time-consuming tools of verification in a plain packaging environment.<sup>422</sup> The 2014 IA fails to consider what additional resources would be required for enforcement (or, rather, “effective enforcement”) when all packs effectively look the same (coupled with the effect this might have on the rate of detection). This is a serious omission given that the 2014 IA presents enforcement as the paradigm solution to the illicit trade issues that would be exacerbated by plain packaging.

3.31 If plain packaging were to be adopted, this additional burden would be introduced at a time when detection of illicit tobacco products is already made more difficult due to changing smuggling tactics. The Home Affairs Select Committee Report notes that illicit traders are moving away from large consignments towards consignments that are “fragmented into smaller values”,<sup>423</sup> which would be more difficult to detect.

3.32. In addition, while the majority of legitimate retailers do not engage in illicit trade, it unfortunately remains the case that some smokers (including those under 18) are able to buy illicit tobacco products from some shops in the UK. Recent operations by Trading Standards have resulted in a number of detections of unscrupulous retailers selling illicit tobacco in their shops, many of whom were employing sophisticated concealment tactics. Some of these illicit products might be being presented to the consumer as contraband when, in fact, they are counterfeit. Whilst the 2014 IA correctly identifies that in a plain packaging environment, consumers will find it more difficult to detect a counterfeit pack,<sup>424</sup> it then makes no attempt to quantify what this impact might be.

3.33 The 2014 IA also fails to consider the impact of the land border between Northern Ireland and the Republic of Ireland. This was identified in JTI’s 2012 consultation response<sup>425</sup> as a problem given the very real security issues in policing it and that, once smuggled product has crossed the border to Northern Ireland, it has effectively made its way into the UK. Problems will still persist, even if both countries adopted plain packaging. The issue of porous borders is exacerbated by the fact that the UK and Ireland are the two markets with the highest tobacco prices in the EU<sup>426</sup> and it is estimated that 28% of cigarettes in Ireland were non-Irish duty paid in 2012.<sup>427</sup> As reported in the recent Home Affairs Select Committee Report, the link between tobacco illicit trade and organised crime is widely acknowledged.<sup>428</sup> Near perfect market dynamics are already in place which will be exploited further by criminal groups on both sides of the border if, as expected, plain packaging were to worsen the illicit trade in either market.

3.34 As far as JTI is aware, there has been no established/recognised research base on the actual impacts (in terms of illicit or otherwise) on a neighbouring state of another having a measure such as plain packaging in place. The 2014 IA itself has identified this as a real risk only in the context of (legal) CBS, and has acknowledged that CBS: “could increase further if standardised packaging was introduced in the UK but not in other EU countries, with extra incentives for tobacco in branded packets being available at cheaper prices.”<sup>429</sup> Such an increase in CBS would not only reduce the amount of duty received by the UK, but would

undermine the alleged effectiveness of plain packaging.<sup>430</sup> The 2014 IA, however, merely identifies this as a risk and does not attempt to quantify it in any way.

### **The 2014 IA's analysis of illicit trade wrongly relies upon the Chantler Report**

3.35 The 2014 IA appears to take comfort from the fact that its findings with regard to the impact of plain packaging are consistent with those of the Chantler Report. Given that the Chantler Report's analysis of illicit trade issues is overly simplistic, the fact that the conclusions of the 2014 IA and the Chantler Report broadly align provides no comfort as to its reliability. The extent to which the 2014 IA relies on the arguments made in the Chantler Report makes it difficult for the 2014 IA to sustain its claim that it: "...draws upon information provided in consultation responses."<sup>431</sup>

3.36 The views and expertise of those with highly relevant knowledge on the subject of illicit trade, presented to the Chantler Review,<sup>432</sup> appear not to have been taken into account or given sufficient weight either by the Chantler Report, or, consequently, the 2014 IA. For example, neither Sir Cyril Chantler nor the 2014 IA appear to have relied upon Professors Zimmerman and Chaudhry's report (with no explanation as to why not), despite the fact that this report specifically addresses this issue in great depth. Since the 2012 Consultation, additional information of direct relevance to this issue has also become available.

3.37 JTI is concerned that the 2014 IA, through its reliance on the Chantler Report, has depended too heavily, and therefore unfairly, on the views of tobacco control advocates, rather than reviewing all evidence from a wide range of sources and reaching its own balanced conclusion. The Chantler Review's dismissal of the findings of the KPMG Report is a case in point in this regard: "[I]n a situation where estimates differ by such magnitudes, I do not have confidence in KPMG's assessment of the size of – or change in – the illicit market in Australia."<sup>433</sup> Such dismissal, however, is based on the (largely) unsubstantiated grounds that: (a) "...Australian Government departments, both Health and Customs, appear to be strongly of the view that KPMG's methodology is flawed..."; (b) "...official Customs data..." shows no significant effect on illicit tobacco following the introduction of plain packaging; and (c) "...analysis undertaken by the Cancer Council Victoria (based on data from the National Drug Strategy Household Survey)..."<sup>434</sup>

3.38 One cannot ignore one data source on the basis that it shows a different finding from another data source, without a valid justification as to why one source of data is convincing and the other is not. As explained in the KPMG Report, it was commissioned to "...conduct an independent report..." and it exercised "...final decisions on all methodologies and messages contained in [the] report."<sup>435</sup>

3.39 Every methodology has its strengths and weaknesses. Reflecting this, HMRC has said: "...neither the KPMG nor the HMRC estimates [on illicit tobacco market in the EU] provide a definitive, representative picture of the composition of the illicit market as a whole."<sup>436</sup> In this respect the 2014 IA in fact (rightly) recognises that in order to "monitor" the risk of illicit trade and CBS, it will: "...need to take account of sources of evidence such as the Empty Pack Survey and data collected by HMRC."<sup>437</sup>

3.40 The soundest approach to addressing a methodology's potential for bias and error is to consider various methods and to judge trends on the basis of these multiple methods. According to the KPMG Report, its methodology (i.e. the empty pack surveys and consumer surveys, calibrated further against other information, such as rolling paper analysis and level of legal domestic sales) appears to have been designed to achieve just that. Besides, the trend

demonstrated by government-led research and tobacco manufacturer-commissioned studies alike is a clear increase in illicit trade since the introduction of plain packaging. While the fundamental differences between the two markets limit the applicability of what is purported to have happened in one market in the other, what is notable is the undisputed *direction of change* observed in Australia.<sup>438</sup>

3.41 The 2014 IA repeats the Chantler Report's mistake by relying on the criticisms made by tobacco control advocates. In doing so, the 2014 IA fails to take into account a valuable source of information which could have been used in assessing the potential impact of plain packaging on the UK illicit tobacco market. If it had done so, the 2014 IA may have been able to present some quantification of the impact, rather than having to repeat that the impact on illicit trade is difficult to quantify.

3.42 That said, there are limitations as to how much one can reliably assume, in an illicit trade context, that what appears to have happened in Australia to date will apply equally in the UK. The Chantler Report makes the mistake of assuming that what it (wrongly) believes to have happened in Australia with respect to illicit trade will automatically apply to the UK. The 2014 IA takes the same view.<sup>439</sup> For example, there have been suggestions that plain packaging did not result in counterfeiters copying tobacco products in plain packaging in Australia.<sup>440</sup> Even if this were the case, given the fundamental differences between the two markets, an 'absence' in Australia does not preclude it from taking place in the UK.

3.43 The differences between the Australian and the UK illicit tobacco markets, both in terms of the nature and the scale, have been widely acknowledged. ACBPS state, for example: "*It is likely that part of the reason that Australia has a significantly smaller illicit tobacco market than the UK (and a number of other countries) is that there is not such a large-scale, organised distribution network for illicit tobacco in Australia as compared with the UK.*"<sup>441</sup>

3.44 Unlike Australia, the UK is a particularly attractive market for illicit tobacco products,<sup>442</sup> which has suffered a more serious problem in counterfeit (as well as in illicit tobacco trade more generally) than has been the case in Australia. Therefore, illicit traders are likely to react differently in the UK to the introduction of plain packaging than they have done so in Australia.

3.45 In any event, recent trends demonstrate a shift in the illicit trade market in Australia. While the emergence of new illicit whites brands since the introduction of plain packaging (as shown in Figure 4 above) is particularly notable, at least one seizure of counterfeits in plain packaging has been reported.<sup>443</sup> The evidence from Australia to date could have been a valuable tool for the DH to adapt, taking into account the dynamics of the UK illicit tobacco market. As noted above, the drafters of the 2014 IA could have reviewed the evidence arising out of Australia to consider what impact plain packaging might have had on illicit trade in Australia, and then sought to assess the extent to which those changes may or may not be replicated in the UK. However, the 2014 IA has opted not to make use of this useful source of information to the detriment of the quality of its analysis.

#### **Other relevant issues overlooked by the 2014 IA**

##### *The 2014 IA's failure to consider the impact of illicit trade on social equality*

3.46 The 2014 IA fails to consider the impact of illicit trade on social inequality. In fact, the 2014 IA mistakenly argues that plain packaging could help reduce health inequalities between socio-economic groups.<sup>444</sup> This view is not only overly simplistic, but plainly wrong. It is

widely acknowledged that the availability of cheap illicit tobacco has a significant impact on social inequalities, affecting the poorest groups with higher rates of smoking.<sup>445</sup> Therefore, to the extent that plain packaging worsens illicit trade, it will further widen existing social inequalities.

3.47 Regulators and public health officials in the UK (as well as Australia) have repeatedly expressed the concern that smokers could be exposed to greater health risks by consuming illicit products that are not produced under regulated conditions.<sup>446</sup> Following a seizure of 600,000 Jin Ling cigarettes, an HMRC spokesperson reported that: "...tests have found such cigarettes had contained traces of materials including rat poison and rat excrement."<sup>447</sup>

3.48 Detections of illicit tobacco in circulation reveal that these products often do not have the requisite health warnings.<sup>448</sup> For instance, in a recent detection of 67,000 cigarettes worth £25,000, none of the cigarettes carried the required health warning.<sup>449</sup> Non-UK duty paid tobacco products entering the UK via CBS will frequently not carry health warnings in English. JTI notes that the 2014 IA itself recognises that CBS is a significant risk for which the supply cannot be "capped" as the CBS is legal.<sup>450</sup> Yet those supportive of the introduction of plain packaging argue that plain packaging will: "...increase the effectiveness of health warnings."<sup>451</sup>

#### *Assumption mistakenly relied on by the 2014 IA's critical value approach*

3.49 The 2014 IA's critical value approach concludes that to: "Produce a net benefit of zero, 20% of the UK duty paid market would need to transfer to the UK duty unpaid market, giving a UK duty unpaid market share of 30%."<sup>452</sup> It makes this point perhaps assuming that a change/transfer of this magnitude is not plausible. Taking HMRC's own mid-point estimates, over the ten-year period between 2001/2002 and 2011/2012, non-UK duty paid cigarettes decreased from 28% to 10% of the total market for cigarettes. During the same period, non-UK duty paid RYO decreased from 72% to 41%. HMRC's figures also show that dramatic increases/decreases can take place within a relatively short period of time. In 1996/1997, illicit trade in cigarettes (excluding CBS)<sup>453</sup> constituted 3% of the UK cigarette market. Four years later, the percentage had risen to 22%.<sup>454</sup> Therefore, the 2014 IA should have assessed whether it is plausible that similar fluctuations could reoccur in the future.

#### *The 2014 IA's failure to consider RYO*

3.50 The 2014 IA's "plausible assumption" in relation to what impact plain packaging might have on CBS and illicit trade does not include RYO. The 2014 IA explains that: "[F]or illustrative purposes the assumptions are worked through below for cigarettes which make up the largest part of the tobacco market. This analysis will be performed for [RYO] as well in due course."<sup>455</sup> RYO constitutes a significant portion of both the legitimate UK tobacco market, but also the illicit market. According to HMRC's estimate referred to in the 2014 IA, the illicit market share of RYO is 36%.<sup>456</sup>

3.51 The 2014 IA does not specify the reason for excluding RYO from its quantification exercise. According to the HMRC's own mid-point estimate, as recent as 2008/2009, 50% of RYO smoked in the UK was non-duty paid. Given the extent of historical changes of this illicit market, the 2014 IA should have assessed whether it is plausible that the level of illicit trade would not increase to such an extent as to undermine the alleged benefits of plain packaging.



#### 4. FAILURE TO CONSIDER ALTERNATIVE MEANS OF ACHIEVING OBJECTIVES

4.1 JTI is committed to the development of appropriate and proportionate tobacco regulation and believes that there is still work which can be done to prevent youth smoking. Further UK packaging regulation, however, is neither appropriate nor necessary. In JTI's 2012 consultation response, JTI suggested five alternative means of achieving the goals it shares with the DH of reducing minors' uptake of smoking, preventing minors from obtaining tobacco products and ensuring that adult smokers are reminded of the health risks of smoking.

4.2 In our Chantler Submission, we also set out alternative means to achieve these goals,<sup>457</sup> including:

- (a) ensuring better enforcement of the current regulatory regime (including the under-utilised provision of The Children and Young Persons Act 1933 on the confiscation of cigarettes from minors) and tackling the illicit trade in tobacco products;
- (b) reinforcing retail access prevention measures, such as 'No ID, No Sale'; and
- (c) following the Scottish example by penalising proxy purchasing by adults and penalising the purchase or attempted purchase of tobacco products by minors.

4.3 The Chantler Report did not (consistent with its method statement): "...*assess[...] the merits of alternative means of tobacco control.*" Nor does the 2014 IA consider these alternative means (or indeed any others), despite BIS's stated commitment of principle to: "...*wherever possible, seek[ing] to implement EU policy and legal obligations through the use of alternatives to regulation.*"<sup>458</sup>

4.4 DH-funded research has recognised that: "[i]ncreased regulation may serve to inadvertently heighten the kudos of smoking as an act of rebellion against adult regulation". The same research also recognises that: "[a]pproaches that inhibit young people's ability to obtain tobacco may...be more appropriate for preventing smoking in this age group".<sup>459</sup>

4.5 The measures set out above, the other non-regulatory measures that we consider below, and a genuine 'no change' option, should have been taken into consideration by the DH. This is particularly so as such alternative options are likely to be effective when evaluated against Better Regulation principles, and address the key methods by which minors access tobacco products, and studies exist to support their efficacy.<sup>460</sup>

4.6 Since the 2012 Consultation, HM Government has taken forward only one of the suggestions identified above, namely by legislating to criminalise proxy purchasing of tobacco or rolling papers through the Children and Families Act 2014. Whilst JTI welcomes this move, we remain concerned that other alternative options, which are less restrictive and more targeted than plain packaging, continue to be overlooked. We believe more can be done to restrict underage access to tobacco.

##### **Better enforcement of the current regulatory regime**

4.7 Studies exist which suggest that youth smoking prevalence decreases in communities where strong enforcement measures are consistently applied.<sup>461</sup> There is, however, evidence which suggests that penalties available under existing legislation are not being used fully or applied consistently.<sup>462</sup>

4.8 The success of negative licensing schemes (discussed in detail in JTI's 2012 consultation response)<sup>463</sup> and minimum age of sale provisions relies on Trading Standards Officers to identify incidences and take appropriate action. The number of test purchases carried out by Trading Standards in 2012 was, however, 34% lower than in 2010.<sup>464</sup> We expect the drop to be even greater for 2013 once the relevant figures are published.

4.9 Trading Standards Officers should be provided with sufficient resources and training to enforce relevant existing legislation, which was introduced, and has real potential, to have a significant impact on youth smoking prevalence. This is particularly important given the recent introduction of penalties for proxy purchasing under the Children and Families Act 2014. JTI has long supported criminalising proxy purchasing (as well as penalising purchase or attempted purchase of tobacco products by minors), and maintains that it can be an effective tool for achieving the DH's policy goals, if properly enforced.

4.10 The question, therefore, is why the DH is considering introducing further regulation, when the current legislation is yet to be utilised and tested fully.

#### **Reinforcement of retail access prevention measures**

4.11 According to Trading Standards, some small shops are still one of the key sources of tobacco for minors.<sup>465</sup> In 2012, JTI assembled a working group to analyse under-age sales prevention measures and to examine what more could be done by JTI in this area. The group found that small and independent retailers often lack the resources to provide high quality staff training and compliance monitoring. This was corroborated in a recent survey of 500 independent retailers, commissioned by JTI, in which nearly a third of respondents (32%) admitted that they did not offer any formal training to their staff in preventing under-age sales. The survey also found that 67% felt that regular compliance testing is an effective way to increase standards.<sup>466</sup>

4.12 In response to these findings, JTI launched a pilot scheme in September 2013 in North West England in which Serve Legal, an independent company which specialises in testing retailers for compliance with under-age sales regulations, made more than 6,000 test purchases across 2,500 randomly selected independent retailers in order to identify those retailers that may be at risk of failing to comply. The "at risk" retailers were then offered on-site training from Under Age Sales Ltd, an independent specialist company, paid for by JTI.

4.13 The scheme also strengthened the nationally recognised "No ID, No Sale!" campaign to create an expectation that customers will be asked for proof of age, including by producing redesigned "No ID, No Sale!" packs in response to retailer feedback. As a result, both retailers and customers are more aware of youth retail access prevention measures in the North West. Following the success of the pilot scheme, and the positive feedback from retailers, JTI intends to roll the programme out across the country later this year, with support from other manufacturers.

4.14 JTI is committed to playing a meaningful role in youth smoking prevention by taking and supporting targeted measures. The DH should do the same. It is not appropriate simply to legislate. Businesses must be supported to comply with legislation designed to prevent youth access to tobacco products by increasing training for retailers and education programmes for minors, and championing compliant retailers.

### **More effective and targeted enforcement to tackle the illicit tobacco trade**

4.15 The significant scale, and extremely serious consequences, of the illicit trade in tobacco products in the UK are set out in JTI's 2012 consultation response, and above. JTI acknowledges that efforts to tackle the illicit trade in tobacco products have made an impact – particularly in cigarettes – in recent years. It is important that further enforcement resources are dedicated to the problem.

4.16 In addition, the level of fines and penalties must be sufficiently high and consistently applied in order for them to act as deterrents. The Home Affairs Select Committee Report received submissions from a range of contributors, including Trading Standards, tobacco control advocates, public health organisations and tobacco product manufacturers, all of whom agreed that sentencing for illicit tobacco related offences is too lenient. Offenders rarely receive the maximum penalty; 43.5% of sentences for tobacco smuggling offences in England and Wales since 2011 have been non-custodial or suspended.<sup>467</sup> As such, JTI supports Trading Standards' calls for dedicated sentencing guidance to be issued in this area.

### **Targeted public information campaigns**

4.17 As stated in our 2012 consultation response, studies suggest that government-led public information campaigns are an important aspect of successfully implementing retail access prevention measures.<sup>468</sup> JTI encourages HM Government to launch renewed campaigns in support of these measures (such as negative licensing schemes) and to explain the recent changes to tobacco control laws (including the new proxy purchasing offence and higher minimum age of purchase).

4.18 In addition, JTI acknowledges that public information campaigns have been carried out in the UK previously, with considerable success to reiterate the health risks associated with smoking, so that adults are able to make informed choices. We note, in particular, the success attributed to the NHS's Stoptober campaign in conjunction with the distribution of NHS "Quit Kits" through pharmacies in the UK.<sup>469</sup> We suggest that renewed use of such campaigns would be a better use of resources by HM Government than introducing plain packaging. This is particularly likely if they are targeted at those groups that the DEH has identified in the Equalities Analysis as having the highest smoking prevalence.

4.19 Indeed, rates of smoking in the US, where packs are branded and carry smaller health warnings, are significantly lower than rates in Europe despite tobacco products being much more highly regulated and taxed in the latter. Studies suggest that the main reason for the difference in smoking rates is that the US has relied more on public advocacy work (i.e. reinforcing messages about the health risks) than regulation.<sup>470</sup> Moreover, that public-advocacy work has involved a range of creative and targeted initiatives, including internet campaigns, text messaging in support of those trying to quit, community-led programmes, school-based programmes, and training for parents.

## **5. EQUALITY ACT 2010 ISSUES**

5.1 As the DH acknowledges in the Equalities Analysis accompanying the Consultation and the 2014 IA, some of the impacts of plain packaging may disproportionately affect certain minority and socio-economic groups. The DH has, however, failed adequately to assess those impacts in order to understand properly the effect of such a policy on those groups, despite its requirement to do so under the Equality Act 2010.<sup>471</sup>

## Socio-economic groups

5.2 The DH considers that the plain packaging proposal has the potential to close the “health inequality gap” between the poorest and richest socio-economic groups in the UK.<sup>472</sup> Despite this, the 2014 IA states that plain packaging is expected to have a greater impact on smoking prevalence among smokers of premium, higher price cigarettes than value brand cigarettes, on the basis that cheaper cigarettes are less likely to be subject to brand attachment.<sup>473</sup>

5.3 As previously explained in JTI’s 2012 consultation response, evidence shows that plain packaging is likely to push down the price of cigarettes, and increase the availability of illicit tobacco products.<sup>474</sup> It is the lower income socio-economic groups, and young people, who will be most vulnerable to such changes.<sup>475</sup> Indeed, the criminal gangs selling illicit tobacco products are not concerned about who they sell their products to. Rather than close the health inequality gap, plain packaging may exacerbate it.

5.4 The DH has acknowledged these risks in the Equalities Analysis. Rather than analyse them properly, however, with input from the potentially affected groups,<sup>476</sup> as it should in accordance with its duty under the Equality Act, it dismisses them on the basis of speculative and groundless conclusions. It states, for example, that: “...standardised packaging is a population level measure to which everyone will be equally exposed, and therefore at the very least should not increase health inequalities and may help to reduce them. If the policy leads to reduced smoking uptake then it should have a positive effect on health inequalities between socio-economic groups because the impact would be greater in those groups in which smoking prevalence is the highest.”<sup>477</sup> There is nothing in the 2014 IA (or indeed elsewhere) to support such a conclusion. As the Equality and Human Rights Commission’s guidance on the equality duty states: “...it is not acceptable to simply conclude that a policy will universally benefit all service users, and therefore the protected groups will automatically benefit, without having evidence to support that conclusion.”<sup>478</sup> This is precisely what the DH has done.

5.5 The DH also inappropriately relies on conclusions in the Chantler Report to dismiss the risk of plain packaging depressing tobacco prices as “small”;<sup>479</sup> even though the Chantler Review did not consider: “issues such as the overall economic impact of standardised packaging.” The impact of the increased availability of illicit tobacco products on these groups is not considered in the Equalities Analysis.

5.6 The DH should have considered these impacts further, including by seeking the views of other government departments and agencies best placed to comment on these issues,<sup>480</sup> and properly taking those views into account.

## Sight and literacy difficulties

5.7 In the Equalities Analysis, the DH identifies the potential impact of plain packaging on partially sighted people, those with learning disabilities (including dyslexia and dyspraxia) and those whose first language is not English. The DH’s analysis of these impacts is limited, and appears to rely on suggestions provided by respondents to the 2012 Consultation. JTI is not in a position to comment on these impacts but recommends that the DH ensures a full and proper assessment of the potential impact of plain packaging on these groups is performed.

## Ethnicity

5.8 The DH concludes in the 2014 IA that plain packaging: “...*would not have any significant negative impact on any particular aspect of equality...*”<sup>481</sup> This conclusion is not justifiable. As noted in the Equalities Analysis, a significant proportion of retail businesses are owned or run by individuals from minority backgrounds. Any loss of revenues associated with plain packaging, as a result of, for example, down-trading to cheaper brands, reduced footfall, channel shift due to changes in transaction time (especially where the first language of retail staff is not English), the increase in illicit trade or re-training of staff, is likely to have a much larger impact on these groups.

5.9 It is clear from the reasons given in the Equalities Analysis that the DH has not seriously considered and assessed these risks with the necessary rigour. The assumption that: “...*losses from tobacco sales may be offset by consumption of [small retailers'] other products*” is unsupported by evidence or research.<sup>482</sup> It is a fallacy, and, in fact, the opposite is true (see, for example, the quote from Lord Howe at paragraph 2.42(iii)). Further, the DH’s suggestion that: “*retailers already need to be planning their future business strategies*” on the basis that “...*there are many trends already impacting [them] (e.g. internet sales, economic cycles, big supermarket competition and demographic changes)...*” is unsatisfactory. It underplays the impact plain packaging would have on small retail owners (who are already having to invest to comply with the display ban of tobacco products that comes into force for smaller shops in April 2015) and their local communities.<sup>483</sup> It reveals the DH’s lack of understanding of how small businesses operate (particularly in rural communities), and the impact on revenues that the loss of just one consumer can have.

5.10 Likening plain packaging to: “...*internet sales, economic cycles, supermarket competition and demographic changes...*” is inappropriate. Plain packaging is not inevitable; it is unnecessary and avoidable. Small businesses already face onerous regulatory requirements. A further layer of regulation will only add to this compliance burden. The DH must reconsider these issues, with the assistance from relevant government departments, such as BIS. As stated in our Better Regulation consultation response,<sup>484</sup> these issues fall squarely within BIS’s remit given that it is committed to promoting: “*competition and stability without impinging on businesses’ ability to operate*” and to removing: “*unnecessary red tape to encourage economic growth and increase personal freedom and fairness.*”

### ANNEX 3: PROPOSED AMENDMENT TO THE CHILDREN AND FAMILIES BILL

*“(1) The Secretary of State may make regulations under subsection (6) or (8) if the Secretary of State considers that the regulations ~~may~~ will contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18.*

*(2) Subsection (1) does not prevent the Secretary of State, in making regulations under subsection (6) or (8), from considering whether the regulations may contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people aged 18 or over.*

*(3) The Secretary of State may treat regulations under subsection (6) or (8) as capable of contributing to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18 if the Secretary of State considers that—*

- (a) ~~at least some~~ each of the provisions of the regulations are capable of having that effect, or*
- (b) the regulations are capable of having that effect when taken together with other regulations that were previously made under subsection (6) or (8) and are in force.*

*(4) Regulations under subsection (6) or (8) are to be treated for the purposes of subsection (1) or (2) as capable of contributing to reducing the risk of harm to, or promoting, people's health or welfare if (for example) they ~~may~~ will contribute to any of the following—*

- (a) discouraging people from starting to use tobacco products;*
- (b) encouraging people to give up using tobacco products;*
- (c) helping people who have given up, or are trying to give up, using tobacco products not to start using them again;*
- (d) reducing the appeal or attractiveness of tobacco products;*
- (e) reducing the potential for elements of the packaging of tobacco products other than health warnings to detract from the effectiveness of those warnings;*
- (f) reducing opportunities for the packaging of tobacco products to mislead consumers about the effects of using them;*
- (g) reducing opportunities for the packaging of tobacco products to create false perceptions about the nature of such products;*
- (h) having an effect on attitudes, beliefs, intentions and behaviours relating to the reduction in use of tobacco products.” (Emphasis added)*

## ENDNOTES

- 1 See paragraph 3.8 of this response and Annex 1, paragraph 3.3.
- 2 See paragraph 1.7 of this response.
- 3 *Ibid.*
- 4 See paragraph 5.13 of this response.
- 5 See paragraph 1.9 of this response.
- 6 See paragraph 3.4(a) of this response and Annex 1, paragraph 2.23, paragraph 2.26.
- 7 See Annex 1, paragraph 2.23(b).
- 8 See paragraph 2.18(b) and paragraph 6.16 of this response.
- 9 See Annex 1, paragraph 2.1(c).
- 10 See paragraphs 6.22 to 6.26 of this response.
- 11 See paragraphs 2.5 to 2.6 of this response.
- 12 See paragraph 1.8 of this response.
- 13 See paragraph 2.18 of this response.
- 14 See paragraph 6.13(b) of this response and Annex 3.
- 15 *Ibid.*
- 16 *Ibid.*
- 17 See paragraph 6.13(d) of this response.
- 18 *Ibid.*
- 19 See paragraph 6.19 of this response.
- 20 See Annex 1, paragraph 2.25.
- 21 See endnote 251 of this response.
- 22 See Annex 2, paragraph 2.11.
- 23 See paragraph 4.19(c) of this response and Annex 1, paragraph 3.16(c).
- 24 See paragraph 4.19(d) of this response and Annex 1, paragraph 3.16(d).
- 25 See paragraph 4.1 and paragraph 6.18 of this response.
- 26 See paragraph 3.5 of Annex 2 of this response.
- 27 See Annex 2, paragraph 3.5.
- 28 See Annex 2, paragraph 3.16 and Figure 4.
- 29 See paragraph 6.2 and paragraph 6.21 of this response and Annex 2, paragraph 2.4.
- 30 See paragraph 4.22 of this response.
- 31 See paragraphs 4.11 and 4.12 of this response.
- 32 See Annex 2, paragraphs 2.61 to 2.63.
- 33 See paragraph 4.21 of this response.
- 34 See paragraph 6.7 of this response.
- 35 See paragraph 6.8 of this response.
- 36 See paragraphs 5.2 to 5.25 of this response.
- 37 The DH has previously, including in the 2012 Consultation, referred both to standardised and plain packaging and has used these terms interchangeably. In the Consultation, the DH makes reference to the term 'plain' in the context of both the Draft Regulations (regulation 5(2)) and the 2014 IA. Footnote 3 of the 2014 IA states: "*Standardised packaging has also been referred to as plain packaging. As packs would not be plain (for example, they would be required to have coloured picture warnings). The term standardised packaging is considered to be a more accurate description.*" (JTI does not consider the term "standardised packaging" to be more accurate given that the Consultation, at paragraph 5.6, is at pains to stress that: "...we do not propose requirements relating to ... the size of cigarette packets..."). Option 3 in the 2014 IA is to: "*Defer a decision pending collection of evidence on experience with plain packaging in Australia.*" The Chantler Review also refers to: "*Plain Packaging Review: Independent Review into standardised packaging of tobacco.*" Finally, plain packaging has become the internationally accepted terminology (having been used in Australia for the only legislation in force mandating these requirements: The Tobacco Plain Packaging Act 2011). For these reasons, JTI refers to plain packaging throughout this response.
- 38 JTI's response to the DH's Consultation on the Standardised Packaging of Tobacco Products, dated 3 July 2012 is available via: [http://www.jti.com/files/4013/4149/4323/Packaging\\_Response.pdf](http://www.jti.com/files/4013/4149/4323/Packaging_Response.pdf).
- 39 See paragraphs 5.13 to 5.17 of this response as regards the issue of the legal validity of TPD2 in light of legal challenges which have recently been brought to it in the UK.
- 40 In June 2009, after an extensive public consultation on the issue in the context of the DH's 2008 Future of Tobacco Control Consultation, the DH said that there was no evidence that plain packaging reduced smoking uptake amongst minors or

helped people to quit. On 25 June 2009, the then Secretary of State for Health (Andy Burnham MP) stated: "No studies have been undertaken to show that plain packaging of tobacco would cut smoking uptake among young people or enable those who want to quit to do so. Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need strong and convincing evidence of the benefits to health, as well as its workability, before this could be promoted and accepted at an international level – especially as no country in the world has introduced plain packaging" (emphasis added). (Parliamentary Debate (26 June 2009),

<http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s09.htm>.) This was after the then Secretary of State for Health (Alan Johnson MP) had told Parliament on 16 December 2008 that: "there is no evidence base that [plain packaging] actually reduces the number of young children smoking" (emphasis added). (Commons Debates (16 December 2008), Volume 485, Column 945). On 10 May 2011 a DH official noted in correspondence with a counterpart at the Australian Department of Health and Ageing that: "there isn't any hard evidence to show that [plain packaging] works". This email was part of the material disclosed on 19 August 2011 pursuant to a Freedom of Information Act 2000 request by PMI (Ref TO00000633879).

41 See: <https://www.gov.uk/government/news/consultation-on-standardised-packaging-of-tobacco-products>. The then Secretary of State for Health said on 12 July 2013, upon the publication of the summary of responses to the DH's 2012 consultation: "Obviously we take very seriously the potential for standardised packaging to reduce smoking rates, but in light of the differing views, we have decided to wait until the emerging impact of the decision in Australia can be measured, and then we will make a decision in England." He further stated in Parliamentary Debate on 6 July 2013 (HC Deb 16 July 2013; col 893) that: "We are waiting to see how things develop in Australia and, as I say, good laws are based on good, sound evidence. That is the way forward."

42 See the Prime Minister's press conference in Downing Street on 17 July 2013: "The decision not to go ahead for the time being with plain paper cigarette packaging was a decision taken by me with the Health Secretary for the very simple reason that there is not yet sufficient evidence for it and there is considerable legal uncertainty about it. If we get more evidence and we can reduce the legal uncertainty then it may very well be a good idea and I'll very happily look at it again" (emphasis added). Available via: <https://www.gov.uk/government/speeches/pm-and-prime-minister-letta-press-conference>. See also the following statement made in Parliament by the Prime Minister on the same day: "Let me be absolutely clear about this: the decision not to go ahead for the time being was made by me... Funny enough, it is the same decision the previous Government made, I have here the letter that the former Labour Secretary of State for Health wrote to another Minister, the right hon. Member for Dulwich and West Norwood (Dame Tessa Jowell), explaining why he was not going ahead. He said this: "No studies have shown that introducing plain packaging of tobacco products would cut the number of young people smoking... Given the impact that plain packaging would have... we would need strong and convincing evidence" in order to go ahead. He did not go ahead..." (HC Deb 17 July 2013; col 1088), (emphasis added).

43 See paragraph 4.3 of JTI's 2012 consultation response.

44 However, for the purposes of the Consultation, JTI relies upon and incorporates (as a result of this cross-reference) all of the evidence, submissions and information submitted previously to the DH. It would be neither proportionate nor appropriate in the limited time available to respond to the Consultation to repeat that here.

45 Originally taken from "Reducing Regulation Made Simple", HM Government (available via: <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/assets/biscore/better-regulation/docs/r10-1155-reducing-regulation-made-simple.pdf>) This has now been replaced by HM Government's Better Regulation Framework Manual, published 10 July 2013, available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31626/r10-1155-reducing-regulation-made-simple.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31626/r10-1155-reducing-regulation-made-simple.pdf).

46 See "One-in, one-out: Statement of New Regulation", HM Government, April 2011, available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/48179/2836-onein-oneout-statement-new-reg.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48179/2836-onein-oneout-statement-new-reg.pdf).

47 See "Principles of good regulation", Better Regulation Task Force, available via: <http://webarchive.nationalarchives.gov.uk/20100407162704/http://archive.cabinetoffice.gov.uk/btr/upload/assets/www.btr.gov.uk/principlescafilet.pdf>.

48 HC Deb 3 Apr 2014; col 1019.

49 JTI does not agree with a number of the assertions made in the current Consultation and the 2014 IA. The fact that JTI does not respond to all of them in this response should not be treated as an acceptance of them.

50 This was previously referred to by the DH as "denormalisation" - "Excellence in tobacco control: 10 High Impact Changes to achieve tobacco control", DH, May 2008. Available via:

[http://www.haringey.gov.uk/dh-excellence-in-tobacco-control\\_1.pdf](http://www.haringey.gov.uk/dh-excellence-in-tobacco-control_1.pdf). "There are three key principles that underpin efforts to tackle the tobacco epidemic – a genuinely strategic approach to tobacco control, effective partnership working and a focus on denormalising smoking." (page 4). "Smoking is the greatest cause of premature death in our country, making it a public health area of priority. If the principles of tobacco control are applied comprehensively then the potential is enormous. Smoking as a normal activity will be challenged and tobacco use denormalised" (page 11).

51 See paragraphs 9.31 to 9.32 of JTI's 2008 consultation response.

52 See paragraphs 3.45 to 3.60 of JTI's 2012 consultation response.

53 The issue of the 'objectives' listed in the consultation is also considered further in this response in the following contexts: plain packaging will not change actual smoking behaviour (section 2 of Annex 1); the amendments which were proposed



by Philip Davies MP to the relevant clause of the Children and Families Bill 2014 (see paragraph 6.13(b) of this response, and Annex 3); and the 2014 Impact Assessment (Annex 2).

54 As suggested by JTI both in correspondence with the DH (and other government departments) and in JTI's submission to the Regulatory Reform Committee's inquiry into Better Regulation on 13 June 2014. The involvement of departments such as BIS was (and remains) required to ensure that any such consultation can be an informed and meaningful exercise.

55 2012 IA, page 3.

56 Chantler Report, Annex A: method statement, page 41.

57 Chantler Report, paragraph 2.9, page 17.

58 Chantler Report, paragraph 1, page 3.

59 Letters to the Secretary of State for Health dated 10 January 2014 and 17 April 2014. Separately, JTI also wrote to the Prime Minister, the Chancellor of the Exchequer and BIS expressing these concerns.

60 See section 2.F of JTI's 2012 consultation response.

61 Page 1 (top left-hand corner) of the 2014 IA does not identify any other departments or agencies as being involved.

62 This Consultation, responses to which are not mandatory, is not an adequate substitute for pro-actively seeking the listed departments / agencies' views.

63 Such analysis is particularly important given: recent successes in combating illicit trade as a result of coordinated efforts between manufacturers, on the one hand, and HMRC and the UK Border Agency, on the other; and further funding requirements in light of an increase in illicit trade and the need for increased resources for pack authentication.

64 See: "Unite Parliamentary Briefing: Standardised Packaging and the threat to UK jobs", Unite, July 2014. See also Imperial Tobacco's announcement, available via: <http://www.imperial-tobacco.co.uk/index.asp?page=56&newscategory=11&year=2014&newsid=2000> in April 2014, that it intends to close its manufacturing plant in Nottingham, citing, amongst other things, "increased regulation" and "growth of illicit trade" as causes. This means that JTI's manufacturing plant in Lisnaffillan will be the only tobacco manufacturing factory in the UK.

65 2014 IA, paragraph 120, page 30.

66 See "A strategy for sustainable growth", BIS, published July 2010. Available via: <http://www.bis.gov.uk/assets/biscore/corporate/docs/s/10-1058-strategy-for-sustainable-growth>.

67 In a letter sent to JTI during the Consultation (14 July 2014), in response to a letter from JTI (11 June 2014), the Minister of State for Business and Energy agreed that it is: "correct to say that the proposal to require tobacco products to be retailed in standardised packs is of direct interest and concern to me and to BIS" and that he, and Lord Curry (non-executive Chairman of the Better Regulation Executive) had been working with representatives of the DH in this respect.

68 See the Institute of Directors submission to the 2012 Consultation, available via: <http://www.iod.com/influencing/policy-papers/regulation-and-employment/consultation-on-standardised-packaging-of-tobacco-products>.

69 See paragraph 2.48(e) of JTI's 2012 consultation response.

70 See the report prepared, on behalf of JTI, by Dr Andrew Lillico, which was submitted as part of JTI's response to the 2012 Consultation, and which is available via: [http://www.jti.com/files/3613/4149/4404/Dr\\_Lillico.pdf](http://www.jti.com/files/3613/4149/4404/Dr_Lillico.pdf). This is especially the case since the tobacco control measures already in place in the UK have limited the means by which tobacco manufacturers are able to compete.

71 Some local authorities have relied on the Local Government Declaration on Tobacco Control, underpinned by Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC), to justify a blanket policy of refusing to engage with tobacco product manufacturers on any and all policy issues, development and implementation. Article 5.3 provides no such justification. Rather, it rightly seeks to protect the process of developing public health policies from undue influence and illicit behaviour. To achieve this, it encourages transparency, inclusivity and integrity in accordance with the UN and OECD-endorsed principles of good governance and Better Regulation. The DH itself recognised this when it met with JTI in 2013 in the context of the 2012 Consultation, noting that: "Under article 5.3 of the [FCTC], DH is not prohibited from meeting with tobacco companies but meetings should take place under conditions of maximum transparency."

72 HM Treasury, The Green Book, Appraisal and Evaluation in Central Government, page 40. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220541/green\\_book\\_complete.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220541/green_book_complete.pdf).

73 See the press release, issued by the RPC on 4 March 2014: <https://www.gov.uk/government/news/independent-watchdog-urges-government-to-hold-firm-on-its-commitments-to-better-regulation>.

74 See minutes of the oral evidence given by given by Anna Soubry MP (then Parliamentary Under-Secretary of State for Public Health) and Andrew Black (Programme Manager, Tobacco Policy, the DH) to the House of Commons European Scrutiny Committee 17 July 2013: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cm/eulag/c591-ic59101.htm>.

75 In response to our letter of 17 April 2014, in relation to proposals to introduce plain packaging for tobacco products in the UK, BIS said our letter had been transferred to the DH: "in view of that Department's responsibility for the matters raised in [it]."

76 See Jane Ellison's letter to Sir Cyril Chantler setting out the Terms of Reference for the Chantler Review, dated 27 November 2013. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/ellison-letter.pdf>.

77 2012 IA, page 3.

78 JTI's submission to the Chantler Review, dated 10 January 2014 is available via:  
[http://www.jti.com/files/1313/8979/4396/JTI - Submission to Sir Cyril Chantler Review.pdf](http://www.jti.com/files/1313/8979/4396/JTI_-_Submission_to_Sir_Cyril_Chanter_Review.pdf)

79 Chantler Report, paragraph 6.11, page 40.

80 Chantler Report, paragraph 18, page 6.

81 See "Who funds research in the UK?: Cancer research in the UK is funded by drug companies, charities and the UK Government." Available via: <http://www.cancerresearchuk.org/cancer-help/trials/more/paying-for-trials>.

82 See for example: <http://www.blf.org.uk/Page/GSK-Partnership> and the statement by the British Lung Foundation that GlaxoSmithKline's support allows them to: "influence the health agendas in England, Scotland, Wales and Northern Ireland to raise the profile of lung health and improve respiratory services."

83 See, for example, the letter dated 14 October 2011 from a group of NGOs, charities, researchers, industry representatives and MBPs to the European Commission President, José Manuel Barroso. Available via: [http://smokefreepartnership.org/IMG/pdf/Tobacco\\_Products\\_Directive\\_letter\\_141011.pdf](http://smokefreepartnership.org/IMG/pdf/Tobacco_Products_Directive_letter_141011.pdf).

84 See "Advisers on e-cigarettes failed to declare their interests" in *Big Pharma's products*, The Times, 26 August 2013. Available via: <http://www.thetimes.co.uk/to/business/industries/consumer/article3852342.ece>.

85 See PHE's submission to the Chantler Review, January 2014: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270768/Independent\\_review\\_into\\_standardised\\_packaging\\_of\\_tobacco\\_PHE\\_response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270768/Independent_review_into_standardised_packaging_of_tobacco_PHE_response.pdf).

86 More generally, the House of Commons Health Committee has previously expressed concerns that: "there is inadequate clarity about how (PHE) will approach crucial policy issues such as... standardised packaging of tobacco products. The public expects PHE to be an independent and forthright organisation that will campaign on behalf of those public health objectives and policies which it believes can improve the nation's health." (Minutes of House of Commons Health Committee's conclusions and recommendations on PHE, prepared 26 February, 2014, <http://www.publications.parliament.uk/pa/cm/201314/cmselect/cmhealth/840/84009.htm>.) Similarly: "We are concerned that there is insufficient separation between PHE and the Department of Health. The Committee believes that there is an urgent need for this relationship to be clarified and for PHE to establish that it is truly independent of Government and able to speak 'truth to power.'" (Minutes of House of Commons Health Committee's conclusions of PHE's independence, prepared 26 February 2014, <http://www.publications.parliament.uk/pa/cm/201314/cmselect/cmhealth/840/84007.htm>.)

87 See pages 5 and 6 of PHE's consultation response, published on 6 August 2014 and available via: <https://www.gov.uk/government/publications/standardised-packaging-of-tobacco-products-draft-regulations-consultation-phe-response>.

88 *Ibid*, page 6.

89 In this respect, see Annex 1, paragraphs 1.2 to 1.6.

90 Professors Devinney and Steinberg also individually met with the Chantler Review team to discuss their research / analysis on 28 February 2014 and 5 March 2014 respectively.

91 World Health Organization, International Agency for Research on Cancer, Volume 12, Methods for Evaluating Tobacco Control Policies (2008) available via: [http://www.iarc.fr/en/publications/pdfs-online/prev/handbook12/Tobacco\\_vol12.pdf](http://www.iarc.fr/en/publications/pdfs-online/prev/handbook12/Tobacco_vol12.pdf).

92 BIS, Better Regulation Framework Manual, page 4. Available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf).

93 The debate as to the status of the evidence is in no way advanced by "Hammond D. Standardized packaging of tobacco products: evidence review. Prepared on behalf of the Irish Department of Health, March 2014" (<http://health.gov.ie/wp-content/uploads/2014/06/Standardized-Packaging-of-Tobacco-Products-Evidence-Review.pdf>). This document, which is authored by a prominent tobacco control advocate, is not referred to or relied upon by the DH in the Consultation and does not identify any evidence since the date of the Chantler Report. As such, this document is not addressed further in this response.

94 The status of the current position in Australia is referred to in respect of Question 1, but it is important also to make this clear in the context of the Question 2 request that respondents provide: "any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging".

95 Additionally, a recent online report (April 2014) notes that: "for the first full year of plain-packaging regulation, tobacco companies sold approximately 21.074bn cigarettes in Australia, a 0.3% increase on the number of cigarettes sold during 2012. Surprisingly, this was the first time in four years that the number of cigarettes sold within Australia has actually increased. Before plain packaging regulations were brought in, the volume of cigarettes sold in Australia declined year after year" (emphasis added). See: <http://www.fool.com/investing/general/2014/04/14/new-data-from-australia-shows-big-tobacco-is-set-t.aspx>. Likewise, the evidence of the Australasian Association of Convenience Stores (AACS) provided to the Chantler Review stated that: "All the while, however, the actual volume of tobacco sold by convenience stores in Australia remains stable, with some AACS members reporting an increase in tobacco sales... There is no evidence I am aware of that clearly demonstrates that plain packaging has led to fewer young people taking up smoking, or habitual smokers choosing to quit smoking. There were academic studies published prior to the introduction of plain packaging that suggested it would benefit retailers, however practical experience over 12 months has shown this to be false." (Written submission of the AACS to the Chantler Review) See also page 34 and pages 52-53 of the Philip Morris International submission to the Chantler Review: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Philip-Morris-International-29-January-2014.pdf>.

- 96 See results from the 2013 National Drug Strategy Household Survey, provided by the Australian Institute of Health and Welfare (AIHW), available via: <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/data-and-references/>.
- 97 Figure 2 prepared by JTI based on AIHW prevalence figures for "daily smoker", "current – occasional weekly" and "current – occasional less than weekly". The linear trend is based on the period 1991 to 2010 with the addition of 1 forecast period (to 2013).
- 98 Figure 3 prepared by JTI based on AIHW "smoking trend by age" data for 12-17 year olds. The graph is based on "daily smoker" data only as AIHW warns that the 2013 data for occasional smokers is an estimate with "a relative standard error of 25% to 50%" and so "should be used with caution." The linear trend is based on the period 2004 (the first data point that exists in the series) to 2010 with the addition of 1 forecast period (to 2013).
- 99 See page 9 of: [https://ris.govspace.gov.au/files/2012/04/PIR\\_table\\_required.pdf](https://ris.govspace.gov.au/files/2012/04/PIR_table_required.pdf). December 2014 is the second anniversary of implementation of plain packaging in Australia.
- 100 An issue we consider in greater detail in this response at paragraphs 2.8 to 2.17.
- 101 "Tobacco tax gap estimates 2012-2013", available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/249543/131009\\_Publication\\_of\\_Tobacco\\_Tax\\_Gap\\_estimates\\_2012-13.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249543/131009_Publication_of_Tobacco_Tax_Gap_estimates_2012-13.pdf). According to HMRC's current upper estimates, up to 13% of the market for cigarettes and 42% of the market for RYO are illicit, with the result that HM Treasury loses up to £2.9 billion a year from the illicit trade in tobacco products.
- 102 "Consultation on the future of tobacco control", Department of Health, May 2008, available via: [http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalasset/documents/digitalasset/dh\\_085651.pdf](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalasset/documents/digitalasset/dh_085651.pdf).
- 103 "Tackling Tobacco Smuggling – building on our success", April 2011, paragraph 1.2. ASH also told the Chantler Review: "[i]t tends to be smokers from lower socioeconomic groups that access illicit tobacco and therefore children from poorer groups who have more access to it..." (Minutes of Sir Cyril Chantler's meeting with SmokeFree Action Coalition and others, page 62).
- 104 JTI 2012 consultation response, paragraphs 4.16 to 4.31.
- 105 Professors Zimmennan and Chaudhry, experts in the global illicit market, have co-authored (at the request of JTI) "The Impact of Plain Packaging on the Illicit Trade in Tobacco Product", paragraph 432, available via: [http://www.jti.com/files/5113/4150/5828/Impact\\_on\\_illicit\\_trade.pdf](http://www.jti.com/files/5113/4150/5828/Impact_on_illicit_trade.pdf).
- 106 *Ibid*, page 2.
- 107 HMRC itself has acknowledged that plain packaging: "probably does enhance and diversify the existing risks the UK faces but it is very difficult to quantify any changes in risk." See the note of Sir Cyril Chantler's second meeting with Andrew Leggett, Deputy Director, and Judith Kelly, Tobacco Strategy and Policy Team, HM Revenue and Customs. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx> (page 36).
- 108 The 2014 IA, paragraph 19: "The intervention carries quantified costs... (Additional losses [beyond the £2.3 billion in Exchequer losses discussed in paragraph 116 of the 2014 IA] with an indicative value of around £2bn increase in non-UK duty paid cigarettes will be further explored...);" paragraph 118: "We later provide an illustrative estimate that for cigarettes [an increase in illicit trade and/or cross border shopping] may be in the order of £2bn discounted over ten years"; and paragraph 142: "Estimates of the impact on cigarettes with these assumptions give around a £2bn reduction to the NPV estimate of this policy...".
- 109 The data can be accessed via: <https://www.uktradeinfo.com/statistics/pages/taxanddutybulletins.aspx>. Click on "Tobacco Duties" (June 2014) under the heading "Bulletin Datasets". The data is provided in tab 2 of the *Tobacco Bulletin June 2014*.
- 110 2014 IA, paragraph 141.
- 111 2014 IA, paragraphs 137 and 140.
- 112 The wording of the 2014 IA does not make clear what is meant by a 2% "transfer" from the UK duty paid to the non-UK duty paid market for cigarettes. For the purpose of responding to the Consultation, JTI has assumed it to mean that 2% of the UK duty paid market (which, according to the 2014 IA, represents 88% of the total cigarette market) would "transfer" to the non-UK duty paid market. 2% of 88% is 1.76%. On that basis, the non-UK duty paid cigarette market would increase by 1.76% to 13.76% of the total cigarette market as a result of plain packaging. According to HMRC's mid-point estimates presented in their 2013 tax gap data, the non-UK duty paid proportion of the cigarette market represents 5.5 billion cigarettes (constituting 12% of the cigarette market). On that basis, 1% of the cigarette market would represent approximately 460 million cigarettes. Therefore, a 1.76% increase in the non-UK duty paid market would result in over 800 million additional cigarettes per year and over 8 billion additional cigarettes over ten years, being smoked in the UK as a result of introducing plain packaging. The terms "additional" and "more" are used to reflect JTI's understanding of the term "transfer" as used by the 2014 IA (i.e. in addition to the amount of non-UK duty paid products available absent the policy, with an equal reduction in the UK duty paid products – with the displacement being from the UK duty paid to UK non-duty paid). See paragraphs 141, 142 and 181 of the 2014 IA.
- 113 The methodology for calculating the impact of a 2% "transfer" from the UK duty paid market to the non-UK duty paid market for cigarettes (as described in endnote 112 above) was used to calculate what this "transfer" might mean if applied to RYO products. The RYO-to-cigarette conversion used is based on UK smokers using an average of 0.4g of RYO tobacco to roll one cigarette. 2% of 58% (which, according to HMRC, is the size of the UK duty paid RYO market) is

1.16%. On that basis, the non-UK duty paid RYO market would increase by 1.16% to 43.16% of the total RYO market as a result of plain packaging. According to HMRC's mid-point estimates presented in their 2013 tax gap data, the non-UK duty paid proportion of the RYO market represents an equivalent of 11.8 billion cigarettes (constituting 42% of the RYO market). This would mean that 1% of the RYO market would represent approximately an equivalent of 280 million cigarettes. Therefore, a 1.16% increase in the non-UK duty paid market would represent an equivalent of over 300 million additional cigarettes per year, and an equivalent of over 3 billion additional cigarettes over ten years, being smoked in the UK as a result of plain packaging.

114 The 11 billion figure combines over 8 billion cigarettes being smoked as a result of plain packaging over a decade (see endnote 112 above) and an equivalent of over 3 billion cigarettes being smoked (converted from RYO using the conversion set out in endnote 113 above) as a result of plain packaging over a decade (see endnote 113 above).

115 The 2014 IA, paragraph 128.

116 The 2014 IA, paragraphs 25 and 26.

117 The 2014 IA, paragraph 137.

118 As shown above in endnote 112, a 1% increase in non-UK duty paid cigarette market (regardless of whether CBS or illicit trade) would represent an additional 460 million non-UK duty paid cigarettes over a year.

119 HMRC, "Man arrested in tobacco smuggling raids" (26 June 2014), accessed via: <http://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/man-arrested-in-tobacco-smuggling-raids-1013394>. In addition, one of the biggest seizures in 2013 seized 30.3 million cigarettes that arrived in three containers from China. See "Millions of smuggled cigarettes seized in wind turbine shipment" (7 March 2013), accessed via: <http://www.thecrs.com/cc/?p=2292>.

120 A 1% increase in illicit cigarettes would represent additional 460 million illicit cigarettes – which is 14 times more in terms of the number of cigarettes than the 32 million cigarettes seized as a result of this seizure.

121 As shown above in endnote 113, a 1% increase in non-UK duty paid RYO market (regardless of whether CBS or illicit trade) would represent an equivalent of additional 280 million non-UK duty paid cigarettes over a year.

122 Combining an additional 460 million illicit cigarettes (see endnote 118 above) and an equivalent of 280 million illicit cigarettes (converted from RYO using the conversion set out in endnote 113 above) totals nearly 750 million additional illicit cigarettes.

123 In respect of the funding of terrorist activities, see, for example, written evidence from the Police Service of Northern Ireland provided to the House of Commons Select Committee on Northern Ireland Affairs: <http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmnia/886/886we06.htm>.

124 "The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis", University of Zurich, Department of Economics, Working Paper No. 149, May 2014. Available via: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2414430](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414430) and "The "Possible" Effect of Plain Packaging on Smoking Prevalence in Australia: A Trend Analysis", Working Paper No. 165, June 2014. Available via: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2460704](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460704).

125 "An analysis of smoking prevalence in Australia", London Economics, November 2013, page 1 (for Philip Morris International).

126 "Illicit tobacco in Australia", KPMG dated 3 April 2014. Available via: [https://www.imperial-tobacco.com/assets/files/cms/KPMG\\_FY2013\\_Illicit\\_Trade\\_Report\\_FINAL\\_11\\_April\\_2014.pdf](https://www.imperial-tobacco.com/assets/files/cms/KPMG_FY2013_Illicit_Trade_Report_FINAL_11_April_2014.pdf). As identified in that document, the report was prepared by KPMG at the request of Philip Morris Limited, British American Tobacco Australia and Imperial Tobacco Australia Limited. KPMG provides a detailed explanation of its methodology in Appendices 1 and 2 to that report.

127 "Corporate report, Britain Open for Business: The Next Phase", published 24 January 2014. Available via: <https://www.gov.uk/government/publications/britain-open-for-business-the-next-phase>.

128 *Ibid.*

129 The response of 'NA' to the question in the 2014 IA of whether plain packaging "goes beyond minimum EU requirements?" is both incorrect and misleading.

130 "Fallon: No more 'gold plating' of EU laws", BIS Press release, issued on 25 February 2013. Available via: <https://www.gov.uk/government/news/fallon-no-more-gold-plating-of-eu-laws>.

131 See the RPC's opinion of the 2014 IA, published 25 July 2014, available via: <https://www.gov.uk/government/publications/impact-assessment-opinion-standardised-packaging-of-tobacco-products>.

132 See the Institute of Directors' submission to the 2012 Consultation, available via: <http://www.iod.com/influencing/policy-papers/regulation-and-employment/consultation-on-standardised-packaging-of-tobacco-products>.

133 See the September 2013 report: "Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union", a joint project between the European Patent Office and the Office for Harmonization in the Internal Market. Available via: [http://ec.europa.eu/internal\\_market/intellectual-property/docs/joint-report-ipo-ohim-final-version\\_en.pdf](http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-ipo-ohim-final-version_en.pdf).

134 See the ICC's 2014 report, "The ICC Intellectual Property Roadmap: current and emerging issues for business and policymakers", available at: <http://www.iccwbo.org/products-and-services/trade-facilitation/ip-roadmap/>.

135 Taken from a speech by the Secretary of State for BIS, Vince Cable MP, to the Alliance for Intellectual Property on 17 October 2013. Available via: <http://www.allianceagainstiptheft.co.uk/dev/downloads/pdf/Cableextracts.pdf>.

- 136 See "Banking on IP: An Active Response", the IPO's March 2014 report, available via: <http://www.ipn.gov.uk/ipresearch-bankingip-2014.pdf> where the IPO set out that: "Intellectual property matters. Whereas, in the not too distant past, the majority of business investment was in people or physical things like premises and machinery, today the majority of business investment is in intangible goods, in ideas and creativity. Making sure that our entrepreneurs, innovators and creators can translate their investment in the creation of intellectual property assets into value is key to the UK's long term growth prospects."
- 137 See "The Role of Government in Promoting and Protecting Intellectual Property", the All-Party Parliamentary IP Group, October 2012 report, available at: <http://www.allpartyipgroup.org.uk/pdfs/The%20role%20of%20Government%20in%20promoting%20and%20protecting%20IP.pdf>.
- 138 See the IP Report available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/318338/IP\\_crime\\_highlight\\_report.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318338/IP_crime_highlight_report.PDF). This report was published ahead of the International IP Enforcement Summit held in London in 2014.
- 139 See a press release by the Secretary of State for BIS, published on 11 June 2014. Available via: <https://www.gov.uk/government/news/government-committed-to-tackling-ip-crime>.
- 140 "Tobacco Regulation: The Plains are Coming", Exane BNP Paribas, as reported in The Irish Times on 21 July 2014, <http://www.irishtimes.com/business/economy/retail-and-services/tobacco-giants-may-sue-over-plain-packaging-1.1872475>. Separately, JTI notes, but disagrees with, the opinion of a Citi research paper dated 17 July 2014, available via: <https://r.citi.com/AmJ5AjCP5eMaMqRFMDZ4T0970wmlPJELAPbTaGBCALA%3D>.
- 141 See recital 29, available via the European Commission's website: [http://ec.europa.eu/internal\\_market/indprop/tm/index\\_en.htm](http://ec.europa.eu/internal_market/indprop/tm/index_en.htm).
- 142 See the joint statement from APRAM, BMM, ECTA, MARQUES and UNION-IP of 3 July 2013 to the ENVI committee, available via: <http://www.marques.org/positionpapers/default.asp>.
- 143 *Ibid.*
- 144 On 17 June 2014, Ireland notified the European Commission of its draft plain packaging legislation under the Technical Standards Directive (98/34/EC).
- 145 See the Law Society President's opening remarks to the Irish Parliament of February 2014, available via: <http://www.lawsociety.ie/Documents/news/2014/Opening%20Statement%20Plain%20Packaging%20%20Law%20Soc.pdf>.
- 146 See endnote reference 141 (recital 10).
- 147 See endnote 74.
- 148 Paragraphs 18 and 19 of the Secretary of State's Summary Grounds for contesting the claims.
- 149 See TRIS notification 2014/277/IRL, which states: "Issue of a detailed opinion by: *BALGARIJA, PORTUGAL, SLOVENSKO. The issue of a detailed opinion extends the standstill period*". Available via: [http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa\\_notif\\_overview&Year=2014&inum=277&lang=EN&NLlang=EN](http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&Year=2014&inum=277&lang=EN&NLlang=EN).
- 150 The full judgment of *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012), is available via: <http://www.austlii.edu.au/au/cases/cth/HCA/2012/43.html>.
- 151 *Ibid*, paragraph 81, per Gummow J.
- 152 *Ibid*, paragraph 101, per Gummow J, who held that: "there is sufficient impairment, at least of the statutory intellectual property of the plaintiffs, to amount to a "taking", but there is no acquisition of any property."
- 153 See footnote 8 of the Opinion of the EU Committee on Legal Affairs available via: <http://www.europarl.europa.eu/sites/getDoc.do?pubRef=-//BP//TEXT+REPORT+A7-2013-0276+0+DOC+XML+V0/EN>.
- 154 See paragraphs 6.21 to 6.33 of JTI's 2012 consultation response.
- 155 The expert opinion of Professor Gervais on the interpretation of TRIPS and the Paris Convention, prepared at the request of JTI, was annexed to JTI's 2012 consultation response. Available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.
- 156 The challenges will proceed on the basis of a harmonised procedure, and five panels consisting of the same three panellists were established on 5 May 2014. A significant number of WTO members have repeatedly argued against plain packaging legislation, claiming that it infringes TRIPS, the Paris Convention and / or TBT requirements.
- 157 See the statement by Cuba to the Committee on Technical Barriers to Trade, 19 and 20 March 2014, available via: [https://docs.wto.org/dol2fe/nagss/fe\\_browse/fe\\_b\\_s005.aspx?mesinsid=109130&language=1&startdate=&enddate=&subiectid=&searchpage=&&cafid=122285,122596,122861,123036,123123,123310,123394,123416,123411,123412,123426,123607,123606,123605,123618,123617,123619,123634&languagechanged=true#](https://docs.wto.org/dol2fe/nagss/fe_browse/fe_b_s005.aspx?mesinsid=109130&language=1&startdate=&enddate=&subiectid=&searchpage=&&cafid=122285,122596,122861,123036,123123,123310,123394,123416,123411,123412,123426,123607,123606,123605,123618,123617,123619,123634&languagechanged=true#).
- 158 See the submission made by the Government of Honduras to the Chandler Review, 15 January 2014, available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/submittedevidence/Republic-of-Honduras-Submission.pdf>.
- 159 See "Intellectual property meeting mulls Irish tobacco plan, drug tariffs, sport, non-violation", 10 and 11 October 2013, available via: [http://www.wto.org/english/news\\_e/news13\\_e/trip\\_10oct13\\_e.htm#plainpackaging](http://www.wto.org/english/news_e/news13_e/trip_10oct13_e.htm#plainpackaging).
- 160 See, for example, MARQUES' submission to the EU Commission's proposal for a revised TPD of 26 April 2013, available via: <http://www.marques.org/positionpapers/default.asp>, "such restrictions [contained by TPD2] on both figurative and

word trade marks would be in direct conflict with Article 20 of TRIPS which protects trade marks against being "unjustifiably encumbered by special requirements, such as ... use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings... Furthermore, TRIPS requires that any encumbrance must be demonstrably justified to protect public health and nutrition. In this context, it should be considered that there appears to be no authoritative or unequivocal evidence that introducing standardised packaging would help diminish tobacco consumption... There is therefore no justification for the severe restrictions of use or the entire removal of trade marks on tobacco packaging" (emphasis added).

161 For example, paragraph 5.7 of the Consultation Document says: "...the draft regulations specify the same colours as those required in Australia (Pantone 448C for packaging and Pantone Cool Grey 2C for any allowed text)."

162 In this respect, see, for example, paragraph 2.27 of JTI's 2012 consultation response and paragraph 7.2 of JTI's 2008 consultation response.

163 "Improving Regulation", an independent report on the analysis supporting regulatory proposals, January-December 2011, published by the RPC via:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/252699/improvingregulationreportmarch2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252699/improvingregulationreportmarch2012.pdf)

164 The RPC's 2012 opinion explains that: "If an IA receives an Amber flag, this means we have areas of concern with the quality of analysis and evidence presented. These issues should be addressed prior to the IA being finalised so as to improve its contribution to the final decision made. On this understanding, we judge the IA to be 'Fit for Purpose'" (emphasis added).

165 See the RPC opinion issued in respect of the 2012 Impact Assessment, available via:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260631/RPC-Published-Opinions-2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260631/RPC-Published-Opinions-2012.pdf), page 94.

166 2012 IA, page 3.

167 See RPC's response to 'Understanding the Impact of Regulatory Policy Committee Amber Opinions' research, published 12 June 2014. Available via: <https://www.gov.uk/government/publications/rpc-response-to-understanding-the-impact-of-regulatory-policy-committee-amber-opinions-research>. The RPC's opinion (see endnote 131) also expressly recognises the 2014 IA as being 'fit for purpose' only "provided the Department addresses the points set out in this opinion."

168 See endnote 131.

169 Watts, M. (1992). "What is a Market Economy? U.S. Information Agency". In this publication, which a US academic wrote for the US Department of State and which has since been translated into Russian, Polish, Korean and more than thirty other languages, it was stated: "Market economies may be practical, but they also rest upon the fundamental principle of individual freedom: freedom as a consumer to choose among competing products and services... To begin with, no government ministry decides how many shirts or blouses to manufacture, or what styles and colors. Anyone - individual or company - can decide to produce and sell shirts and blouses in a market economy, and many will do just that if they believe they can sell these products at prices high enough to cover their production costs - and earn more making such clothing than they can doing something else. This leads to direct competition between different firms making and selling these products, and that competition is one of the basic reasons why there are generally so many different styles, fabrics, and brands of clothing for consumers to choose from..." (emphasis added). Available via:  
[http://www.google.co.uk/url?url=http://guangzhou.usembassy-china.org.cn/uploads/images/8e33nqY0bnOYc11MVDCZe/What is a Market Economy.doc&rc=j&frm=1&a=&ecsc=s&sa=U&ei=9arU5DAPOSQ7Ab0woD4Cw&ved=0CBQOFIAA&usq=AFOjCNHH5m5BAXDBInPdORCfU8nn4jP3A](http://www.google.co.uk/url?url=http://guangzhou.usembassy-china.org.cn/uploads/images/8e33nqY0bnOYc11MVDCZe/What%20is%20a%20Market%20Economy.doc&rc=j&frm=1&a=&ecsc=s&sa=U&ei=9arU5DAPOSQ7Ab0woD4Cw&ved=0CBQOFIAA&usq=AFOjCNHH5m5BAXDBInPdORCfU8nn4jP3A)

170 See paragraph 4.24 of this response and also, for example: "The economic importance of brands – seven reasons why brands really matter", British Brand Groups: <http://www.britislibraadsgroup.org.uk/library/download/462e21762ce5f>; and "Importance of branding to the UK economy", Intellectual Property Awareness Network: <http://www.ipaware.net/node/41>.

171 See, respectively, "PM speech at Open Government Partnership 2013", 31 October 2013, <https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013>; the Prime Minister was unequivocal about the benefits of free markets when campaigning for the leadership of the Conservative Party in 2005, available via: <http://www.theguardian.com/politics/2005/nov/08/toryleadership2005.conservatives>; "The importance of Scotland to the UK: David Cameron's speech", 7 February 2014, <https://www.gov.uk/government/speeches/the-importance-of-scotland-to-the-uk-david-camersons-speech>; and the report of the Conservative 2012 conference held in Birmingham, 7 October – 10 October 2012: <http://www.theguardian.com/politics/2012/oct/10/david-cameron-leader-aspination-nation> and <http://www.telegraph.co.uk/news/politics/conservative/9598534/David-Camerson-Conservative-Party-Conference-speech-in-full.html>. Emphasis added in quotes.

172 As explained above, many of the most serious failings of the 2014 IA are due to the DH failing to commission the independent expert reviews on the wider aspects of the policy that JTI has repeatedly called upon it to do.

173 2014 Consultation, paragraph 1.1, page 2.

174 HC Deb 28 November 2013; col 409.

175 See the unrevised transcript of evidence taken before the Select Committee on Science and Technology, 25 June 2014. Available via: <http://www.parliament.uk/documents/lords-committees/science-technology/behaviourchangefollowup/04ucST240614.pdf>.

176 HC Deb 10 Feb 2014; col 605.

- 177 See the letter from Professor Dame Sally Davies to Jane Ellison, dated 2 April 2014, available via: [http://data.parliament.uk/DepositedPapers/Files/DEP20140559/Chief\\_Medical\\_Officer\\_to\\_Party\\_USec\\_Public\\_Health\\_Chantler\\_Review.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP20140559/Chief_Medical_Officer_to_Party_USec_Public_Health_Chantler_Review.pdf).
- 178 HC Deb 10 Feb 2014; col 602.
- 179 HC Deb 3 April 2014; col 1122.
- 180 HC Deb 3 April 2014; col 1029.
- 181 See endnote 74.
- 182 HC Deb 3 April 2014; col 1019.
- 183 See, for example, questions from Fiona Bruce MP: "I strongly support the Minister's statement and proposals. Does she agree that if 4,000 children a year can be discouraged from taking up smoking there will be a double public health win— not only better health outcomes for those 4,000, but the release of funds for the health treatment of others in their generation for illnesses and disease? Those funds would otherwise have to be used, in time, to treat many of those 4,000 for smoking-related diseases" (HL Deb 3 April 2014, vol 753; col 1024) and Luciana Berger MP: "As Sir Cyril says, if we can reduce that figure by even 2%, 4,000 fewer children will take up smoking each year. For that reason, I strongly welcome the fact that Sir Cyril's review confirms what public health experts have been arguing for some time: standardised packaging makes cigarettes less attractive to young people and could help to save lives" (HL Deb 3 April 2014, vol 753; col 1019).
- 184 These figures were also repeated, absent any meaningful context, by Sir Cyril Chantler in the BBC2 documentary "Burning Desire: The Seduction of Smoking," originally broadcast on Thursday 29 May 2014: "The 2% reduction in the 200,000 or so young people who start smoking each year would be 4,000 young people not starting to smoke each year which, of course, would translate eventually into a huge saving in terms of lives."
- 185 Chantler Report, paragraph 18, page 6.
- 186 Chantler Report, paragraph 6.11, page 40.
- 187 See ASH media release, published 16 July 2014, available via: <http://www.ash.org.uk/media-room/press-releases/huge-drop-in-australian-smoking-rates-attributed-to-standardised-packs>.
- 188 For JTI's press release, see: [http://www.jti.com/files/7414/0595/4753/JTI\\_Australia\\_ASH\\_Final\\_180714.pdf](http://www.jti.com/files/7414/0595/4753/JTI_Australia_ASH_Final_180714.pdf). See also the letter from Mr Daniel Torras (JTI's UK Managing Director) to the Financial Times on the same issue: <http://www.ft.com/inl/cms/s0/1abf3096-08f8-11e4-8d27-00144feab7de.html#axzz39REdyVW>.
- 189 As we noted in that letter, consistent with principles of Better Regulation this present Consultation should have been for a minimum 12 week period. Indeed, the Cabinet Office's own "Consultation Principles: guidance" recognises that: "Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response... For a new and contentious policy, 12 weeks or more may still be appropriate." The unfairness of such a short consultation period is exacerbated by the fact that Sir Cyril Chantler had nearly three times as long to produce his report (27 November 2013 to 31 March 2014 being nearly 18 weeks), and which, unlike the present exercise, was only required to consider one (albeit important) aspect of the implications of proceeding with plain packaging.
- 190 2014 Consultation, page 2.
- 191 See the summary of responses to the 2012 Consultation, available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212074/Summary\\_of\\_responses\\_to\\_consultation\\_-\\_standardised\\_packaging\\_tobacco.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212074/Summary_of_responses_to_consultation_-_standardised_packaging_tobacco.pdf). Separately, it is apparent from a response received to a FOIA request made by JTI (ref: DE00000832529) that in respect of the 2012 consultation, TONIC, the company which the DH requested carry out a review of the responses: "was asked by the Department to consider the responses to the consultation and produce a summary report of the key themes arising from this, rather than making a judgement on the quality of the evidence provided" (emphasis added).
- 192 See endnote 191 (page 13 of that document). Separately, the way the DH relies on consultation responses differs to how they have done so previously. In the summary report to the 2008 Consultation, the DH relied upon the fact that 98% of respondents were in favour of plain packaging to underline their intention to publish a consultation on plain packaging in 2012. It has not been made clear why the DH has shifted from relying on numbers to advance their position to ignoring their relevance now. The same logic dictates that the fact that the clear majority of respondents (over two-thirds) were, in 2012, opposed to plain packaging underlines why the DH should not now depart from its July 2013 stated position on this policy.
- 193 See the DH's news release: "How standardised tobacco packaging would work in practice." Published 26 June 2014, available via: <https://www.gov.uk/government/news/how-standardised-tobacco-packaging-would-work-in-practice>.
- 194 See endnote 191, page 8 and the distinction drawn between "Detailed responses that addressed multiple consultation questions" (2444 responses) and "Campaign responses" (665,989 responses).
- 195 This is an example of a response submitted to the 2012 Consultation. Available via: <https://www.gov.uk/government/consultations/standardised-packaging-of-tobacco-products>.
- 196 *Ibid.*
- 197 The statement of Secretary of State Jeremy Hunt MP, is available via: <https://www.gov.uk/government/news/consultation-on-standardised-packaging-of-tobacco-products>.



198 See the DH press release: <https://www.gov.uk/government/news/independent-review-of-standardised-packaging-for-tobacco>.

199 Sir Cyril Chantler also sought assistance from: Dr Yanzhong Wang and Professor Janet Peacock (both from King's College, London) and Professor Catherine Pope (University of Southampton), in order to assess the systematic review of the evidence on the public health effects of plain packaging, initially commissioned by the DH as part of the 2012 Consultation (but as updated) i.e. the Stirling review; and Mr James Dollis and Mr Mark Ransford, in order to work on price and illicit trade issues.

200 Chantler Report, paragraph 1.10, page 12. As noted in the method statement, the Chantler Review Team also visited Australia to take account of the experience of plain packaging in that country.

201 JTI's key regulatory submissions are available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

202 The DH also held separate meetings with other members of the TMA in or around this time. Despite being the lead department in proposing numerous pieces of tobacco control legislation, JTI understands that this was the first time in several years that the DH had met with any TMA member on such issues. Inevitably, it is very difficult to develop legislative proposals that are necessary, proportionate, evidence-based and in line with Better Regulation principles if a regulator refuses to engage directly on a regular basis with members of the industry it regulates.

203 See <https://www.gov.uk/government/news/government-response-to-tobacco-standardised-packaging-review>.

204 See endnote 56.

205 See "Behaviour change: the principles for effective intervention", NICE Guidance, published October 2007 available via: <http://www.nice.org.uk/guidance/ph6/resources/guidance-behaviour-change-the-principles-for-effective-interventions-pdf>.

206 *Ibid*, page 6.

207 *Ibid*, paragraph 2.16.

208 Note of meeting between Sir Cyril Chantler and Professor Steinberg, 5 March 2014. Transcript available via: <http://www.kcl.ac.uk/health/packaging-docs.aspx>.

209 Emphasis added. Chantler Report, paragraph 14, page 5.

210 Chantler Report, paragraph 4.22, page 30.

211 Webb, T.L., and Sheeran, P. (2006). "Does Changing Behavioral Intentions Engender Behavior Change? A meta-analysis of the experimental evidence". *Psychological Bulletin*. Vol. 132, No.2, pages 249-268.

212 *Ibid*, page 260.

213 Chantler Report, paragraph 4.21, page 29.

214 In these articles, non-conscious processes are also called "implicit attitudes", "automatic processes" or "automaticity", depending on the source.

215 Webb et al. (2006), page 263.

216 Sheeran, P., Gollwitzer, P.M. Bargh, J. A. (2013). "Non-conscious Processes and Health", *Health Psychology* 2013, Vol. 32, No. 5, pages 460-473.

217 Sheeran et al. (2013), page 464.

218 *Ibid*.

219 Marteau TM, Hollands GJ, Fletcher PC, (2012). "Changing human behavior to prevent disease: the importance of targeting non-conscious processes". *Science*. 337, pages 1492-5.

220 *Ibid*, page 1494.

221 Chantler Report, paragraph 4.22, page 30.

222 Marteau et al. (2012), page 1494.

223 *Ibid*.

224 The priming studies are not relevant to determining the effect of standardised packaging on actual behaviour because they do not include interventions that alter the environment, comprising the sensory qualities or visual design of the product that is actually consumed and its packaging. The corollary of reducing consumption in the absence of such interventions, for example, by way of "intermediate outcomes", is also not discussed, nor can it be in these types of studies.

225 *Ibid*.

226 Chantler Report, paragraph 3.18, page 22.

227 Chantler Report, paragraph 4.22, page 30.

228 Robinson TN et al, (2007). "Effects of Fast Food Branding on Young Children's Taste Preferences. *Archives of Paediatric and Adolescent Medicine*". Vol 161, No.8.

229 *Ibid*, page 796.

230 Harris JL, Bargh JA and Brownell KD, (2009). "Priming Effects of Television Food Advertising on Eating Behaviour". *Health Psychology*. Vol 28, No 4, pages 404-413.

231 *Ibid*, page 410.

232 Marteau TM, Hollands GJ, Fletcher PC, (2012). "Changing human behavior to prevent disease: the importance of targeting non-conscious processes". *Science*. 337, page 34.



- 233 Chantler Report, paragraph 4.22, page 30.
- 234 Marteau et al. (2012), page 34.
- 235 Hollands et al. (2013), abstract from article via: <http://www.biomedcentral.com/1471-2458/13/1218>.
- 236 Chantler Report, page 4.
- 237 Chantler Report, paragraph 4.22, page 30.
- 238 Young, J. et al., "Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis." *Med J Aust* 2014; 200 (1): 29-32.
- 239 Zacher, M. et al., "Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips." *Addiction*. 2014 Apr;109(4):653-62. doi: 10.1111/add.12466. Epub 2014 Feb 25.
- 240 Wakefield, M et al. "Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study". *BMJ Open* 2013;3:e003175 doi:10.1136/bmjopen-2013-003175.
- 241 See Sir Cyril's Chantler's note of his meeting with Professor Devinney, 28 February 2014. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx> (page 28).
- 242 Chantler Report, paragraph 18, page 6.
- 243 Chantler Report, paragraph 14, page 5.
- 244 Chantler Report, paragraph 6.2, page 38. The quote continues: "It strongly supports the intermediate outcomes identified, and, taking into account the wider evidence around marketing, and drawing on modern behavioural psychology, there is a clear plausible link to behaviour."
- 245 Chantler Report, paragraph 12, page 5.
- 246 Statement attributed to Professor Linda Bauld, Note of meeting between Professor Linda Bauld, Dr Crawford Moodie and Ms Kathryn Angus, UK Centre for Tobacco Control Studies, University of Stirling, 15 January 2014. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx> (page 4).
- 247 Professor Devinney's 2014 report, paragraph 4.4, page 27. Available via: [http://www.jti.com/download\\_file/1246/629/](http://www.jti.com/download_file/1246/629/).
- 248 See endnote 241 (page 27).
- 249 See endnote 247, paragraph 4.10(b).
- 250 "Evidence vital to the tobacco debate", Dr Neil McKeganey, Letters to the Editors, Scotland on Sunday, 27 April 2014.
- 251 Chantler Report, box 1, page 23. Further, JTI notes that some lobbyists (including an executive agency of the DH) have even tried to suggest that it will take "many years" to discern the impact of plain packaging. The PHE submission to the Chantler Review states, at page 12: "Given that standardised packaging has been introduced in only one country for a period of just over 13 months, it is inevitable that the evidence supporting the case for this approach is based upon measures of process rather than measures of outcome. Changes in the initiation rates of smoking among children and young people will take many years to be properly discerned, and have wide confidence intervals that are a consequence of limitations upon survey size. Similarly, changes in overall prevalence of smoking require long periods of observation" (emphasis added), available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270768/Independent\\_review\\_into\\_standardised\\_packaging\\_of\\_tobacco\\_PHE\\_response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270768/Independent_review_into_standardised_packaging_of_tobacco_PHE_response.pdf). See also endnote 89 of JTI's Chantler Submission.
- 252 Chantler Report, box 4, page 36. Subsequent to the Chantler Report, PMI has, for example, reported in its 2014 Second-Quarter Results Conference Call July 17, 2014 as follows: "...[In] Australia... the combination of a certain commoditization of the market, induced by plain packaging, large excise tax increases, and heavy price discounting, particularly at the bottom of the market, has accelerated down-trading to lower price, lower margin brands, or even illicit products. The super-low price segment has grown from 6.3% in 2011 to 28.3% in the first half of this year, when the effective price gap between a premium brand, such as Marlboro, and a super-low price brand, such as Band Street, widened to about eight Australian Dollars per pack of 25 cigarettes, or about 36%. This compares to a gap of about 26% in 2011." Available via: <http://www.pmc.gov/Archives/cdgar/data/1413329/000141332914000036/a2014-07x16x2014xjixsecond.htm>.
- 253 Chantler Report, paragraph 4.23, page 30.
- 254 See endnote 56.
- 255 Chantler Report, paragraph 1.19, page 13.
- 256 Chantler Report, paragraph 10, page 4.
- 257 Maynard, M. et al., (2014). "Plain packaging of cigarettes and smoking behavior: study protocol for a randomized controlled study", *BioMed Central, Trials* 2014, 15:252.
- 258 Chantler Report, paragraph 1.20, page 13. JTI considers it notable that Sir Cyril Chantler refers to the "best available evidence" (emphasis added), which is clearly more qualified than any assessment of "the best evidence" (the latter being more conducive to satisfying the Government's Better Regulation requirement for "robust and compelling" evidence).
- 259 Chantler Report, paragraph 4.17, page 28.
- 260 See endnote 241 (page 26).

261 Bonnefoy et al. November 2007. "Constructing the evidence base on the social determinants of health: a guide." Available  
via: [http://www.who.int/social\\_determinants/knowledge\\_networks/add\\_documents/mekn\\_final\\_guide\\_112007.pdf](http://www.who.int/social_determinants/knowledge_networks/add_documents/mekn_final_guide_112007.pdf).

262 *Ibid*, paragraph 9.1.1.

263 *Ibid*.

264 Chantler Report, Annex E; Stirling Review and Update : Qualitative studies. Analysis by Professor Catherine Pope,  
Southampton University, page 56.

265 *Ibid*, page 57.

266 *Ibid*.

267 Chantler Report, paragraph 4.7.

268 See the Cochrane Collaboration website, available via: <http://www.cochrane.org/about-us>.

269 See endnote 241.

270 A number of third party statements have previously called into question the science of the Cochrane Collaboration. See for  
example Shrier, I. (2003). "Cochrane reviews: new blocks on the kids", British Journal of Sports Medicine, 37;473-474 and  
Groves, T. (2014) "How bloggers responded to the updated Cochrane reviews on Tamiflu and Relenza", British Medical  
Journal, 24 April 2014.

271 Chantler Report, paragraph 4.8, page 26.

272 At paragraph 1.13 of his report (page 12), Sir Cyril Chantler notes that: "a number of papers referenced in the tobacco  
industry's submissions were considered in detail after identification of those that appeared most relevant to the task. The  
voluminous literature on tobacco control was also scrutinised to the extent that time allowed, including material sourced  
from references in submissions, published papers and previous reviews." It is not made clear how the Chantler Review  
team assessed which papers were considered "most relevant to the task" or whether the Chantler Review team took a  
similar approach when assessing submissions from proponents of plain packaging.

273 Professor Steinberg's Letter to Sir Cyril Chantler dated 7 January 2013, page 9. See also Professor Laurence Steinberg  
(2010): "Adolescent Decision Making and the Prevention of Underage Smoking", annexed to JTI's 2012 Consultation  
response, pages 28-29.

274 Chantler Report, paragraph 4.6, page 26.

275 Chantler Report, paragraph 4.14, page 27.

276 See endnote reference 241, page 28.

277 See endnote 124.

278 "An analysis of smoking prevalence in Australia", London Economics, November 2013, page 1.

279 See endnote 273, page 29.

280 *Ibid*.

281 In respect of the issue of whether plain packaging has caused an increase in youth smoking, see paragraph 2.29 of Annex 1  
to this response.

282 See endnote 90 and Professor Steinberg's Report referred to at endnote 273.

283 Chantler Report, paragraph 6.2, page 38.

284 See endnote 241, page 28.

285 Hatchard, J. et al. (2014). "Representation and Misrepresentation of Scientific Evidence in Contemporary Tobacco  
Regulation: A Review of Tobacco Industry Submissions to the UK Government Consultation on Standardised Packaging",  
PLOS.

286 Chantler Report, paragraph 4.15, page 28.

287 Chantler Report, paragraph 3.16, page 22.

288 For example: (a) the statement by Ronald Ridderbeekx (paragraph 3.1) refers only to brand switching activities between  
existing adult smokers; (b) the 1992 PMI report on marketing perceptions (paragraph 3.2) refers to adult female smokers  
(as an aside, JTI queries: (i) how relevant the views expressed in a document that is over 20 years old can be, not least  
because of the extent and scope of regulatory change in the UK since then; and (ii) the applicability of historic documents  
belonging to one manufacturer, to other manufacturers); (c) the Kotowski and Hammond review (paragraph 3.3) considers  
documents which discuss particular segments of the adult smoking population; and (d) the statement by the former JTI  
executive (paragraph 3.3) again refers simply to the launch / rejuvenation of a new product, and is clearly referable to brand  
switching amongst existing adult smokers.

289 See Chantler Report, paragraph 4.22, page 30. The Chantler Review Team met with: (a) Kate Waters "to gain insight into  
'how marketing works': how it is approached by marketing departments/agencies, and where the role of packaging fits in  
this field of expertise"; and (b) Andy Knowles "to better understand the purpose of packaging, and its relationship to  
marketing". These discussions are not discussed or acknowledged in the Chantler Report.

290 Chantler Report, paragraph 3.9, page 20.

291 The Chantler Report variously and wrongly confuses and / or conflates the concepts of "branding", "packaging design"  
(paragraph 6.10), "product design" (paragraph 3.6) and "advertising and promotion" (paragraph 3.7), despite these being  
specialised areas that work in different ways.

292 Chantler Report, paragraph 3.22, page 24.

293 In this context, it is important to differentiate between products (such as cigarettes or tea) and brands (such as Camel or Twinings).

294 Chantler Report, paragraph 7, page 4.

295 Capella ML, Taylor, CR and Webster, C. (2008). "The effect of cigarette advertising bans on consumption", Journal of Advertising, Vol. 37, Issue 2, 7-18.

296 Grabowski, H. (1978), "The effects of advertising on intra-industry shifts in demand", Explorations in Economics Research, Vol. 3, 675-701, Lambin, J. (1976), "Advertising, Competition and Market Conduct in Oligopoly Over Time", Amsterdam: North-Holland Publishing Co, as cited in Mullond JP (1989), "The Effect of Advertising on the Level and Composition of Cigarette Consumption", 13 November 1989.

297 See paragraph 3.8, FTC document.

298 Chantler Report, paragraph 8, page 4.

299 *Ibid.*

300 Chantler Report, paragraph 7, page 4.

301 See, for example, Lancaster, M, and Lancaster, A. (2003), "The economics of tobacco advertising: spending, demand and the effects of bans", International Journal of Advertising 22 and Duffy, M (1996), "Econometric studies of Advertising, Advertising Restrictions and Cigarette Demand: A Survey", International Journal of Advertising, Vol 15, Issue 1, 1-23.

302 Gallup Org. (1993), "Smoking Prevalence, Beliefs and Activities, by Gender and Other Demographic Indicators".

303 See paragraph 2.11 of JTI's Chantler Submission, and paragraph 3.8 of the FTC document.

304 For example, Nelson, JP (2003), "Youth smoking prevalence in developing countries, effects of advertising bans", Applied Economic Letters, Vol. 10, 805-811, Lancaster and Gotthofer (2000) "The Economics of Tobacco Advertising: Spending, Demand and the Effects of Bans", Proceedings of the American Academy of Advertising, Newport, Rhode Island, April 14-17, 200, Duffy, M (1996), "Econometric studies of Advertising, Advertising Restrictions and Cigarette Demand: A Survey", International Journal of Advertising, Vol 15, Issue 1, 1-23, and Stewart MJ (1993), "The Effect on Tobacco Consumption of Advertising Bans in OECD countries", International Journal of Advertising, 12, 155-180.

305 The transcript of the relevant part of the hearing is available via:  
<http://www.austlii.edu.au/au/other/HCATrans/2012/91.html>.

306 JTI's 2012 consultation response, paragraphs 4.8 and 4.9.

307 Indeed a letter dated 16 December 2013, written by the Parliamentary Under Secretary of State at the DH, shows that Sir Cyril Chantler had not planned to consider illicit trade at all: "You ask for the review of Sir Cyril Chantler to be extended to include whether the introduction of standardised packaging is likely to have an effect on public health, to be extended to include the possible impact on the illicit tobacco trade. I am afraid this is not possible." This letter of response to the Common Sense Alliance was disclosed in response to a Freedom of Information request, published on the DH website. Available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/310952/FOI\\_response\\_letter.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310952/FOI_response_letter.pdf).

308 The risk that the illicit trade will be made worse by the introduction of plain packaging has been recognised by the 2012 Consultation and the accompanying 2012 IA: "there is a risk that plain packaging may lead to some reversal of the existing downward trend in the illicit trade in tobacco products"; and "it may be argued that plain packaging would be easier and cheaper to copy, so increasing the supply of illicit tobacco." See the 2012 IA, paragraphs 76 and 79.

309 See endnote reference 105.

310 Submission by Iggesund Holmen Group, dated 6 January 2014; meeting with representatives from API Group, Essentra, Chesapeake and Weidenhammer and their slides; submission of European Carton Makers Association; and former Scotland Yard Detective Chief Inspector (Will O'Reilly). All available via: <http://www.kcl.ac.uk/health/packaging-docs.aspx>.

311 See, for example the report "Better Regulation and Certain Tobacco Control Measures" <http://www.jti.com/how-we-do-business/resources/> which was prepared by Professor Martin Cave OBE, in 2010 at the request of JTI. Professor Cave is a regulatory economist specialising in competition law and in the network industries, including airports, broadcasting, energy, posts, railways, telecommunications and water. He has published extensively in these fields, and has held professorial positions at Warwick Business School, University of Warwick, UK, and the Department of Economics, Brunel University, UK. He is now Visiting Professor at Imperial College Business School. He has been a Deputy Chair of the Competition Commission from January 2012. As explained in paragraph 1.2 of his report, Professor Cave is an expert in regulatory economics who has specialised knowledge in the design of regulatory policies to achieve economic (and also social) objectives, including expertise in the field of IAs, having prepared (on behalf of a regulator) and assessed, both from an academic perspective and on behalf of those to be regulated, such impact assessments. In 2009 he was awarded the OBE for public service.

312 The statement at paragraph 23 of the 2014 IA that: "The freedom to have branded tobacco, therefore, carries a cost to others; and society arguably need not accord value to a freedom that involves inflicting harm on others" is a powerful illustration of the manner in which the authors of the 2014 IA are seemingly content not to give meaningful consideration to the costs of plain packaging.

313 See endnote 131.

314 "IA Toolkit: How to do an Impact Assessment", HM Government (August 2011), page 19.

315 See endnote 311, page 15.

316 2014 IA, paragraphs 149 and 154, pages 37 and 28 respectively.

317 The Green Book, rule 2.14, page 6.

318 2014 IA, page 1.

319 2014 IA, paragraph 149.

320 Health and Social Care Information Centre "Smoking, Drinking and Drug Use Among Young People in England – 2013", 4 July 2014, page 53.

321 2014 IA, paragraph 53.

322 JTI recently entered into agreement to acquire Zanders Ltd., a leader in e-cigarettes best known for its E-Lites brand. See: <http://www.jti.com/media/news-releases/jti-acquires-leading-e-cigarette-brand-e-lites/>.

323 "E-cigarette uptake", A report commissioned by PHE, Professor Linda Bauld, Kathryn Angus and Dr Marisa de Andrade. Available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/311491/E-cigarette\\_uptake\\_and\\_marketing.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311491/E-cigarette_uptake_and_marketing.pdf).

324 "Electronic cigarettes", A report commissioned by PHE, Professor John Britton and Dr Ilze Bogdanovica. Available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/311887/E-cigarettes\\_report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311887/E-cigarettes_report.pdf).

325 2014 IA, paragraph 203, page 51.

326 See paragraph 6.16. Since the date of JTI's 2012 consultation response, HM Government also legislated to introduce a proxy purchase offence. It is unclear how, if at all, any effect of this policy (if any) has been factored into the 2014 IA's baseline analysis.

327 2014 IA, paragraph 149, page 37.

328 Henriksen et al. (2004), "Association of retail tobacco marketing with adolescent smoking", *American Journal of Public Health*, Dec 2004, Vol 94, No 12; 2081-2083.

329 A further factor severely limiting the relevance of Henriksen's California based critique of "retail tobacco marketing" to the UK is that tobacco product manufacturers have effectively been stopped from advertising their products in the UK for over a decade (this point is explained more generally at paragraph 2.24 of Annex 1).

330 2009 IA, paragraph 48, page 17.

331 See, notably, the reports by Dr Andrew Lilico prepared at the request of JTI: (i) "Economic Analysis of a Display Ban and/or a Plain Packs Requirement in the UK" dated 2 September 2008; (ii) "The impact of restrictions on the display of tobacco products – a supplemental report" dated 18 October 2009; (iii) "Economic Analysis of a Display Ban Requirement in England" dated 28 April 2010; (iv) "Economic Analysis of Restrictions on the Display of Tobacco Products – 2009 Canadian Annual Smoking Data" dated 30 November 2010; and (v) "Economic Analysis of a Display Ban Requirement in England – Supplemental Report" dated 11 January 2011. Dr Lilico is an expert in microeconomic analysis and regulatory impact assessment. Dr Lilico's September 2008, October 2009 and November 2010 reports are available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

332 2014 IA, paragraph 153 page 38.

333 TPD2 Impact Assessment, 19 December 2012, page 114.

334 The European Commission states, at page 113 of the 2012 TPD2 IA, that the Australian impact assessment estimated that its proposals: "would result in a 1.3% decline in smoking prevalence rate per annum (12.3% decrease in 10 years) and a 3% decrease in tobacco consumption per capita per annum (26.3% decrease in 10 years)." In fact, these are the baseline figures cited by the Australian impact assessment. See further, *Cost-benefit analysis of proposed new health warnings on tobacco products*, Applied Economics (Canberra: Applied Economics; 2003), page 14.

335 "The Introduction of Picture Warnings on Tobacco Packs – Final Regulatory Impact Assessment", UK Department of Health (London: UK DoH; 2007).

336 The DH assumed in 2007 that the introduction of pictorial warnings would result in a 0.5% decrease in smoking prevalence. This figure was duplicated from a 2002 DH assumption as to the effect of written warnings that, in turn, was derived from a 2001 DH assumption made in relation to the advertising ban. See footnote 2 of the 2007 DH "Final Regulatory Impact Assessment".

337 2014 IA, paragraph 151, page 37.

338 See paragraphs 3.37 to 3.41 of JTI's 2012 consultation response and paragraphs 4.25 to 4.30 of JTI's Chantler submission.

339 See endnote 247.

340 JTI's 2012 consultation response, paragraph 3.41.

341 It is our understanding that these are the views of Dr Hora (despite his name being redacted by the DH). This is based on the fact that he was, and still is, the Director, Center for Risk and Economic Analysis of Terrorism Events at the University of Southern California, and he says "my earlier work is cited [sic]..." in paragraph 125 of Annex 2 of the 2012 IA, which references Dr Hora and Dr van Winterfeldt's work.

342 2014 IA, paragraph 135, page 34.

343 2014 IA, paragraph 20, page 7.

344 *Ibid.*

345 2014 IA, summary table, pages 45 to 47.  
346 2014 IA, page 46.  
347 See endnote 311.  
348 JTI's 2012 consultation response, paragraph 6.7.  
349 2014 IA, paragraph 22, page 7.  
350 2014 IA, paragraph 90, page 24.  
351 *Ibid.*  
352 See "Ashes to Ashes" Convenience Store news article, published 22 May 2014. Available via:  
<http://www.conveniencestore.co.uk/advice/your-business/ashes-to-ashes/357764.article>.  
353 HL Deb 6 May 2009; Col 570.  
354 See Asda's history via their website: <http://your.asda.com/about-asda/the-history-of-asda>.  
355 Qatar Holding LLC is a wholly owned subsidiary of the Qatar Investment Authority (QIA) and acts under QIA's direction and control. See further: <http://www.j-sainsbury.co.uk/investor-centre/share-price/major-shareholders/>.  
356 JTI's 2012 consultation response, paragraph 5.37(a). See further Dr Lilico's 2012 Report, page 3, available via:  
[http://www.jti.com/files/3613/4149/4404/Dr\\_Lilico.pdf](http://www.jti.com/files/3613/4149/4404/Dr_Lilico.pdf).  
357 See paragraph 17(c) of JTI's 2012 consultation response.  
358 2014 IA, paragraph 84, page 23.  
359 See endnote 140.  
360 See the MARS submission to the 2012 Consultation, pages 1 and 4.  
361 2014 IA, paragraph 22, page 7.  
362 See BIS's published policy: Reducing the impact of regulation on business, updated on 10 July 2013. Available via:  
<https://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business/supporting-pages/operating-a-one-in-two-out-rule-for-business-regulation>.  
363 2014 IA, paragraph 112.  
364 See Statistical bulletin: Labour Market Statistics, released June 2014. Available via:  
<http://www.ons.gov.uk/ons/re/vlms/labour-market-statistics/june-2014/statistical-bulletin.html>.  
365 "Unite Parliamentary Briefing: Standardised Packaging and the threat to UK jobs", Unite, July 2014. See also endnote 64.  
366 2014 IA, page 1.  
367 See JTI's 2012 consultation response, paragraphs 5.18 to 5.20.  
368 Dr Lilico's 2012 Report, Summary, point 5 and 6.  
369 2014 IA, paragraph 1. See also paragraph 245 of 2014 IA.  
370 FTC Document, paragraph 3.76. Available via:  
[http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_085651.pdf](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_085651.pdf). See also page 3 of the 2014 IA.  
371 See Better Policy Making: Ofcoms approach to Impact Assessment. Available via:  
<http://www.ofcom.gov.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment/>.  
372 See endnote reference 311, paragraph 4.13, page 20.  
373 2014 IA, paragraph 24, page 8.  
374 See, for example the WHO Alcohol fact sheet, updated May 2014. Available via:  
<http://www.who.int/mediacentre/factsheets/fs349/en/>.  
375 2014 IA, paragraph 261, page 69.  
376 2014 IA, paragraph 266, page 69.  
377 JTI recognises that many people report difficulty quitting smoking. No matter how smoking is described, people can stop smoking if they are determined to do so. No one should believe that they are so attached or 'addicted' to smoking that they cannot quit. See further: <http://www.jti.com/how-we-do-business/smoking-and-health/addiction/>.  
378 The Green Book, paragraph 5.25, page 21.  
379 See "GSK plc announces major three-part transaction with Novartis to drive sustainable sales growth, improve long-term earnings and delivering increasing returns to shareholders", GSK media release, 22 April 2014. Available via:  
<http://www.gsk.com/media/press-releases/2014/gsk-announces-major-three-part-transaction-with-novartis.html>.  
380 For example, British American Tobacco plc and Imperial Tobacco Group plc are listed on the London Stock Exchange.  
381 The DH could, additionally, also have asked the tobacco manufacturers it met in 2013 (including JTI) about the known extent of their UK and non UK-based institutional investors.  
382 See endnote 127.

- 383 See [http://ec.europa.eu/internal\\_market/top\\_layer/living\\_working/services-establishment/index\\_en.htm](http://ec.europa.eu/internal_market/top_layer/living_working/services-establishment/index_en.htm) and Article 49 Treaty on the Functioning of the European Union.
- 384 See [http://ec.europa.eu/internal\\_market/capital/index\\_en.htm](http://ec.europa.eu/internal_market/capital/index_en.htm) and Article 63 Treaty on the Functioning of the European Union.
- 385 2014 IA, paragraph 157.
- 386 2014 IA, page 1.
- 387 The Green Book, paragraph 5.8.
- 388 See endnote 386.
- 389 See endnote 191.
- 390 2014 IA, paragraph 176, page 48. Also see paragraph 126, page 32: *"The potential impact on the UK duty unpaid market remains unknown and unquantified. If the illicit market increased significantly it could significantly increase the costs of standardised packaging policy."*
- 391 2014 IA, paragraph 26, page 8.
- 392 2014 IA, paragraph 136, page 34.
- 393 2014 IA, paragraphs 117 and 118, page 30.
- 394 2014 IA, paragraphs 136 and 137, page 34.
- 395 See endnote 126.
- 396 *Ibid*, page 6.
- 397 Australian Customs and Border Protection Service 2012-2013 Annual Report, Table 30, accessed via: <http://www.customs.gov.au/aboutus/annualreports/2013/p3i.html>.
- 398 JTI Chantler Submission, paragraphs 7 and 8 of the Schedule. ASH has postulated that illicit traders may be smuggling packs in plain packaging: *"because people know that's what it should look like, and if it looks branded, then it will expose it to looking more like it may be a smuggled pack and therefore, from the supplier's side, they want their product to go under the radar"*. See Smokefree Action Coalition meeting with the Chantler Review Team, page 53, available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/SmokeFree-Action-Coalition-27-January-2014.pdf>.
- 399 2014 IA, paragraph 125.
- 400 See, for instance, paragraphs 129 and 137 of the 2014 IA. The 2014 IA refers to the Chantler Report's definition of counterfeit: *"very high quality copies of the pack, but distinguishable from legal duty free through the lack of identifiable production/security markings"*. There are four issues with this categorisation: (a) as demonstrated in Appendix E of Professors Zimmerman and Chaudhry's Report, available via: [http://www.jti.com/files/51113/4150/5828/Impact\\_on\\_illicit\\_trade.pdf](http://www.jti.com/files/51113/4150/5828/Impact_on_illicit_trade.pdf), counterfeit packs exhibit a wide spectrum of varying levels of sophistications; (b) while a counterfeit pack of course would not contain a genuine and, therefore, *"identifiable"* production/security markings, it is simply not the case that all counterfeits contain no production/security markings; (c) it is unclear why the Chantler Report distinguishes *"legal duty free"* packs from other types of counterfeits. If this distinction is made under the assumption that counterfeits are designed to imitate legitimate products manufactured for duty free sale, this is not the case. In fact, counterfeits of a popular 'illicit whites' brands, such as Jin Ling, have been detected; and (d) the reference to the *"identifiable"* markings seems to imply that they somehow assist in the identification of counterfeits from legitimate products. This is in line with the arguments often made by tobacco control advocates, which have no basis on reality. See paragraphs 3.11 to 3.14.
- 401 The Chantler Report relied on the same assumption. Sir Cyril Chantler rightly raised the point that plain packaging could increase the demand for illicit products but quickly dismissed the potential problem by concluding that: *"restrictions placed on supply by border controls"* provides a solution and added that: *"[i]llicit tobacco is not a normal market – more people would buy illicit cigarettes today if they could, but they cannot because supply is limited by effective enforcement."*
- 402 See pages 6, 13 and 14 of the minutes of Sir Cyril Chantler's meeting with ASH on 27 January 2014. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/SmokeFree-Action-Coalition-27-January-2014.pdf>.
- 403 2014 IA, paragraph 132.
- 404 The Tobacco Products (Manufacture, Presentation and Sales) (Safety) (Amendment) Regulations 2007. Available via: [http://www.opsi.gov.uk/si/si2007/uksi/20072473\\_en\\_2](http://www.opsi.gov.uk/si/si2007/uksi/20072473_en_2).
- 405 The 2014 IA states that *"against"* the argument that plain packaging would be easier and cheaper to copy *"it is also clear that counterfeiters are already able to copy tobacco packaging on the market in the UK at present"*, paragraph 132, page 33.
- 406 As was explained in the submission by packaging manufacturers, amongst other participants, at meetings held as part of the Chantler Review (which appear to have been ignored in their entirety). See the submission by Iggesund Holmen Group, 6 January 2014. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/submittedevidence/Iggesund-Holmen-Group-Submission.pdf>. As explained by a tobacco packaging supplier, paperboard manufacturers produce and dispose of materials under strict regulations. Plain packaging will make a broader range of less regulated and more widely available packaging material so become suitable for the tobacco packaging process.

407 "Investigation: We infiltrate smuggling gang", The Sun, 4 June 2014.

408 Draft Regulations, Part 2, regulations 3(1) and 7(1); Schedule 1, regulation I(2)(e); Schedule 3, regulation 1(2)(c).

409 See endnote 105, paragraphs 404 and 409.

410 The 2014 IA mentions the cost of printing machines in the context of the proposed measure's impact on cost of manufacturing packaging for legitimate manufacturers (see paragraph 94 of the 2014 IA) but fails to consider what impact this may have on illicit traders. According to 2014 IA, a gravure machine costs over £6 million, whereas, an offset printer costs significantly less: £2 million for a new machine and £0.5 million for a second-hand machine.

411 See endnote 398.

412 2014 IA, paragraph 132.

413 *Ibid.*

414 *Ibid.*

415 *Ibid.*

416 "Tobacco smuggling", House of Commons Home Affairs Committee dated 14 June 2013. Available via: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmha/ff200/200.pdf>.

417 *Ibid.*, paragraph 17.

418 See paragraphs 7.6 to 7.15 of JTI's 2012 consultation response.

419 2014 IA, paragraph 120, page 30.

420 See endnote 105, paragraphs 57 to 64.

421 *Ibid.*, paragraphs 214 to 275.

422 *Ibid.*, paragraphs 404 to 411.

423 See endnote 416.

424 2014 IA, paragraph 132, page 34.

425 JTI's 2012 Consultation response, paragraph 4.7. See also paragraph 23 of JTI's written evidence to Home Affairs Select Committee for the Tobacco Smuggling Inquiry, page 100. Available via: <http://www.parliament.uk/documents/commons-committees/home-affairs/Tobacco-written-evidence.pdf>.

426 See TMA's publication of EU cigarette prices on their website, available via: <http://www.the-tma.org.uk/tma-publications-research/facts-figures/eu-cigarette-prices/>.

427 See the Irish Tobacco Manufacturers' Advisory Committee website, available via: <http://www.itmac.ie/non-duty-paid/what-is-it/>.

428 See endnote 416.

429 2014 IA, paragraph 131, page 33.

430 See endnote 416.

431 2014 IA, paragraph 38, page 10.

432 Meeting with representatives from API Group, Essentra, Chesapeake and Weidenhammer and their slides; submission of European Carton Makers Association; former Scotland Yard Detective Chief Inspector (Will O'Reilly). All available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx>.

433 2014 IA, paragraph 137, page 35.

434 Chantier Report, paragraph 5.6, page 33.

435 See endnote 126.

436 See endnote 107.

437 2014 IA, paragraph 182, page 48.

438 See endnote 397.

439 2014 IA, paragraph 137, page 34.

440 2014 IA, paragraph 129 page 33.

441 The Chantier Review meeting with the Australian Government Department of Health, Canberra (11 March 2014), page 6. See also: ASH "The illicit market in Australia is very different to [the UK]" (The Chantier Review meeting with SmokeFree Action Coalition, page 64); and Cancer Council Victoria "illicit tobacco use is much more common in the UK than in Australia...". All available via: <http://www.kcl.ac.uk/health/packaging-docs.aspx>.

442 See endnote 105, paragraphs 214 to 270.

443 The Sydney Morning Herald, "Tobacco industry claims on impact of plain packaging go up in smoke", 12 March 2014. Available via: <http://www.smh.com.au/federal-politics/political-news/tobacco-industry-claims-on-impact-of-plain-packaging-go-up-in-smoke-20140311-34kfc.html>.

444 2014 IA, paragraph 41, page 10.

445 2014 IA, paragraph 42, page 11 and see endnote 105, paragraphs 222 to 225.

- 446 See schedule to JTI's 2012 consultation response.
- 447 Peterborough Evening Telegraph, "HMRC raid uncovers £120k of illegal cigarettes", 16 December 2011.
- 448 JTI places a health warning on all of its cigarette packs – even if it is not required to do so by law. Our position on health warnings is set out at: <http://www.jti.com/how-we-do-business/regulating-tobacco-products/size-health-warnings/>.
- 449 "Illicit cigarettes hidden in shop", Liverpool Express, 1 May 2014; "Swindon Polish shop owner sold illegal tobacco", Swindon Advertiser, 20 May 2014; "Sniffer dog finds illegal tobacco in James Bond style secret lair under Wakefield store's floor", The Gazette, 24 May 2014.
- 450 2014 IA, paragraphs 20 and 140.
- 451 Chantler Report, paragraph 2.3(a).
- 452 2014 IA, paragraph 277.
- 453 HMRC data re RYO is only available from 2000/2001 onwards.
- 454 See endnote 108.
- 455 2014 IA, paragraph 136, page 34.
- 456 Tobacco tax gap estimates 2012-2013, HMRC, Table I.2. Accessed via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/249543/131009\\_Publication\\_of\\_Tobacco\\_Tax\\_Gap\\_estimates\\_2012-13.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249543/131009_Publication_of_Tobacco_Tax_Gap_estimates_2012-13.pdf). See also paragraph 129 of the 2014 IA.
- 457 See JTI's submission to the Chantler Review, Section 5, page 23. Available via: [http://www.jti.com/download\\_file/1247/629/](http://www.jti.com/download_file/1247/629/).
- 458 See endnote 92.
- 459 Sutcliffe K, Brunton G, Twamley K, Hinds K, O'Mara-Eves AJ, Thomas J (2011) "Young people's access to tobacco: a mixed-method systematic review", page 4. London: EPPI-Centre, Social Science Research Unit, Institute of Education, University of London, which is available via: <http://eppi.ioe.ac.uk/cms/LinkClick.aspx?fileticket=1P0jfyv3Y%3D&tabid=3301>.
- 460 Various studies have been completed to assess the efficacy of the suggested measures, using a range of methodologies. JTI makes no comment on, nor does it endorse the methodology of (or any assertions, statements or conclusions made in) any of the studies referred to in this section of the response.
- 461 See, for example, Tutt et al, "Restricting the Supply of Tobacco to Minors", Journal of Public Health Policy (2009) 30, I, 68-82 and Jason et al, "Effects of Enforcement of Youth Access Laws on Smoking Prevalence" (1999), American Journal of Community Psychology, 27(2), 143-160.
- 462 See paragraphs 7.6 and 7.12 of JTI's 2012 consultation response.
- 463 JTI's 2012 consultation response, paragraphs 7.9-7.15.
- 464 See Tobacco Control Survey, England 2012/13: A report of council trading standards service activity. Available via: <http://www.derby.gov.uk/media/Trading-Standards-Institute-Tobacco-Control-Survey-2012-13.pdf>.
- 465 Young Persons Alcohol and Tobacco Survey 2013, Trading Standards North West.
- 466 A group of 500 randomly selected independent retailers across the UK were interviewed by Cheetham Bell JWT, on behalf of JTI, by telephone between 21 October 2013 and 1 November 2013.
- 467 Department of Justice Northern Ireland consultation "Extension of Unduly Lenient Sentencing Provisions to Fraudulent Excise Evasion For Fuel and Tobacco", May 2013, paragraphs 2.2-2.3 Available via: <http://www.dojni.gov.uk/index/public-consultations/current-consultations/unduly-lenient-sentencing-for-excise-fraud.pdf>.
- 468 See endnote 461. See also paragraphs 7.35 to 7.36 of JTI's 2012 consultation response.
- 469 See PHE press release: "Stoptober challenge reaches new high as country's biggest mass quit attempt", published 29 October 2013. Available via: <https://www.gov.uk/government/news/stoptober-challenge-reaches-new-high-as-countrys-biggest-mass-quit-attempt>.
- 470 See "American teens are less likely than European teens to use cigarettes and alcohol, but more likely to use illicit drugs", Michigan News, June 2012, available via: <http://ns.umich.edu/news/releases/20420-american-teens-are-less-likely-than-european-teens-to-use-cigarettes-and-alcohol-but-more-likely-to-use-illicit-drugs> and "Why do Europeans smoke more than Americans", David M. Cutler and Edwards L. Glaeser, NBER Working Paper No. 12124, March 2006, available via: <http://www.nber.org/papers/w12124.pdf>.
- 471 See page 8 of Volume 2 of Equality Act 2010 guidance for English public bodies (and non-devolved bodies in Scotland and Wales). Available via: [http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/PSED/equality\\_analysis\\_guidance.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/PSED/equality_analysis_guidance.pdf).
- 472 See "Equalities Analysis: Standardised Packaging", June 2014, page 14: "The policy has the potential to advance equality of opportunity by reducing health inequalities as set out above...". Available via: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/323404/equalities\\_analysis.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323404/equalities_analysis.pdf).
- 473 2014 IA, paragraph 157, page 38 and paragraph 44, page 11. The DH also states in paragraph 10, page 6 of the 2014 IA that: "There is likely to be a number of reasons why people from less affluent backgrounds are less successfully able to quit, including levels of addiction and the socially reinforcing nature of smoking in groups and communities where smoking rates are high." There is no reference to packaging.



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- <sup>474</sup> See paragraphs 4.4 to 4.9, and 4.16 to 4.30 of JTI's 2012 consultation response regarding illicit trade. See paragraphs 5.21 to 5.37 of JTI's 2012 consultation response regarding down-trading.
- <sup>475</sup> See section 5 of Annex 1 to this response in relation to illicit trade. HMRC recognises in its April 2011 publication, *"Tackling Tobacco Smuggling – building on our success"*, that: "[u]nregulated distribution networks associated with smuggling make tobacco more accessible to children and young people and perpetuate health inequalities across socio-economic groups." Research commissioned by ASH also found that: "one in four of the poorest smokers buy smuggled tobacco compare to one in eight of the most affluent" – *Tobacco Smuggling*, ASH, April 2011, page 3.
- <sup>476</sup> The 2014 IA was not published in languages other than English (although the Consultation Document was).
- <sup>477</sup> See endnote 472, page 8. The DH also states in paragraph 42, page 11 of the 2014 IA that: "*if display of branded packets induces take-up within the home and explains the link between parental smoking and take-up, standardised packaging may be helpful in tackling the difference in acculturation to smoking across socio-economic groups.*"
- <sup>478</sup> *Ibid*, page 16.
- <sup>479</sup> *Ibid*.
- <sup>480</sup> *Ibid*, page 11.
- <sup>481</sup> 2014 IA, paragraph 41, page 10.
- <sup>482</sup> See endnote 472, page 11.
- <sup>483</sup> *Ibid*, page 9.
- <sup>484</sup> JTI's submission to the Regulatory Reform Committee's inquiry into Better Regulation on 13 June 2014.

## A response

Consultation on the introduction of regulations for standardised packaging of tobacco products

### OVERVIEW

The Anti-Counterfeiting Group and British Brands Group remain concerned that the policy to standardise packaging of tobacco products has not been sufficiently scrutinised on a detailed, reliable evidence, to the extent that the desired policy goals may not be achieved.

Our primary concerns are that standardised packaging will result in:

- **down trading**, promoting a change of an increase in consumption;
- **growth in illicit imported brands**, resulting in an increase in consumption and weaker age control;
- **growth in counterfeit products**, increasing risks to public health including to children.

Rises in taxation and storage costs are not meant to be relied upon to provide realisable remedies to these concerns.

Further analysis and further monitoring of the Australian markets is recommended to ensure the goal of reduced tobacco consumption is achieved.

### 1 INTRODUCTION

The Anti-Counterfeiting Group and British Brands Group welcome the opportunity to respond to the Department of Health's consultation on the introduction of regulations for standardised packaging of tobacco products.

- 2 The Anti-Counterfeiting Group (ACG) campaigns on behalf of consumers and legitimate businesses for recognition of the economic and social cost of counterfeiting. The British Brands Group champions the benefits of branding and the potential for brands to deliver choice and value to consumers in an environment of vigorous but fair competition.
- 3 Both organisations contributed to the 2012 consultation and the respective submissions are linked [here](#) and [here](#). The ground covered in these submissions is not duplicated here.
- 4 Both organisations support fully the objective to improve public health and wellbeing. Our response to the consultation is intended to help government achieve that goal and focuses on those aspects of the policy that have a brand dimension.
- 5 The introduction of standardised packaging represents a significant intervention in the market which will affect consumer behaviour and the working of that market. Some of those effects may support the policy goal but others may well not. Specifically our primary concerns are that:

- (1) making tobacco products visually more similar will be a strong commoditising influence on consumer behaviour. Over time consumers who perceive fewer differences between products will use price as a stronger determinant of choice. Down-trading risks thwarting the policy goal, with smokers consuming the same or more;
  - (2) consumer preference for branded packs and/or a desire to be individual may increase the appeal of – and market for – illicit branded packs (contraband) from abroad. Such packs are likely to use – and stimulate – unregulated supply chains which in turn ignore age controls;
  - (3) the simplification and homogenisation of tobacco packaging reduces the complexity and cost of producing fake products, encouraging supply. At the same time, commoditisation of the market may encourage demand for such products. This increases the exposure of the public to low quality, even more harmful products that use unregulated supply chains.
- 6 These factors remain largely un- or under-scrutinised, with the result that the policy faces a risk of causing a net harm to public health and wellbeing, not the intended improvement.

## 7 THE CHANTLER REVIEW

The Review concludes that the benefit of standardised packaging, on the parameters so far assessed, is finely judged:

I am satisfied that the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time on the uptake and prevalence of smoking and thus have a positive impact on public health. (para 18)

## 8 Commoditisation / down-trading

The Review recognises the risks of down-trading (see paras 5.1-5.4 and Annex C). However it focuses on reduced desirability of the product while ignoring the effects of price on consumer decision-making and choice when products are presented to them in a way that suggests they are all essentially the same. The analysis is therefore incomplete.

- 9 While the Review refers to the reduction of brand appeal leading to reduced consumption, it does not acknowledge or analyse the potential outcome that, were tobacco prices to fall or consumer choice to be driven more strongly by price, consumption might stay constant or rise.
- 10 The Review's solution to commoditisation is to raise tax levels. This amounts to the use of one policy to overcome the shortcomings of another and is itself imperfect. A tax increase would raise prices of all tobacco products, so while all may be more expensive relative to their pre-tax-rise levels, the relative prices of one product to another will remain unchanged. Consumers may still feel they are getting a good deal by trading down. Furthermore, any increase in tax increases incentives to import illicit branded packs and trade in counterfeit product.
- 11 **Illicit branded and 'white' packs (contraband)**  
The Review acknowledges 'contraband' and 'illicit whites' (see para 5.5 and Box 3) but does not address the contradiction present in the core evidence used to support standardised packaging: that consumer preference for branded packs designs supports the hypothesis that consumers will prefer imported branded or illicit whites over domestic standardised packs.
- 12 Any growth in contraband or illicit whites will run counter to the policy, not only because it undermines its core nature (the removal of branding/differentiation from the market) but because

It will encourage the use of – and stimulate – the unregulated supply chain with its less rigorous age controls.

- 13 The unregulated supply chain and the risks of exposing children to tobacco products – directly and indirectly – has yet to be analysed, representing a significant gap in policy understanding.
- 14 The Review's solution to growth in illicit branded or white packs is effective border enforcement. The efficacy of border enforcement however is, we suggest, over-claimed (see below).
- 15 **Counterfeit**  
The Review contends that standardised packaging is no easier than differentiated packaging to counterfeit. This is counter intuitive and contrary to the evidence presented by the Consumer Packaging Manufacturers Alliance.
- 16 Discrepancies in findings between a KPMG study and Australian government figures resulted in the KPMG study being dismissed in the Review, rather than both studies being used to inform on a market that is notoriously difficult to analyse.
- 17 Once more, the Review places the focus on enforcement as the only means to counter any increase in counterfeits. We question whether this is realistic.

## 18 THE EVIDENCE

The effects of a significant market intervention such as standardised packaging on consumer behaviour and competitive market responses will only become apparent in the medium to long term.

- 19 While evidence from Australia may provide a useful indicator, the impact of standardised packaging cannot be isolated easily from other effects (of the tax rise on 1<sup>st</sup> December 2013). The Australian market has also unique attributes that mean lessons cannot be imported wholesale into other markets. It would appear there is no conclusive evidence yet of the efficacy of standardised packaging so the risks of unintended consequences arising from a policy that is already finely judged remain real.
- 20 **Commoditisation / down-trading**  
There are already some indications of down-trading in the Australian market:
  - between 2012 and 2013, sales of factory-made cigarettes fell by 1.1% while hand-rolled tobacco increased by 3.5%, with indications that historic trends have not been disrupted (source: Illicit tobacco in Australia, KPMG, 3 April 2014, p.6);
  - Data from InfoView indicates down-trading to cheaper price segments accelerate following the introduction of standard packaging in December 2012 (see Annex 1). Tax effects may influence the 2014 figures;
  - A C Nielsen reports that the market share of cigarettes priced under \$15 grew from 25.6% in 2011 to 35.2% by the end of 2013 (source: The Australian, 18 June 2014);
  - The same article quotes Roy Morgan consumer research suggesting that smokers of low-price brands claim to smoke more cigarettes per day (14-17) than smokers of higher priced brands (9-12). This is corroborated by experience in the US where the rise in discounted cigarettes in the 1980-90s correlated with an increase in youth smoking (source: Health, United States, 2007, p101 and Harvard Business School Philip Morris: Marlboro Friday, p19).

- 21 The Impact Assessment acknowledges the potential significant down-trading effect:
- the rate of down-trading between the top two price bands and the lower two bands is predicted to double in rate after the introduction of standardised packaging (paras 88 and 115);
  - by 2025 the number of premium and mid-priced products is estimated to be around half the level of that anticipated were current trends to continue (para 122);
  - it states that "Standardised tobacco packaging will limit competition through limiting product differentiation. However, it is also expected to increase price competition." (para 203)
- It is worth noting that the Impact Assessment makes no prediction for down-trading from factory-made cigarettes to hand-rolled tobacco (para 122), despite that being seen in Australia (see para 20 above).
- 22 The Impact Assessment also warns of the implications of raising duty to compensate for down-trading, stating that duty changes will only be effective if the reduced distinction between legal and illicit packaging is compensated by stronger measures to deter illicit imports. It goes on to state that "these stronger measures are likely to involve additional resources and funding which cannot be assumed or guaranteed" (para 120).
- 23 Looking at tobacco consumption overall in Australia, it is not yet clear that standardised packaging is causing a reduction. Declines in consumption seen to date seem to be following a pre-existing trend, with consumption falling more in a period when duty increased than when standardised packaging was introduced. There is also some evidence that more young people are smoking (see Annex 2).
- 24 This suggests the policy is indeed finely judged. In light of this, it is clear that down-trading and the implications for consumption warrant closer and more considered analysis than has currently been undertaken.
- 25 **Illicit branded and 'white' packs (contraband)**  
The Stirling Review asserts that people prefer branded packs over standardised packaging designs when presented with the choice.
- 26 Consumption of contraband products has shown a significant and accelerating rise, from 0.42 million kg of illicit tobacco consumption in 2011 to 0.51 million kg in 2012 but then to 1.28 million kg in 2013 (source: Illicit tobacco in Australia, KMPG, 3 April 2014).
- 27 'Illicit whites', a subset of contraband, are a feature of the Australian market with a growing share over the period when standardised packaging was introduced, rising from 0.4% of total tobacco consumption in Q2, 2012 to 1.7% in Q2, 2013. Manchester, for example, grew its share from 0.2% to 1.0% of the total market in the same period (source: Illicit tobacco in Australia, KMPG, 3 April 2014).
- 28 While experience from Australia is illustrative, the consumption of contraband products can be expected to be a greater issue in the UK in light of its proximity to continental Europe, the extent of cross-channel traffic, the concept of the single market and the greater population. It is therefore important to understand the contraband market and its supply chain much better if the predicted modest positive effect of standardised packaging is not to be neutralised.

29 **Counterfeit**

The KPMG study, dismissed in the Chantler Review, identifies the consumption of counterfeit products as small in overall terms (0.14% of all consumption in 2013). Using a consistent methodology, this represented a rise over the period when standardised packaging was introduced, from 0.05% in 2012.

30 Meanwhile Australian government figures show a rise in detections over a similar period:

**Tobacco detections in sea cargo and amount of duty evaded**

Year	No of detections	Tobacco (tonnes)	Cigarettes (millions of sticks)
2011-12	45	177	141
2012-13	76	183	200

It is not known the extent to which there is a rise in counterfeit activity or a rise in enforcement.

31 The Impact Assessment, in exploring counterfeiting, acknowledges that:

- "standardised packaging may increase the attractiveness of counterfeit [ ] products" (para 120);
- "standardised packaging may lead to easier market entry for new counterfeit suppliers leading to an overall increase in the supply of counterfeit cigarettes" (para 132);
- "it is hard to predict the potential impact on the complex and dynamic nature of the illicit trade in contraband and counterfeit tobacco and any switching in legitimate trade to branded packs purchased abroad" (para 128); and
- "the potential impact on the UK duty unpaid market remains unknown and unquantified. If the illicit market increased significantly it could significantly increase the costs of a standardised packaging policy" (Para 126).

32 The particular threats to public health posed by counterfeit products and the wider implications of any growth in counterfeiting, such as links to organised crime, warrant a deeper assessment.

33 **Enforcement**

A fuller analysis of the enforcement regime is required before proceeding with the policy, both in the context of age controls and to assess whether it represents a viable solution to a rise in consumption of illicit products, whether contraband or counterfeit.

34 While we acknowledge the professionalism and diligence of enforcement agencies such as Trading Standards and the Border Force, they would be presented with a significant additional burden if required to offset negative consequences arising from the policy, especially so if there is no additional resource to do so.

35 In terms of the enforcement of age controls, Trading Standards is already over-stretched, reporting a significant reduction in both budget and staff (see Annex 3). The Trading Standards Workforce Survey in March 2014 identified a reduction in staff of over 40% between 2009 (3,534 FTE) and 2014 (1,995.4 FTE).

36 In relation to border control, the Chantler Review described the HMRC's actions in combating illicit trade as "very effective" (para 5.10). This may be misleading. A key indicator of effectiveness would be to identify the interception rate of illicit products as a proportion of all illicit tobacco. Such rates are hard to measure and generally not available, although a UNODC report (see p181, The Globalization of Crime) considered a 7% interception rate of footwear from China as plausible. Were this rate also to apply to tobacco products, it would fall well short of 'effective'.

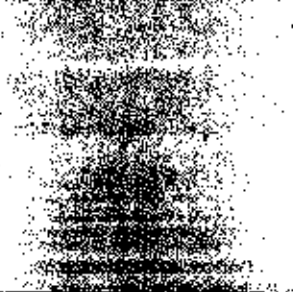


- 37 There is some evidence that the Border Force is already facing challenges in controlling illicit trade, before the imposition of any additional burden:
- Recent figures indicate that cigarettes represent 8.95% of all articles detained, demonstrating that the trade in fakes is well-established (source: Customs action to tackle goods infringing Intellectual Property Rights – Frequently Asked Questions, 2014, European Commission);
  - There was a significant decrease in tobacco articles detained in 2013 compared with 2012 (source: Report on EU customs enforcement of intellectual property rights, European Commission, p. 12). The reasons for this are unclear but may reflect less effective enforcement;
  - the National Audit Office, in a 2013 report on border controls, found that Border Force performed consistently below target in relation to cigarette seizures, due to staff shortages and a focus on other priorities (para 2.14);
  - the report also found that, when the Border Force flagged to individual ports the need to improve performance on illegal cigarettes, it made little material difference (para 2.16);
  - the Independent Chief Inspector of Borders and Immigration, in a 2013 report on freight operations, found that large seizures of cigarettes were not being investigated or prosecuted and that operating protocols were being breached, with physical examinations of consignments selected by HMRC not being carried out (Foreword);
  - in a 2013 report on Stansted Airport, the Inspector highlighted the shortage of staff (para 3.8) and shortfalls in Border Force oversight relating to tobacco products (para 4.81);
  - In a 2013 report on e-borders, the Inspector found that poor data quality and prioritisation of immigration over customs resulted in 649,000 records relating to drug and tobacco smuggling being deleted from the system without being read, having a significant impact on border staff's ability to seize restricted goods (para 24).
- 38 As we have highlighted, the Impact Assessment indicates that additional resources and funding for stronger enforcement cannot be assumed or guaranteed (para 120).

### 39 FURTHER CONCERNS

The British Brands Group has expressed concerns over standardised packaging in other brand-related areas such as the weakening of the positive effects of branding (such as investments in innovation, quality and reputation) and the implications of appropriating intellectual property rights. These concerns remain but are not articulated further in this response.

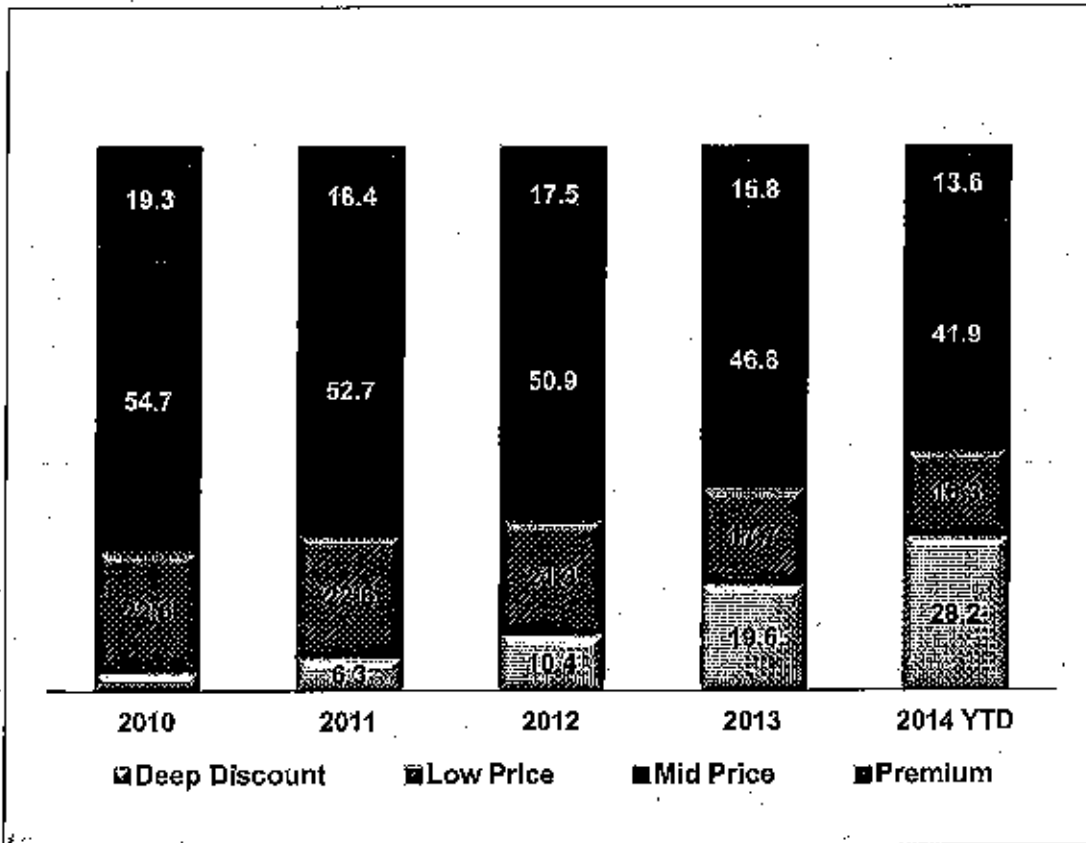
### 40 MEMBERSHIP

The Anti-Counterfeiting Group has 162 members, of which 86 are trade mark holders. Five of those are in the tobacco industry. Additionally, the Tobacco Manufacturers Association is a correspondent member, being a sectoral trade association rather than a manufacturer. The British Brands Group has 36 members of which 3 are in the tobacco industry. Membership lists of both organisations are available on request.



ANNEX 1

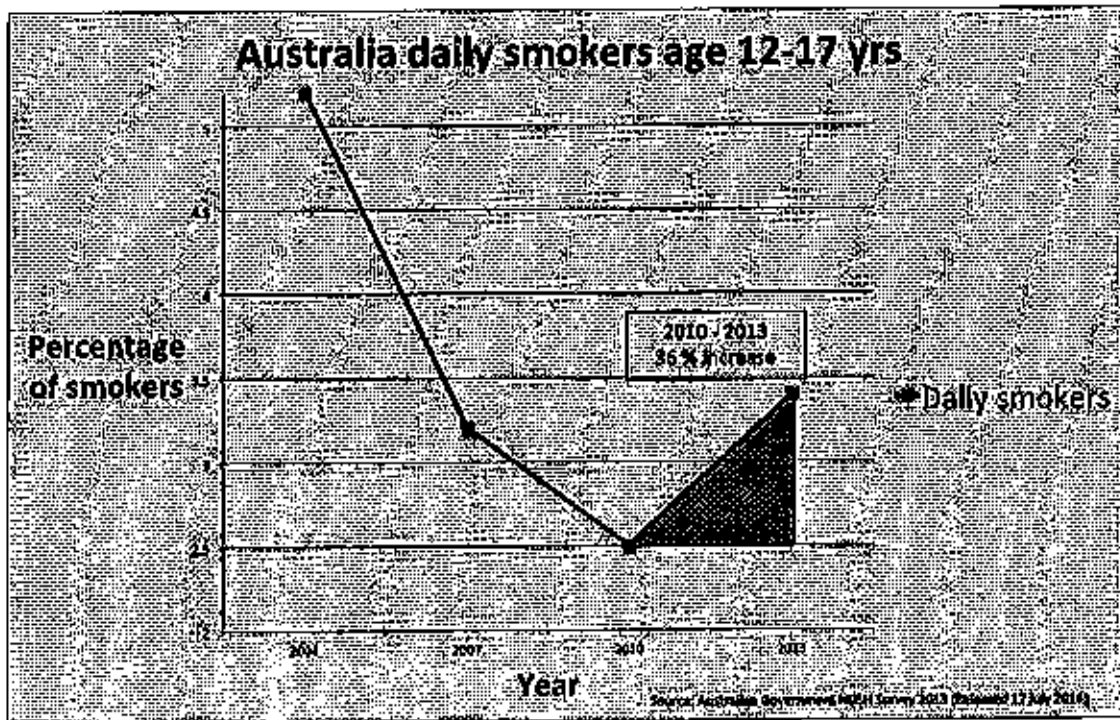
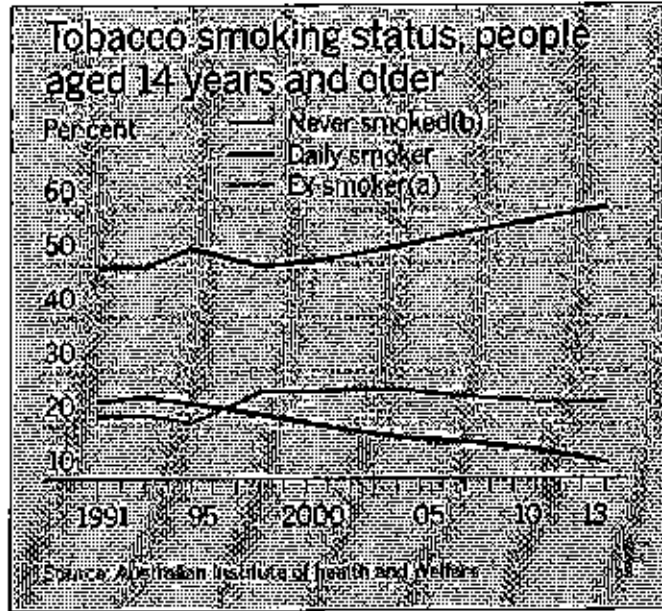
**Market shares by price segment in the Australian market**

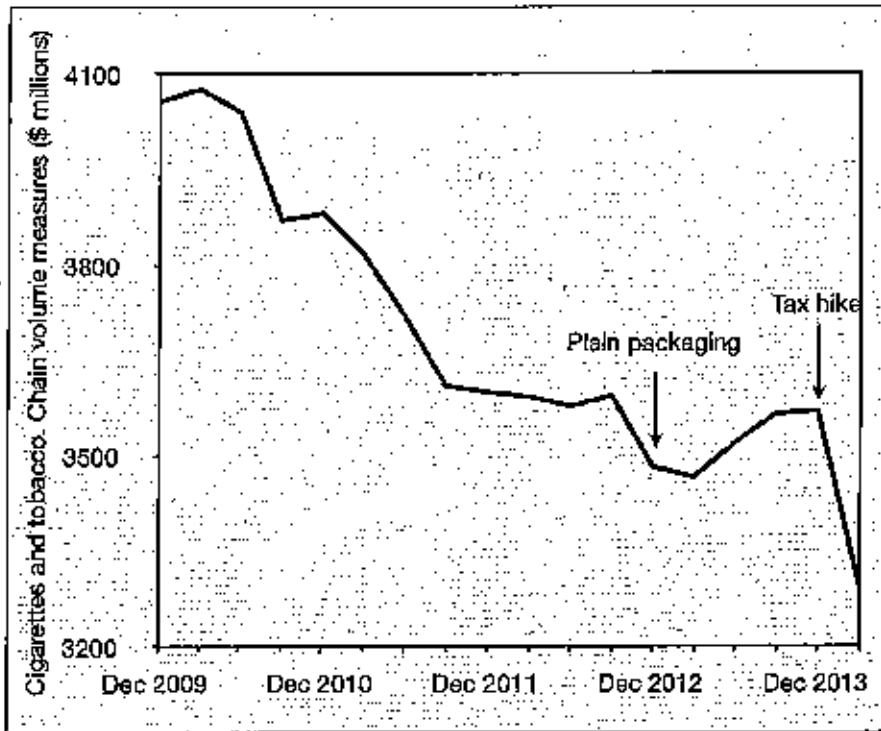


Australia: Shares of tobacco sales by segment Source: InfoView

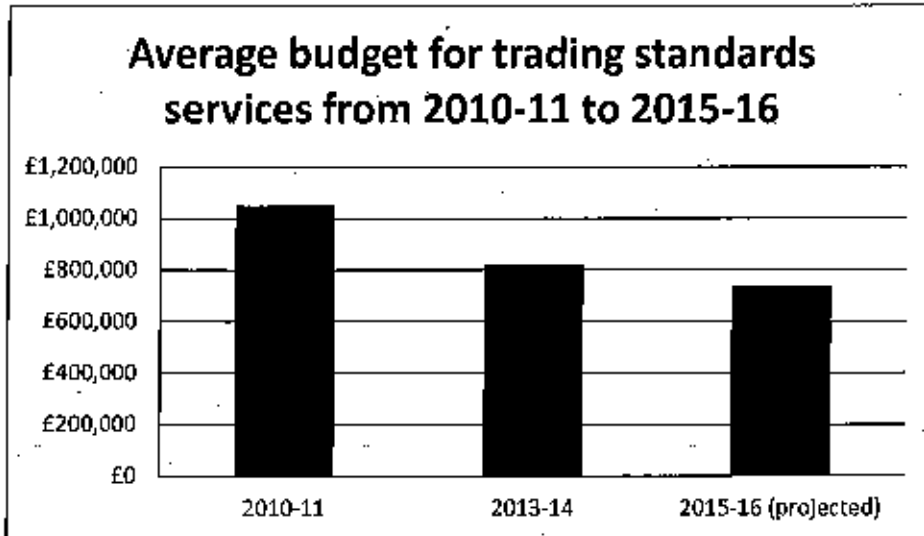


**Trends in the Australian market**






**Evidence of declining resources for Trading Standards**



The 2014 Trading Standards Workforce Survey in March identified a total of 889.9 FTE trading standards officers across 126 services in England and Wales, and 1995.4 FTE total staff. This represents a sharp decrease from the 2009 survey which identified 3534 FTE staff working in 122 trading standards services in England and Wales.

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