



Illegal, Unnecessary and Damaging for UK plc

Why standardised packaging is a bad policy idea that would not work

A response to the Department of Health consultation on standardised packaging of tobacco products

07 August 2014

<http://www.imperial-tobacco.com>

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i. Introduction - Company background

Imperial Tobacco Group PLC (“**ITG**”) is a FTSE top 25 company, the world’s fourth largest international - and second largest European - tobacco company. ITG manufactures and sells a range of cigarettes and other tobacco products. ITG has sales in over 160 countries worldwide and is the world leader in the premium cigar, fine-cut (roll-your-own) tobacco and rolling papers sectors.

Imperial Tobacco UK (“**ITUK**”, and, together with ITG, “**Imperial Tobacco**”) is the Bristol-based trading operation of ITG which distributes Imperial Tobacco’s products to the UK market. ITUK is market leader, holding approximately 45 per cent market share. ITUK’s leading UK cigarette brands include Lambert & Butler, JPS, Richmond, Embassy and Regal. ITUK also distributes tobacco products on behalf of Philip Morris Ltd.

Imperial Tobacco directly employs over 1,600 people in the UK and last year collected around £5.8 billion for the Exchequer in duties and other taxes. Imperial Tobacco has around 26,000 shareholders with 53 per cent of issued shares held in the UK. Over 34,000 individuals are members of the company pension fund, and it is estimated that the tobacco industry indirectly supports the livelihoods of over 70,000 people elsewhere in the economy via the supply chain, production and packaging, retailers within the UK.¹

Tobacco is a legal product, enjoyed by around 10 million adults in the UK. This equates to around 20 per cent of the adult population and is not an insignificant minority. These adults make an informed choice to smoke. They smoke for many and varied reasons and, despite the continual stream of unreasonable and disproportionate tobacco control regulations imposed upon them and propaganda to dissuade them, many do not wish to give up.

Our commercial focus is solely on gaining the custom of the 55% of existing adult smokers – over 5 million adults - who currently do not choose our products and maintaining the loyalty of those smokers who currently enjoy our products and wish to continue smoking. We do not market our products to anyone under the age of 18 or to non-smokers. We adhere to all legislation, and where none exists, our International Marketing Standards which are published at: http://www.imperial-tobacco.com/files/environment/marketing_standard_2009.pdf. We support retailer programmes designed to discourage tobacco sales to children such as our

¹ Cogent factsheet, published Q2 2014: <http://www.the-tma.org.uk/policy-legislation/employment/>

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support for the 'No ID, No Sale' retailer awareness campaign and the CitizenCard proof-of-age scheme.

Imperial Tobacco notes that from the launch date, respondents only had a six week period to respond to the *Department for Health's Consultation on standardised packaging of tobacco products* ("DH" and "**Consultation**"). This was an unusually short period given: the vast number of responses received (over 665,000 in total, including 427,888 opposed to standardised packaging) to the Consultation on standardised packaging of tobacco products published in April 2012 (which itself had to be extended from 3 to 4 months); the complex and contentious nature of the policy including a detailed Impact Assessment; the diversity of interested parties, many of whom (such as small retailers) lack the significant resources required to respond to a Consultation of this nature in such a short time frame; and the fact that the Consultation response period spans a holiday period. We wrote in similar terms to request an extension to the time period for responding and this was rejected. We maintain that this was unreasonable.

Imperial Tobacco nevertheless welcomes the opportunity to respond to the Consultation. Imperial Tobacco supports sound, evidence-based, reasonable and practicable regulation of tobacco products.

ii. Executive summary

NO EVIDENCE: There is no credible or robust evidence that standardised packaging (also commonly referred to as “plain packaging”) would contribute to improving public health.

The experience of Australia to date shows that standardised packaging has been ineffective and counterproductive

Smoking prevalence has continued in line with trend and consumption is unaffected: Statistics² confirm that plain packaging has had no discernible impact with no acceleration in decline in smoking rates. National rates for youth smoking (12-17 year olds) actually increased from 2.5 to 3.4%³ between 2010 and 2013, despite the introduction of plain packaging. Smoking prevalence in both New South Wales and South Australia increased from 14.7 to 16.4%⁴ and 16.7 to 19.5%⁵ respectively. The data also suggests that consumption increased, rather than decreased, immediately after plain packaging was introduced.

Illicit trade has increased: KPMG’s report⁶ published in April 2014 found that illicit tobacco as a proportion of total consumption had increased by nearly 20% from 11.8% in 2012 to 13.9% in the year after plain packaging was introduced. This represents lost excise to the Australian Government in excess of AUD 1bn. Of particular concern is the unprecedented growth in so called ‘illicit whites’.⁷ In 2013, around 2.3% of all manufactured cigarettes consumed in Australia were illicit whites.

Retailers have been negatively affected: Plain packaging has seriously dented Australian retailers’ bottom line through significant down-trading to lower margin products, increased staff training costs, losing business to the illicit market and customer frustration.

Australian Government Review in December 2014: The Australian Government has committed to begin a review of its legislation by December 2014. The UK Government should at least wait until this review has been conducted before deciding whether or not to proceed with regulations.

Standardised packaging would lead to an increase in illicit tobacco in the UK:

Standardised packaging would increase the supply of, or demand for, illicit tobacco and other non-duty-paid tobacco in the UK. The increase in illicit trade would have a direct negative influence on public health for the following reasons:

Product differentiation: Standardised packaging would reduce the ability for consumers to differentiate between different brands and packs. The commoditisation of any category leads to an increased focus on price. The cheapest available price will be found in the illicit market.

² Australian Government 2013 National Drug Strategy Household Survey data table available at <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/data-and-references/>, July 2014

³ Australian Government 2013 National Drug Strategy Household Survey, as before

⁴ http://www.healthstats.nsw.gov.au/Indicator/beh_smo_age

⁵ http://www.premier.sa.gov.au/images/news_releases/14_05May/afrescodining.pdf

⁶ KPMG Full Year 2013 Report on Illicit Tobacco in Australia, April 2014

⁷ Illicit whites are brands made by illegal manufacturers exclusively for smuggling into high price countries.

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Easier to produce illicit product: Criminals have welcomed the prospect of standardised packaging.⁸ Standardised packaging would provide a stimulus for illicit trade by creating a “Counterfeiters’ Charter”, aiding and accelerating the spread of counterfeit and other illicit products by making it cheaper and easier to mimic legitimate packaging and by creating an unfulfilled supply vacuum for branded products.

Increased availability: The opportunity for criminals to increase the availability of illicit products would expose children who cannot legally purchase the product to tobacco products. In the UK, a third of all smokers aged 14-17 years currently buy illicit. This may be a gateway to further criminal activity, including drugs, and increase the prevalence of youth smoking.

By depressing prices and effectively promoting the non-UK duty-paid tobacco trade, including the illicit trade, there is a real risk of consumption actually increasing.

The Chantler Report (the “Report”) conclusions are partial, speculative and an insufficient basis on which to legislate:

The Report omitted to mention the only real world figures on smoking prevalence available at the time,⁹ despite the data being drawn to Sir Cyril’s attention by the authors. That data showed no increase in the rate of decline of smoking prevalence amongst 14-17 year olds after plain packaging had been introduced. Instead the Report relied at its heart on a selection of theoretical studies, none of which showed that plain packaging would reduce smoking prevalence and which acknowledged their own very significant limitations. Nor could the Report demonstrate to what extent and within what period the policy would be expected to have an impact. In addition the Report dismissed real-world data from KPMG showing an increase in the illicit trade, based on methodology approved by the NAO, OLAF and the OECD.¹⁰ KPMG were not offered the chance to comment on the Review’s accusation that their methodology was flawed, or on other figures the Report relied upon instead. Sir Cyril Chantler himself acknowledged that *“it is too early to draw definitive conclusions”* and *“data is only just becoming available”*.

ILLEGAL MEASURE - Standardised packaging would infringe national, European and international laws, treaties and agreements and create significant legal risk for taxpayers:

Standardised packaging contravenes national and European laws and would put the UK in the position of breaching important international treaties and agreements. The Australian Plain Packaging Act is subject to an on-going dispute in the WTO on grounds of eroding the protection of intellectual property rights, imposing severe restrictions on the use of validly registered trade marks and erecting an unnecessary obstacle to trade. The UK Government should at least await the outcome of the WTO dispute resolution proceedings.

Compensation:

The introduction of standardised packaging could result in legal action against the Government and lead to the serious risk of a compensation bill that could run to billions of pounds.

UK Plc closed for business:

The UK Government’s brand ban could affect all business sectors. Removal of branding disrupts competition in a market economy as manufacturers would have their ability to compete

⁸ <http://www.thesun.co.uk/sol/homepage/news/5669365/Sun-Investigates-fake-cigarette-foreign-crime-gangs.html>

⁹ A Kaul, M Wolf: *The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis*, Saarland University / University of Zurich, March 2014

¹⁰ See glossary at the end of the submission.

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effectively for existing smokers significantly reduced. Standardised packaging would also be an unjustified interference with legitimate intellectual property rights. It would send strongly negative signals about the UK as a place to do business and could threaten future Foreign Direct Investment. Standardised packaging would be likely to have a significant adverse impact on hundreds of SMEs.

Standardised packaging would set a dangerous precedent for other sectors:

Standardised packaging would be a precedent for similar restrictions on choice by consumers in other FMCG businesses and sectors in the UK. Standardised packaging is already being called for by some campaigners for other consumer goods. Mars has expressed concerns about similar legislation being introduced in the chocolate, other food and non-alcoholic beverage industries.¹¹

UNNECESSARY NEW POLICY - Revised EU Tobacco Products Directive:

Since the original 2012 consultation on standardised packaging in 2012, a significant new law covering packaging has been introduced in the form of the revised EU Tobacco Products Directive (“**TPD2**”). TPD2 is subject to several legal challenges.¹² The validity of Article 24(2) TPD2, which purports to give Member States the power to adopt standardised packaging, has been challenged as part of these proceedings. If a challenge succeeds, the UK Government would be prohibited from introducing standardised packaging and, therefore, whilst this uncertainty exists the Government ought not to consider standardised packaging. In addition, the UK Government should await evidence regarding the effectiveness of that measure before considering the introduction of standardised packaging.

Existing regulatory context:

Existing tobacco control measures have not been properly evaluated for their effectiveness or for delivering the outcomes or benefits that were originally expected or promised. This falls short of better regulation principles which should not be applied selectively. A proper review of existing measures, many of which have been introduced only recently, should be undertaken before proceeding with standardised packaging.

Alternative solutions would be a better approach than standardised packaging:

The Government should follow the example of other jurisdictions that have been successful in tackling youth smoking by using the following approaches:

1. Tougher enforcement of existing legislation and additional resources to support enforcement agencies and retailers in their efforts to tackle under-age smoking;
2. Preventing youth access through greater support to proof-of-age schemes, which have contributed to a decrease in youth smoking prevalence to the lowest ever figure;¹³
3. A greater focus on education and support rather than criminalisation, as in the case of Germany which permits the advertising and display of tobacco yet has significantly fewer young people taking up smoking than the UK.

Imperial Tobacco believes any introduction of standardised packaging would be ineffective for public health and counterproductive for the reasons set out in our responses to the four questions below.

¹¹ A Mars spokeswoman reportedly said: "The 2012 response was not a comment on the specific policy. We were highlighting the need to ensure any legislation did not have unintended knock-on effects on brand equity and intellectual property within other categories." The Times, Sweet-makers warn of plan packet fears, Michael Savage, 25 July 2014

¹² a) The Plenipotentiary of the Republic of Poland filed a complaint with the Court of Justice of the European Union on 22 July 2014 and b) separately, by way of a reference to the Court of Justice of the European Union through the Courts of England and Wales, several companies are challenging.

¹³ Smoking, Drinking and Drug Use Among Young People in England – 2013

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

In July 2013 the UK Government announced that it would not make a decision on whether to proceed with standardised packaging until the evidence from Australia could be measured.¹⁴ No relevant official statistics from Australia had been published at the time, but despite that the DH announced a further review of standardised packaging on 28 November 2013, to be led by Sir Cyril Chantler (the “**Chantler Review**”).

The remit of the three month review was to examine the evidence to answer whether standardised packaging was likely to have an effect on public health, in particular in relation to the health of children. The Chantler Review expressly excluded consideration of relevant factors such as legal issues, competition, intellectual property issues, overall economic impact and freedom of choice.¹⁵

The Chantler Review report (the “**Report**”), published in April 2014, was highly partial, dismissing evidence strongly suggesting that the introduction of the policy in Australia has so far had no perceivable impact on public health, whilst it has had the effect of increasing the illicit trade. The Report went so far as to assert that Sir Cyril was not “...*aware of any convincing evidence pointing the other way*” (i.e. evidence that standardised packaging doesn’t work) despite being presented with specific research to that effect.

For example, the Chantler Review dismissed a KPMG study¹⁶ reporting that there had been a significant increase in illicit tobacco on the basis that it was methodologically flawed, despite the same methodology being used for a similar study on a larger scale on behalf of the European Anti-Fraud Office (“**OLAF**”) since 2006, and being based on methodology approved by the National Audit Office (“**NAO**”), OLAF and the Organisation for Economic Co-operation and Development (“**OECD**”). It is not clear from the Chantler Report whether the Chantler Review sought KPMG’s comments on other figures relating to illicit tobacco or on the draft sections of the report mentioning KPMG’s work.

¹⁴ <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130712/wmstext/130712m0001.htm>

¹⁵ Independent Review into standardised packaging of tobacco Method Statement, 16 December 2013, page 1

¹⁶ KPMG Full Year 2013 Report on Illicit Tobacco in Australia, April 2014

As outlined in greater detail below,¹⁷ Imperial Tobacco understands that the Chantler Review dismissed the KPMG report's findings on the basis of two pieces of evidence; one which agrees with the findings in the report,¹⁸ and another which does not compare the same time period (the KPMG data was from 2013¹⁹ while the contrasting data referenced in the Report was from a 2010 study that was not designed to assess the volume of illicit trade²⁰).

In discussing the illicit market the Report also focused on counterfeit product while ignoring the significant growth seen in Australia in illicit whites, 'chop-chop' and the emergence of a new category of illicit product in plain packaging with brand names like 'Spoonbill', 'Thunder Bay' and 'Junlong' that are created by organised criminals using plain packaging to successfully mimic a legal product. Illicit whites also benefit from being the only branded tobacco product on the market. The failure to note the creation of new illicit plain packaged brands as a phenomenon is surprising as it was specifically brought to the Chantler Review's attention by Imperial Tobacco.

At its heart the Report relies on a selection of theoretical studies, including those in the 'Systematic Review' commissioned by the Department of Health from Public Health Research Consortium ("PHRC"), none of which have been able to show that standardised packaging would reduce smoking prevalence and which themselves have had to acknowledge their very significant limitations. For example, the PHRC 'Systematic Review' could only conclude that there was "**some evidence from the studies in this review that plain packaging may affect smoking-related attitudes and beliefs,**" and importantly warned that "**....caution is required in interpreting these findings**"²¹ [our emphasis]. This academic theoretical evidence is therefore far from robust. The Report places far too much reliance on it in justifying Sir Cyril's personal conclusion. Sir Cyril Chantler himself had to acknowledge that "*it is too early to draw definitive conclusions*" and "*data is only just becoming available*".

While Sir Cyril himself expressed a personal belief that the policy would have a positive impact on public health, he was unable to demonstrate that it would. Nor could he comment on the extent to which it could be expected to reduce smoking rates other than having a "modest" effect over an unspecified period of time. The Report's reliance on "intuitive plausibility" as the

¹⁷ Section 4.3 of this submission

¹⁸ The Australian Customs & Border Protection Service Data for 2012 -2013

¹⁹ https://www.imperial-tobacco.com/assets/files/cms/KPMG_FY2013_Illicit_Trade_Report___FINAL___11_April_2014.pdf

²⁰ Analysis undertaken by the Cancer Council Victoria based on data from the National Drug Strategy Household Survey

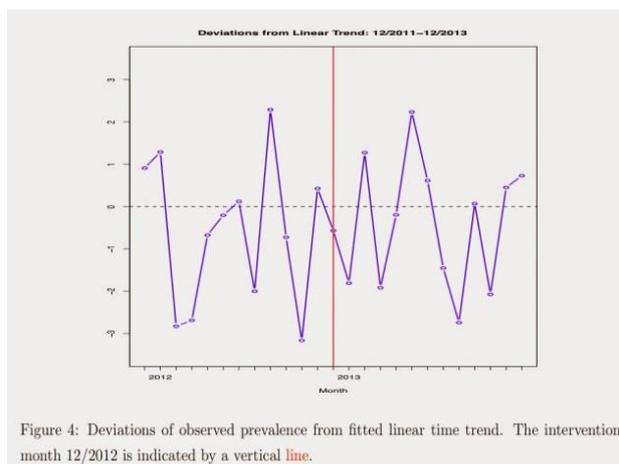
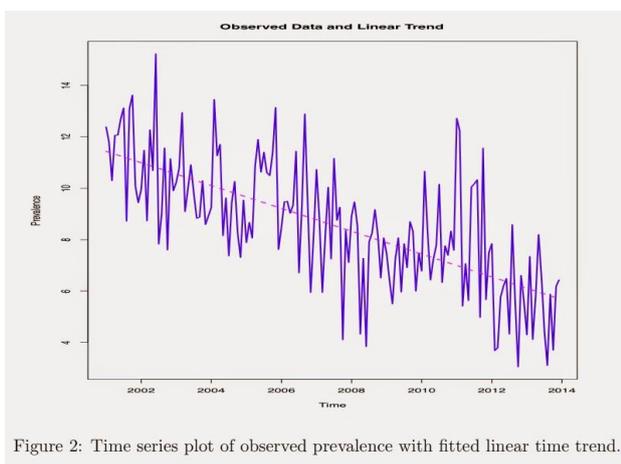
²¹ http://phrc.lshtm.ac.uk/papers/PHRC_006_Final_Report.pdf

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justification for its conclusion is an insufficient and improper basis on which to introduce a highly contentious policy with far reaching implications for the UK.

Remarkably, the only piece of published real-world data²² about underage smoking rates in Australia that was available to the Review was not even mentioned in the Report. This was despite its authors visiting the review team in London to talk through their findings. The study by statisticians Dr Ashok Kaul and Dr Michael Wolf strongly suggested that there had been no increase in the rate of decline of smoking prevalence amongst 14-17 year olds between December 2012 (when the legislation came into force) and December 2013 (when the most recent data ended):



The data was from a large survey that has been used by tobacco control researchers in the past. When asked about this omission Dr Kaul said:

“Sir [Cyril] Chantler apparently did not feel the need to reference the only paper on plain packaging based on real-world data in his report to support his findings. In particular, a neutral reader of the review would expect to find a complete reference list of original research to be able to draw his own conclusions.”

“The empirical evidence so far does not support the conclusion of a short term effect. Of course, short-term effects are important for policy makers around the world who would

²² *The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis*, Ashok Kaul and Michael Wolf, March 2014

*like to chose [sic] their regulatory policies from a set of alternatives that have been proven to be effective - plain packaging is so far not part of this set.*²³

The decision by the Chantler Review not to mention the only real world figures on smoking prevalence available at the time is inexplicable.

The Report also relied on an apparent increase in calls to a cessation support telephone service after Australia had introduced its legislation. But it failed to report the fact that the study “*could not assess whether a change in packaging achieves the desired outcomes*” and crucially that in any event ultimately callers’ “*intention to quit smoking remained unchanged.*”²⁴ Yet this was the conclusion of a review of the study by a UK Government NHS website.

The Report notes the market research and market segmentation undertaken by tobacco companies but does not provide the context that these practices are standard for all manufacturers of consumer goods. The Report seeks to suggest that there must be a spillover effect where a package designed to appeal to a young adult must also appeal to children. Any spillover effect, if true, would apply to all brands and goods, including those of other age restricted items such as alcohol and cars. Should such a phenomenon exist, it does not of itself justify banning the brands concerned.

The Report wrongly argues that a brand or pack constitutes an advert or promotion. Existing legislation²⁵ is clear about what constitutes advertising, marketing and sponsorship. Even were the assertions within the Report to be the case, tobacco products are not unique in being on public display. The same applies to other products including age restricted items like drink, games, films and magazines. What is unique about tobacco products is the very large and graphic health warnings that dominate the packs. If one considers the packs as an advertisement, it must also be the case that the very prominent health warnings act as one too. In fact, aside from trade customers, tobacco products are not even going to be visible to people who have not already purchased them, due to the UK display ban – which is already in force for large retailers and will be in force for all retailers in the UK by the end of April 2015.

The Report also wrongly suggests that the frequency of changes in pack design supports an assertion that a pack constitutes an advertisement. As Sir Cyril is not an expert in brands and marketing it is not perhaps surprising that he was unaware that increased pace of change in

²³ <http://velvetgloveironfist.blogspot.co.uk/2014/04/an-interview-with-dr-ashok-kaul.html>

²⁴ <http://www.nhs.uk/news/2013/07/July/Pages/Does-plain-packaging-help-smokers-quit.aspx>

²⁵ Tobacco Advertising & Promotion Act 2002

pack design is a known feature of consumer goods where the market is mature, saturated and declining. It is also consistent with brands competing for share of the adult smoking market.

The assertion of cigarettes as a badge product, which is conspicuously consumed while making a statement about the smoker's image and identity, ignores the fact that smokers have far fewer freedoms to consume their legal product in public because of bans – both statutory and 'voluntary' – on smoking in public places and open spaces, in addition to new proposed legislation for private vehicles where children are present. The Report contains no rigorous evidence or assessment of whether and to what extent tobacco products act as so called "badge products".

Similarly, the Report's acceptance of one academic's analysis that branded packaging *could* act as a stimulus to smoke is an insufficiently rigorous basis on which to draw a conclusion.

Given the multitude of very significant shortcomings and assertions within it, the independence and conclusions of the Report are highly questionable and cannot be relied upon to inform government decision-making.

Nevertheless, in spite of its fundamental shortcomings the UK Government has said it is minded to proceed with regulations on the basis of the Report. Yet doing so would contradict the Government's own statement to Parliament that it would measure the policy's impact in Australia before making a decision.²⁶ The Report does not do this.

The available statistical evidence from Australia so far shows no departure from the existing downwards trend, and in two Australian states smoking prevalence actually increased.²⁷ Contrary to the aims of the policy, youth smoking prevalence has also gone up,²⁸ the illegal market has increased significantly²⁹ and retailers have been negatively impacted³⁰.

The research which has been relied upon by the DH (and the Chantler Review) to date has been speculative, selective and inconclusive. The Government's own principles of regulation

²⁶ <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130712/wmstext/130712m0001.htm>

²⁷ New South Wales and South Australia from 14.7 to 16.4% and 16.7 to 19.5% National Drug Survey, published by the Australian Government Department of Health on 17 July 2014 http://www.healthstats.nsw.gov.au/Indicator/beh_smo_age
http://www.premier.sa.gov.au/images/news_releases/14_05May/afrescodining.pdf

²⁸ From 2.5 in 2010 to 3.4 in 2013 for people aged 12-17 years old classed as daily smokers. National Drug Survey, published by the Australian Government Department of Health on 17 July 2014

<http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

²⁹ KPMG 2013 Full Year Report on Illicit Tobacco in Australia, April 2014

³⁰ Asian Trader special report *Australian Retailers Have Their Say*, March 2014

require the Government to provide a "robust and compelling case" before pursuing any legislation. It has failed to do so.

Undercover journalism has confirmed that people involved in organised crime welcome the introduction of standardised packaging as it would make it significantly easier and cheaper for them to counterfeit tobacco products.³¹ Tobacco smuggler Fauz Firdaus said his profits would soar when he no longer has to copy existing packaging. He was caught on video by undercover Sun reporters punching the air and cheering "*Plain packaging...I support the UK Government!*" This view of an individual involved in organised crime confirms that of serving police officers, where over 80 per cent think it would boost the black market trade.³²

While the Chantler Review noted the anticipated agreement on the revised EU Tobacco Products Directive, it failed to show how, or to what extent, standardised packaging would have an impact over and above the strict new requirements of that Directive.

The Report accepts without question the flawed premise that the impact of regulation cannot be measured when it forms part of a 'comprehensive tobacco control policy'. This 'get out clause' in terms of pre- and post-implementation impact assessments appears to be unique to tobacco policy and fails to meet the Government's better regulation principles.

Legislation should not be pursued until what is a highly controversial and unprecedented policy within the UK - with potentially very significant unintended consequences - is proven to reduce consumption amongst under-age smokers, or to assist quitters or those who have quit from relapsing. Evidence led policy requires the UK Government not to consider the introduction of standardised packaging until its effects in Australia have been properly studied and only after the outcome of various legal challenges.

Data released by the Australian Government on 17 July 2014³³ clearly shows that there has been no acceleration in decline brought about by plain packaging.

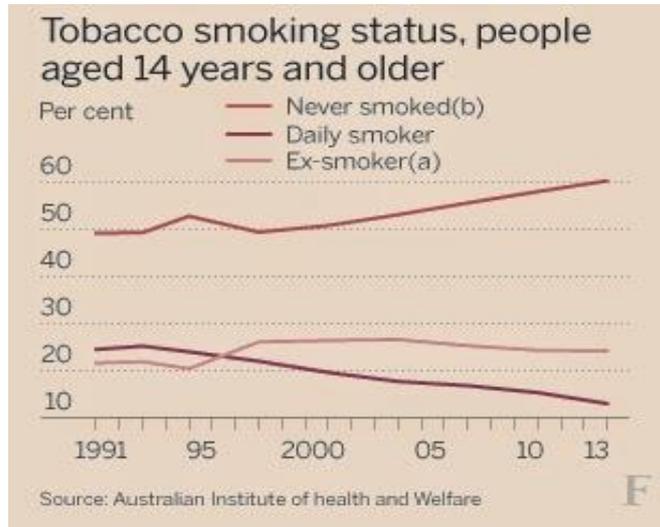
³¹ <http://www.thesun.co.uk/sol/homepage/news/5669365/Sun-Investigates-fake-cigarette-foreign-crime-gangs.html>

³² <http://www.thesun.co.uk/sol/homepage/news/politics/5666179/plain-packaging-will-lead-to-explosion-in-tobacco-smuggling-poll-says.html>

³³ <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

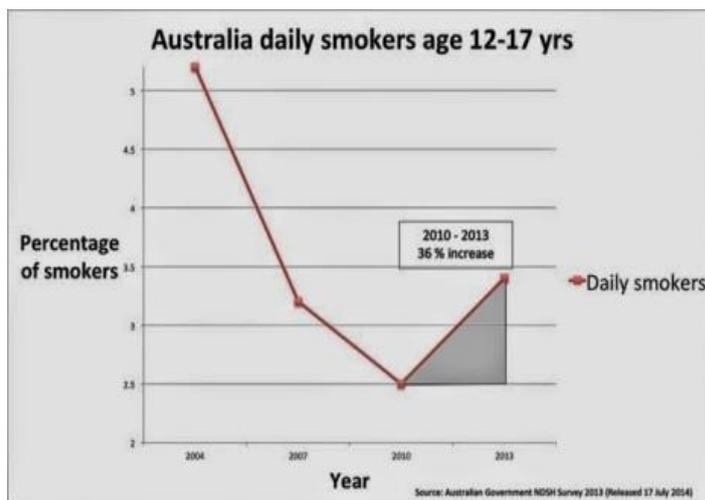
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Although that data appear to show that prevalence of daily smokers declined from 15.1% to 12.8% over a three year period (2010-2013), the rate of decline appears to be unaffected by the introduction of plain packaging in December 2012, since prevalence in 2013 continued to decrease in line with trend. Furthermore, in producing this graph, the Australian Government disregarded casual smokers.³⁴ The prevalence rate for this group of smokers has increased between 2010 and 2013.³⁵

What is striking is that between 2010 and 2013 (a year after plain packaging was introduced) youth smoking incidence has increased from 2.5% to 3.4% for daily smokers. This is despite the alleged impact plain (standardised) packaging is supposed to have on reducing youth smoking.³⁶



³⁴ Who smoke weekly or less than weekly

³⁵ National Drug Survey, published by the Australian Government Department of Health on 17 July 2014 <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

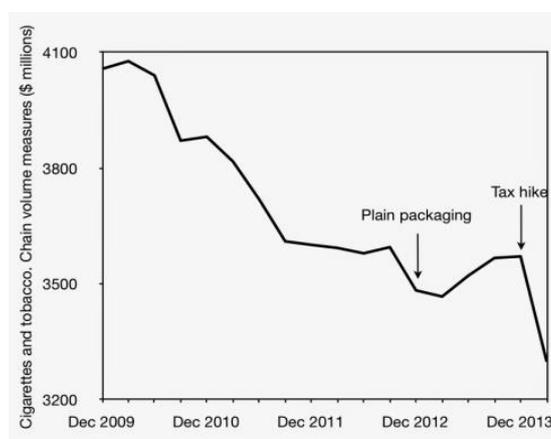
³⁶ See, for example, paragraphs 56-61 of the Impact Assessment.

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The data further show that there has been an increase in smoking prevalence in both New South Wales and South Australia from 14.7 to 16.4%³⁷ and 16.7 to 19.5%³⁸ respectively.

Data also suggest that consumption initially increased, rather than decreased, after plain packaging was introduced. Only when a planned 12.5% tax increase was introduced in December 2013 did duty-paid consumption decrease. The graph below demonstrates this but crucially shows volumes for duty-paid consumption and does not include consumption of non-duty paid or illicit tobacco; which we know to have increased.³⁹



Because the academic evidence cited in support of the policy is currently conjecture, and given the mounting real world evidence that the policy has not been effective in Australia, proceeding with the policy would be unjustified and would undermine the Government's commitment to the better regulation principles that it has so clearly laid out and on which it has repeatedly placed great emphasis.

³⁷ http://www.healthstats.nsw.gov.au/Indicator/beh_smo_age

³⁸ http://www.premier.sa.gov.au/images/news_releases/14_05May/afrescodining.pdf

³⁹ Appendix D, Australian Study on Illicit Trade (KPMG) – April 2014 states that overall consumption (including illicit) has remained stable.

2. Response to 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 No evidence it works

There is no credible or robust evidence that standardised packaging would contribute to improving public health. By depressing prices and effectively promoting the non-UK duty-paid tobacco trade (“**NUKDP**”) including illicit trade, there is a real risk of consumption increasing. The Consultation ignored the established research as to the reasons why people smoke and continue smoking, specifically those under 18, which do not include packaging and branding.

2.2 Australian experience has proven that standardised packaging has had no effect

The facts from Australia, the only country to have introduced plain packaging, so far show the following effects.

2.2.1 Smoking Prevalence and Youth Smoking

Following the introduction of plain packaging in Australia, smoking prevalence has not been affected.

Data released by the Australian Government on 17 July 2014⁴⁰ clearly shows that there has been no acceleration in decline as a result of the introduction of plain packaging.

As stated above, although the data appear to show that prevalence of daily smokers declined from 15.1% to 12.8% over a three year period (2010-2013), the rate of decline is unaffected and prevalence continues in line with trend. In addition, the prevalence rate for casual smokers⁴¹ has increased.⁴²

Geoff Neideck of the Australian Institute of Health and Welfare was quoted in the Sydney Morning Herald⁴³ as saying “*the results were continued a long term trend (sic),*” and that “*the plain-packaging laws should be seen in the context of changing attitudes and cultural practices.*”

⁴⁰ <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

⁴¹ Who smoke weekly or less than weekly

⁴² National Drug Survey, published by the Australian Government Department of Health on 17 July 2014
<http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-kff>

⁴³ <http://www.smh.com.au/federal-politics/political-news/plunge-in-smoking-attributed-to-plain-packaging-20140716-ztqht.html>

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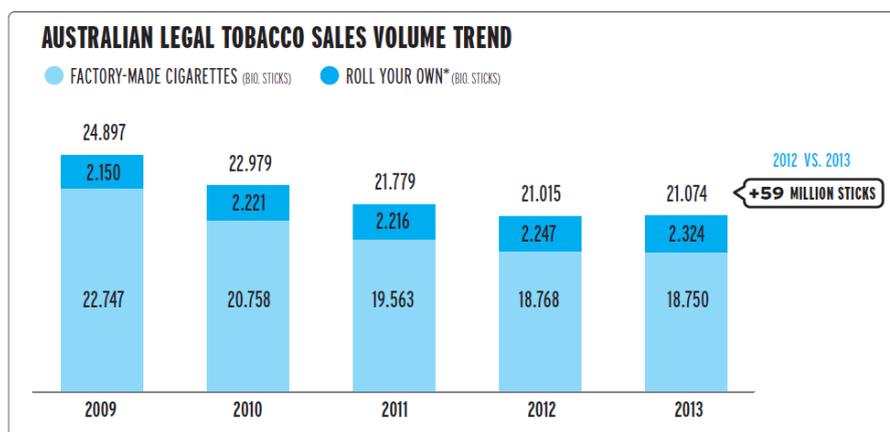
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What is more, youth smoking incidence has increased from 2.5% to 3.4% for daily smokers between 2010 and 2013 (a year after plain packaging was introduced).⁴⁴

Furthermore, both the 1H2013 (published October 2013)⁴⁵ and FY2013 (published April 2014)⁴⁶ KPMG reports found that overall consumption (including illicit) has remained stable.

2.2.2 Industry commercial data

Contrary to the predictions of the Australian tobacco control lobby, Imperial Tobacco Australia (“ITA”) has not seen an industry-wide out of trend volume decline since the introduction of plain packaging in Australia. The tobacco market largely continues to perform based on historical trends, showing no impact from plain packaging. In fact, Australian legal tobacco sales are up +59 million sticks in 2013 compared to 2012. Factory Made Cigarettes (“FMC”) declined by less than -0.1% and Fine Cut Tobacco (“FCT”) grew by +3.4%.⁴⁷ This is illustrated in the following chart that uses Industry Exchange of Sales Data:



This data shows a slight reversal of a long term historical trend and is driven by consumers down-trading from FMC to relatively more affordable FCT products and illicit trade.

The down-trading trend is also noticeable when one looks within the FMC segment and sees a clear shift from medium price to lower priced cigarettes, indicating that down-trading between price segments seems to become more prevalent in a plain packaging environment.⁴⁸

⁴⁴ Australian Government 2013 National Drug Strategy Household Survey data table available at <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/data-and-references/>, July 2014

⁴⁵ KPMG 2013 Half Year Report on Illicit Tobacco in Australia, October 2013

⁴⁶ KPMG 2013 Full Year Report on Illicit Tobacco in Australia, April 2014

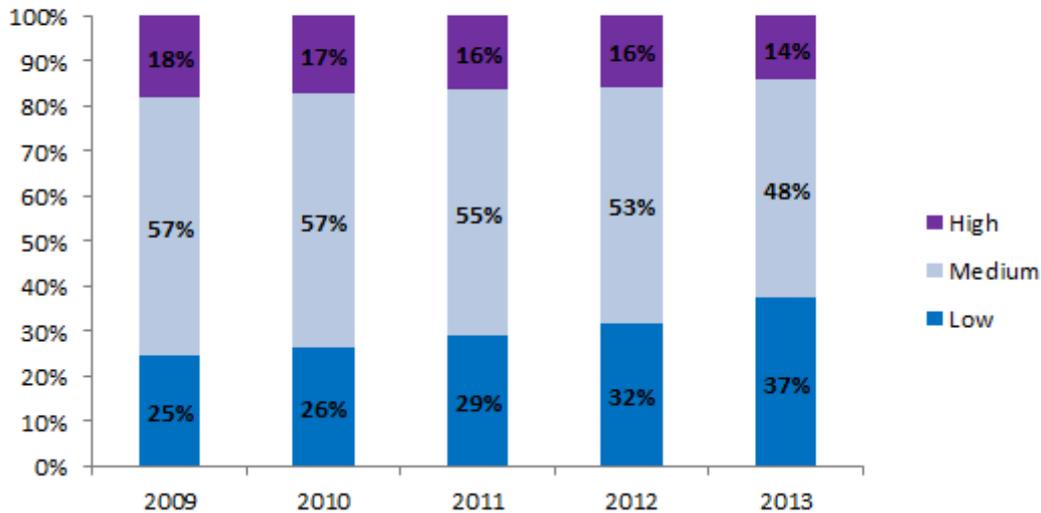
⁴⁷ Industry Exchange of Sales – FCT volumes have been converted to a stick equivalent amount applying the Australian Government’s conversion rate of 0.8

⁴⁸ Industry Exchange of Sales – segments based on KPMG Illicit tobacco in Australia - 2013 Half Year Report (October 2013), p11

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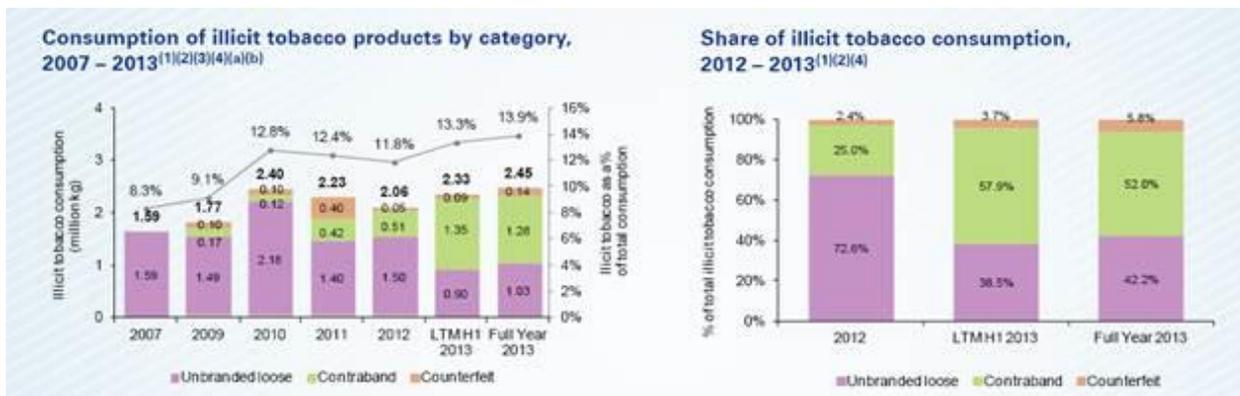
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Market Share of manufactured cigarettes by price category (EOS)



2.2.3 Increase in the illegal market (KPMG illicit trade data)

The full year KPMG report on the size of the illicit tobacco market since the introduction of plain packaging was published in April (see Appendix D), finding that illicit trade as a percentage of total consumption has further increased from 13.3% in 1H2013 to 13.9%, representing a loss in excise tax revenue in excess of AUD 1.0 billion to the Australian Government. The report was prepared by KPMG on behalf of PMI, BAT Australia and ITA and data is based on an empty pack survey, web-based consumer interviews to gauge the prevalence of loose tobacco and rolling paper data. It finds that while the legal tobacco market has contracted slightly, overall consumption is slightly up. The graphs below illustrate the development of illicit trade since 2007 as well as the change in mix.



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The report also indicates a structural shift away from unbranded tobacco (chop-chop) towards manufactured cigarettes. Illicit whites have emerged as a major form of illicit trade.

A classic example of the unintended consequences of poorly thought through legislation is the fact that illicit whites brands such as Manchester have the competitive advantage of being the only branded tobacco products on the market. Manchester is currently the largest illicit whites brand in Australia; if it were sold legally in the country it would have a 1.4% market share. If all of this illegal tobacco had been consumed in the legitimate market, it would have represented an excise amount in excess of AUD1.0 billion.

2.2.4 Increase in the illegal market

The images below illustrate the first examples of an illicit plain pack sold in Australia.



The brand Spoonbill is not officially registered anywhere in the world. Intelligence suggests that it was manufactured in Asia solely for smuggling into Australia. It demonstrates that with plain packaging regulations in force, it is not even necessary for counterfeiters to use an existing brand. Criminals can simply use a fictitious name, comply with packaging regulations to avoid obvious detection and sell cheaply. It would be impossible for a consumer to tell whether this is a genuine product or not.

The images below illustrate 'Thunder Bay', an illicit standardised pack sold in Australia and 'Jun Long' which is the first example of a counterfeit version of the 'illicit whites' brand 'Jin Ling'.

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2.2.5 Bad for Retailers

Plain packaging has seriously dented Australian retailers' bottom line through increased staff training costs, losing business to the illicit market, product handling errors, customer frustration as well as revenue and profit loss due to down-trading while having no impact on the volume of tobacco sales.

The trade press recently reported the following:

"This [plain packaging] was described by the retailers I spoke to as "expensive chaos.""

"Retailers I spoke to explained that they have to deal with open pack refund returns, training staff, lost customers who can't be bothered waiting while they are trying to find a tobacco brand, and delivery mistakes. One year on and the viewpoint I was getting is that people in Australia were still smoking, tobacco sales on the whole were the same, people were just switching to cheaper brands, oh and the rise of smuggling and illicit products."

"...the customer experience of purchasing tobacco, a legal product, had changed completely. The biggest problem is returns with up to a third of all purchases being returned as the purchase was incorrect."⁴⁹

In addition, Jeff Rogut, Chief Executive of the Australasian Association of Convenience Stores (AACS) also stated:

"...retailers have seen a dramatic shift to cheaper tobacco products as brands are devalued. In 2013, there was a dramatic 58% increase in the 'sub value' segment. These are actual sales to consumers, not wholesale sales to retailers"

"The extra financial costs for retailers as a direct result of plain packaging are associated with additional staff training, labour, product handling errors, increased inventory management procedures and increased customer frustration. These have been absorbed entirely at retailers' expense. Compounding this burden is the explosion of the illegal tobacco market."⁵⁰

⁴⁹ Asian Trader special report *Australian Retailers Have Their Say*, March 2014

⁵⁰ Jeff Rogut, Australian Association of Convenience Stores to The Irish Times, June 2014

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UK retailers have expressed similar concerns. James Lowman, the CEO of the Association of Convenience Stores has said:

“...it will take longer to serve customers when all packs look essentially the same.”⁵¹

2.3 Australian Government Review in December 2014

The Australian Government is planning to conduct a review on the plain packaging implementation in December 2014 and we would expect other governments to wait until this review has been completed before making any policy decisions. The Australian review would present a more appropriate time for a comprehensive review to be conducted in the UK. Indeed, this appeared to be accepted by the Government when it announced, following the extensive consultation that concluded in August 2012, that it would wait until the impact of plain packaging in Australia could be properly analysed before making a policy decision. It is wholly unclear why the Government has departed from its previous stated position.

Following the one year anniversary of plain packaging, in December 2013, the following statements were made:

- **ITA:** *“One year on and there is still no evidence to support the introduction of plain packaging [...] ITA has not seen a volume decline, with demand for this legal product remaining largely unchanged.”⁵²*
- **British American Tobacco Australia:** *“It’s now one year on and plain packaging isn’t having its desired effect. Instead smokers are now down trading to cheaper brands [...] Worse still, the illegal market is now at its highest ever level.”⁵³*
- **Australian Retailers Association:** *“The plain packaging experiment is not working and has had no impact on legal tobacco volumes”⁵⁴*

⁵¹ <http://www.conveniencestore.co.uk/news/regulatory-policy-committee-raises-plain-pack-concerns/369897.article>

⁵² ITA media release: One year on and plain packaging shows no effect, November 2013

⁵³ BATA media release: Plain packs fail while cheap smokes grow, November 2013

⁵⁴ Australian Retailers Association media release: Plain tobacco packaging proven to have no effect but a burden to retailers, November 2013

2.4 International legal implications

The UK Government will be aware that, as a result of its decision to introduce plain packaging legislation, the government of Australia has faced claims from Ukraine, Cuba, Honduras, Indonesia and the Dominican Republic under the auspices of the World Trade Organization (“WTO”) dispute resolution framework. The dispute has attracted the attention of 36 WTO trading partners, including the EU, who have joined the dispute as Third Parties.

The UK and the EU are members of the WTO and a signatory to all of the agreements which form the basis for the claims against Australia. That includes the Agreement on Trade Related Aspects of Intellectual Property Rights, the Paris Convention for the Protection of Industrial Property and the World Trade Organization Agreement on Technical Barriers to Trade.

If the UK Government decided to introduce standardised packaging, it would risk subjecting itself to: legal action at an international level, a finding that standardised packaging legislation is invalid, sanctions and undermining its reputation on an international level as a jurisdiction that respects intellectual property rights. This would deter future Foreign Direct Investment into the UK at a time when it is struggling to compete with other economies around the world.

In addition, there are first indications that the unilateral introduction of standardised packaging could lead to retaliation by other governments with the potential, in effect, of triggering trade issues. For example, it was reported in May this year that Indonesia had threatened to require Australian and New Zealand wine as well as Scottish whisky to be sold in plain packaging if the countries continued with (in Australia’s case) or were to push ahead with standardised packaging including for tobacco products imported from Indonesia (see Section 2.11).⁵⁵

2.4.1 Bi-lateral Investment Treaty Arbitration

In November 2011, following the introduction of plain packaging in Australia, Philip Morris Asia brought an arbitration action against Australia under the Australia-Hong Kong Bilateral Investment Treaty claiming substantial financial injury for the loss of the real value and ability to use its intellectual property investments in Australia.⁵⁶

⁵⁵ <http://www.foodmag.com.au/news/indonesia-threatens-to-slap-plain-labels-on-austra>

⁵⁶ http://www.pmi.com/eng/media_center/company_statements/Pages/bilateral_investment_treaty.aspx

2.5 Lack of robust evidence that standardised packaging has worked

Contrary to what tobacco control lobbyists have been saying and how some media outlets have portrayed it, a study by the Centre for Behavioural Research in Cancer in Australia (funded by the anti-tobacco lobbying organisation Quit Victoria) does not support a case for standardised packaging. In fact an analysis of the study on the UK NHS Choices⁵⁷ website concludes that:

*“...the study could not assess whether a change in packaging achieves the desired outcomes – of an increase in quit rates...While people smoking the plain pack cigarettes were significantly more likely to have thought about quitting and place higher priority on quitting, **their intention to quit smoking remained unchanged.**”* [our emphasis]

The effectiveness of the policy in Australia can only be properly judged on actual changes in consumption by both adults and under-age smokers, after factoring out other possible significant influences on consumption like tax increases and the reduction in travel allowances. The numbers support our previously expressed concerns that standardised packaging would be a gift to organised crime, whereas there are still no facts to show it could be an effective intervention to reduce smoking prevalence amongst young people or adults.

2.6 Packaging is not a reason why people start smoking

All the evidence suggests packaging is not a reason why people start smoking as evidenced in Australia as the only live market. Only 1% of UK smokers cite packaging as one of the various factors in their decision to start smoking.⁵⁸ Research regularly shows the most important factors involved in smoking initiation include:

- rebelliousness;
- risk taking;
- family structure, parental example;
- relationships, peer pressure;
- socioeconomic status;
- school connection; and,

⁵⁷ <http://www.nhs.uk/news/2013/07July/Pages/Does-plain-packaging-help-smokers-quit.aspx>

⁵⁸ http://ec.europa.eu/health/tobacco/docs/eurobaro_attitudes_towards_tobacco_2012_en.pdf

- educational success.

2.6.1 Why do people smoke?

The many different benefits of smoking, including habitual behaviour, all contribute to why an individual chooses to smoke. The reasons for smoking may differ between smokers, and a smoker may smoke for different reasons throughout the day.

The benefits that smokers report include: aid to socialising, pleasure, sensory stimulation, mood regulation, and cognitive enhancement. The strong habitual behaviour aspect of smoking is supported by scientific evidence and it develops as a consequence of the benefits of smoking. Whilst such behaviour becomes repetitive and, to a degree automatic, it is still controllable. These observations are supported by scientific studies. An expert health panel report to Health Canada concluded:

- young people do not decide to smoke on the basis of tobacco packages;
- packages do not lead to smoking; and,
- changing the package would not “*have any major effect on the decision(s) to smoke or not to smoke*”.⁵⁹

This prediction was proven true by real world studies following the introduction of pictorial health warnings in Canada in December 2000. As Chris Snowdon notes in his paper ‘*Plain Packaging – Questions that Need Answering*’,⁶⁰

“Similarly bold claims were made by campaigners about the likely reduction of smoking prevalence if graphic warnings on cigarettes were introduced several years ago, but it has since been concluded that these warnings ‘have not had a discernible impact on smoking prevalence⁶¹ and [a]mongst young people, the impact of picture health warnings was negligible’⁶²”

2.6.2 Why young people smoke⁶³

⁵⁹ Goldberg ME, Liefeld J, Kindra K, Madill-Marshall J, Lefebvre J, Martohardjono N and Vredenburg H. *When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products: Expert Panel Report* to Health Canada, Ottawa, 1995.

⁶⁰ Chris Snowdon, *Plain Packaging – Questions that Need Answering*, Institute of Economic Affairs, August 2014

⁶¹ Gospodinov, N and I. Irvine (2004), *Graphic Health Warnings on Tobacco Packaging: Evidence from the Canadian Experiment*, *Topics in Economic Analysis and Policy*, 4(1), 30

⁶² Wardle, H., D. Pickup, L. Lee, J. Hall, K. Pickering, K. Grieg, C. Moodie and A. MacKintosh (2008), *Evaluating the Impact of Picture Health Warnings on Cigarette Packets*, *Public Health Research Consortium*: 8

⁶³ Please refer to Section 3.3 of our 2012 Consultation response – Appendix C.

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The evidence and research suggest the introduction of standardised packaging would not have a material impact on addressing smoking, particularly underage smoking, therefore providing no discernible health benefit.

2.6.3 The role of packaging

Packaging has three roles:

- Physical – providing physical protection and security of the product itself;
- Information – providing information including Government health warnings, yield measurements (tar, nicotine and carbon monoxide), recycling or disposal messages, weights and measurements, price information, manufacturer's details; and,
- Brand differentiation – branded packaging enables smokers to distinguish one brand from another. This drives effective competition between tobacco companies and allows retailers and smokers to easily identify and select their product of choice.

Pack innovations provide smokers with choice, reinforce brand differentiation, and can provide a genuine competitive advantage by leading to brand-switching behaviour among existing adult smokers.

All FMCG companies seek to evolve their brands in this way – and we are no exception.

The 2003 tobacco advertising and marketing ban did not include packaging.

British Brands Group director John Noble stated:

“Branding fulfils many significant and positive functions for consumers and markets. Take it away and consumers lose out and markets become commoditised, with price rather than quality the influencing factor.”⁶⁴

2.7 The impact of ‘Denormalisation’ policies on smoking rates

⁶⁴ <http://www.britishbrandsgroup.org.uk/upload/File/Plain%20packaging%20BBG%200311.pdf>

The smoking rate (also referred to as ‘prevalence’ or ‘incidence’) is a measure of the percentage of smokers in the population. This metric is derived from population surveys in which a sample of people are asked different questions about their lifestyle. Data is normally available for regular (daily) and occasional smokers. Data is usually segmented by age, gender and socio-economic status.

The primary stated goal of most tobacco control policies is to reduce smoking prevalence. For example, the Australian Federal Authority has set a performance benchmark to reduce smoking rates to 10% by 2018 in their tobacco control strategy for 2012 to 2018.⁶⁵ Reducing the smoking rate by an average of 2% across Europe was also set as the benchmark for the review of the EU Tobacco Products Directive. Globally, there were rapid declines in smoking rates in the 1970s and 80s which probably reflected the growing awareness and acceptance of government health messages on smoking. However, smoking rates have been levelling off in most jurisdictions since about 2000 and especially since 2005 when the World Health Organisation’s FCTC was ratified.

However, against this global trend there are exceptions. For example, smoking rates in Turkey have remained largely unchanged over the last 20 years. And despite falls in the 1990s, smoking rates in France and Ireland have risen slightly in recent years – despite stringent tobacco regulation.⁶⁶

Since the ratification of the FCTC in 2005 there has been a shift in regulatory policy towards co-ordinated global population level interventions designed to change attitudes to tobacco use and to alter its social context. This social engineering approach to tobacco control is referred to as ‘denormalisation’.

Denormalisation aims to work on both supply of and demand for tobacco products – seeking to reduce the production and availability of tobacco products, curtailing opportunities to smoke at work and the home, and attacking brand value and attractiveness through product standardisation. The denormalisation objective is for those who don’t smoke to become less tolerant of those who do, and even those who continue to choose to smoke to become more receptive to regulation. Tobacco manufacturers are treated with suspicion and are excluded

⁶⁵ Australian National Tobacco Strategy 2012-2018:

[http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/D4E3727950BDBAE4CA257AE70003730C/\\$file/National%20Tobacco%20Strategy%202012-2018.pdf](http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/D4E3727950BDBAE4CA257AE70003730C/$file/National%20Tobacco%20Strategy%202012-2018.pdf)

⁶⁶ ERC market reports 2012

from discussion, even where their expertise could inform regulation. A 2012 review claimed that:

“The majority of studies suggest that tobacco industry denormalisation is effective in reducing smoking prevalence and initiation and increasing intentions to quit.”⁶⁷

This claim is refuted by the evidence. For example, the OECD published a Factbook on Economic, Environmental and Social Statistics in early 2013.⁶⁸ They compared the change in smoking rates in a number of countries between 1990 and 2010. Their analysis shows that in the EU, Scandinavian countries including Denmark, Sweden and Norway saw the largest fall in smoking rates over this period. In contrast, Great Britain was just behind the OECD average and Ireland had one of the poorest records of all, a decline of just 3% over 20 years.

To evaluate the impact of denormalisation on smoking rates, it is most relevant to focus on the changes which have occurred since FCTC ratification in 2005. Although rates of decline have slowed in many countries since about 2000, the Scandinavian countries continued to see continuing falls in smoking rates over the same period. However for many other developed countries, FCTC ratification appears to have had little or no impact on smoking rates. When compared to the period from 1990-2010, Australia has seen a change from 17 to 13% in its smoking prevalence since 2005. Smoking rates in France and Turkey have actually increased since 2005,⁶⁹ despite both countries embracing policies of tobacco denormalisation. Most significantly of all, Ireland has also seen a rise in smoking rates since 2005 despite being the first country in Europe to introduce a comprehensive smoking ban in 2004, a display ban in 2009 and having the highest tobacco excise tax rates in the EU.

In England and Wales, smoking was banned in all indoor public places from July 2007. In 2010 the UK Government published a ten year tobacco control plan entitled ‘A SmokeFree Future’.⁷⁰ The data presented in that plan suggests that rather than having no impact on smoking rates, the smoking ban may in fact have had the opposite effect. It indicates that for 2008, the year after the smoking ban was first introduced, smoking rates rose both for manual workers and in the general population. This completely contradicts the analysis made in DH’s official report of the smoking ban impact in March 2011:

⁶⁷ Tobacco industry denormalisation as a tobacco control intervention: a review; Ruth E Malone, Quinn Grundy and Lisa A Bero, *Tob Control* 2012 21: 162-170

⁶⁸ OECD Factbook 2013: Economic, Environmental and Social Statistics, January 2013

⁶⁹ ERC market reports 2012

⁷⁰ ‘A Smokefree Future’ UK Department of Health, February 2010

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“...this type of legislation has the potential to change social norms around smoking and results in changes in smoking behaviour...” [evidenced by] “...a general pattern of reduced tobacco consumption...”⁷¹

In section 2.6.1 above we have also set out how the introduction of large pictorial health warnings in Canada in 2000 has had no discernible impact on smoking prevalence.

Further evidence of the lack of any correlation between denormalisation, tobacco control initiatives and smoking rates is presented in our review ‘Denormalisation, smoking rates and the way ahead for tobacco product regulation’ in Appendix E. Overall, there is no evidence that smoking rates have been greatly impacted by tobacco regulation nor the policy of denormalisation pursued after ratification of the FCTC in 2005. In these terms, denormalisation is not working as an effective tobacco control policy.

Smoking rates are still falling consistently in markets where a viable choice/alternative to smoking is presented to consumers. Furthermore, we suggest that the Norwegian experience with smokeless tobacco could be a predictor of what the impact of e-cigarettes on smoking rates could be in the US and Western Europe in 10 to 15 years’ time, provided that the growth of this sector is not impeded by poorly conceived regulation.

2.8 Standardised packaging would increase the trade in illicit tobacco

Standardised packaging would increase the supply of, or demand for, non-duty-paid tobacco including illicit products in the United Kingdom. The increase in illicit trade would have a direct negative influence on public health for the following reasons:

Product Differentiation - Standardised packaging would, by its very nature, reduce the differentiation between brands and packs. The commoditisation of any category leads to an increased focus on price. The cheapest available price would be found in the illicit market.

Easier to counterfeit - Standardised packaging would provide a stimulus for the illicit trade of tobacco products - which already costs the Exchequer billions of pounds each year - by creating a “Counterfeiters’ Charter”, aiding and accelerating the spread of counterfeit tobacco products and the trade in illicit tobacco by making it simpler to copy legitimate

⁷¹ The Impact of Smokefree Legislation in England: Evidence Review, Professor Linda Bauld, March 2011

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packaging and also by creating an unfulfilled supply vacuum for branded products. Furthermore, the criminals have no qualms about selling their products to children; a clear public health issue and a significant societal problem.

Increased availability - The opportunity that standardised packaging would bring to criminals would increase the availability of illicit products, which in turn would expose more children under the age of 18, who cannot legally purchase the product, to tobacco. This may be a gateway to further criminal activity, including drugs, and have the effect of increasing smoking prevalence of youth smoking and not reducing it. In this regard, it should be noted that there is clear survey evidence⁷² that:

- 50% of the tobacco bought by 14 to 15 year olds is illegal;
- 1 in 4 young smokers are regularly offered illegal tobacco, which is far more often than adults;⁷³
- 1 in 7 young smokers have gone to a private address (or a "fag house"⁷⁴) to buy illegal cigarettes;
- Buyers of cheap illicit products smoke more, and admit it keeps them smoking;⁷⁵ and,
- A third of all smokers aged 14 -17 buy illicit and on average accounts for almost half of total consumption.⁷⁶

Increased access for children - The illicit tobacco market undermines Government and industry efforts by making it easier for children and adults to access illegal tobacco products. Peddlers of illicit products, unlike the vast majority of legitimate UK tobacco retailers, do not care or question how old a buyer is; they are happy to sell packs and even single cigarettes to minors.⁷⁷

Unregulated product is dangerous - Illicit and counterfeit products usually undermine and circumvent legislation on ingredients, smoke emissions and reduced fire risk cigarettes and may not carry mandated English language health warnings.

⁷² HMRC Measuring Tax Gaps 2011

⁷³ NEMS 2011 <http://tobaccofreeutures.org/news/illegal-tobacco-dealers-are-making-it-easy-for-kids-to-smoke-in-the-north-west/>

⁷⁴ NEMS 2011, *ibid*

⁷⁵ <http://ash.org.uk/localtoolkit/docs/cllr-briefings/Illicit.pdf>

⁷⁶ <http://www.ashscotland.org.uk/media/3480/Andrea%20Crossfield%20ITS%20Sept%202010.pdf>

⁷⁷ <http://www.bbc.co.uk/news/uk-england-devon-25671824>

If the Government wants to ensure that children are unable to access tobacco products, as Imperial Tobacco does, it should not drive them into the arms of criminals who have no qualms about who they sell to.

2.9 Lack of credible or reliable evidence or research

Imperial Tobacco does not believe there is any credible or reliable evidence that standardised tobacco packaging would achieve the Government's stated objectives of reducing smoking prevalence among young people or assisting smokers who have, or are trying to, quit.

The research which is relied upon is speculative and inconclusive and fails to provide the "*robust and compelling case*" that is required by the Government's better regulation agenda.⁷⁸ Instead the 2012 and 2014 Consultations and Impact Assessments relied upon "subjective judgments" from anonymous "experts" about their views on the likely impact of standardised packaging. These judgements were not made available as part of the 2012 consultation and cannot form the basis for an evidential justification of standardised packaging. It is valid to question the independent nature and objectivity of such research and its methodology and underlying raw data. Proponents of standardised packaging ignore the substantial body of research which runs contrary to their pre-determined objectives.

The 2012 and 2014 Consultations failed to provide any explanation of how standardised packaging would address the real issues behind smoking initiation and activity by young people and attempted quitters.

2.9.1 Standardised Packaging of tobacco – A Systematic Review

The authors of the 2012 Systematic Review⁷⁹ - despite being well-known tobacco control advocates and in many cases reviewing their own work - do not show that standardised packaging would meet the Government's stated objectives. The Systematic Review provided no evidential basis for standardised packaging.

The Review Report relied on by Government is the product of selective and questionable research methods and does not present the clear and compelling evidence base that would be

⁷⁸ BIS general principles of better regulation

⁷⁹ Moodie et al: Plain tobacco packaging – a systematic review, University of Stirling, 2012

required to justify the introduction of standardised packaging. In summary, the Systematic Review:

- is not independent. Its authors have well-established links with, and receive funding from, organisations that actively pursue a tobacco control agenda and/or have been well known advocates of standardised packaging for many years. Indeed, 20 of the 37 studies included in the Systematic Review include work by the authors (and their colleagues);
- failed to demonstrate a causal link between tobacco packaging and smoking behaviour (including initiation, prevalence and consumption);
- does not demonstrate, therefore, that standardised packaging is necessary to achieve the Government's public health objectives by affecting smoking behaviour; and,
- does not comply with the Government's own guidelines and standards. The conclusion reached stated only "*there was consistency in study findings regarding the potential impacts of plain packaging.*" That, manifestly, does not provide the standard of "*robust and compelling*" evidence that standardised packaging would have any impact on smoking behaviour that is required by the Government's Better Regulation Agenda.

Contrary to how it has been presented, the PHRC 'Systematic Review' commissioned by the DH does not provide supporting evidence that standardised packaging would be an effective intervention. It concluded:

*"....**caution is required in interpreting these findings**, as expressed smoking-related intentions are not always predictive of future smoking behaviour⁸⁰ and perceptions of the impact of a future policy measure on the behaviour of others are of course subjective. However, there is **some evidence** from the studies in this review **that standardised packaging may affect** smoking-related attitudes and beliefs, and smoking behaviour, particularly for young people and/or non-smokers and lighter smokers."⁸¹ [our emphasis]*

Attempts to present the PHRC review as evidence supporting standardised packaging are unjustifiable. The same would be true of the subsequent subjective views solicited by the DH from an unknown group of selected academics, which itself concluded that "*there remains*

⁸⁰ Ajzen & Madden 1986, Sheeran 2002

⁸¹ http://phrc.lshtm.ac.uk/papers/PHRC_006_Final_Report.pdf

*considerable uncertainty about the likely impact of plain packaging of tobacco products.*⁸²
More recent reports by advocates of standardised packaging suffer from the same limitations.

Many of them seek to show that survey participants (including children) prefer branded packs to non-branded packs. That is not in itself surprising, but it does not show that non-branded packs would lead to actual changes in behaviour when people are deciding whether or not to smoke, particularly in a mandated standardised packaging environment where such comparisons – at least between legal products – could not occur.

In Imperial Tobacco's view, in addition to not being evidence-based it is difficult to envisage how the introduction of such a draconian measure as standardised packaging could be:

- reasonable, having regard to a full consideration of the costs of standardised packaging, including its effects on illicit trade;
- proportionate, having regard to whether there are less costly ways of realising the identified policy objectives. The Government does not address this issue at all, and has historically ignored alternative ways of limiting the access of young smokers to tobacco⁸³; and,
- effective, in terms of achieving the stated objectives of reducing tobacco consumption, particularly by the young and poor socio-economic groups. It is quite clear that the evidence for any public health benefits can at best be described as very limited, with there being no consideration of whether these benefits would be appreciable in the context of all the other anti-tobacco measures which have recently been introduced.⁸⁴

2.9.2 No contribution to improving public health

There is no credible or robust evidence that standardised packaging would contribute to improving public health. By depressing prices and effectively promoting the NUKDP tobacco trade including illicit products (with tobacco prices being lower in many other countries and illicit tobacco sold at lower prices than UK duty-paid products), there is a real risk of consumption increasing. The Consultation ignores the established research as to the reasons why people smoke and continue smoking, specifically those under 18, which do not include packaging and branding.

⁸² <http://www.biomedcentral.com/1471-2458/13/18>

⁸³ See section 2.17 Alternative Solutions

⁸⁴ Please refer to Appendix A, Current tobacco control measures.

2.9.3 No new evidence

There is no evidence that demonstrates that standardised packaging would achieve any or all of the Government's stated policy objectives. The PHRC 'Systematic Review'⁸⁵ and Impact Assessments have not shown that smoking behaviour and consumption would change as a result of the introduction of standardised packaging; still less do they provide a sufficient evidence base to justify such a draconian policy. Crucially for the terms of reference for this Consultation, no new robust evidence has been provided to date. The Systematic Review update⁸⁶ (17 studies) produced in September 2013 contained the same flaws as the previous Review e.g. self-reported intent versus real world impact and the statement that they do not show standardised packaging to be an effective intervention. Sir Cyril's Method Statement stated that he envisaged:

"...commissioning further expert evidence to assist in the qualitative analysis of what I consider to be key evidence".⁸⁷

Imperial Tobacco respectfully requests that all interested parties to the Consultation are afforded an opportunity to review and comment upon any 'new' evidence that may be submitted – either in support of or against standardised packaging. This would be consistent with the principles of a fair and open consultation process.

2.10 Government's role in public health

In January 2014, Ipsos MORI, the Social Research Institute, released the latest edition of its *Understanding Society* report.⁸⁸ In this issue, they look at the way Britons live now and how attitudes, values and behaviours compare with those in other countries. Interestingly, a poll of 19 major countries (including the UK) found that the majority of the population everywhere (with the exception of Russia) think Governments at best have a limited role in trying to "encourage healthy lifestyles". Only 30% of Britons thought it was the responsibility of Government to influence people's behaviour to encourage healthy lifestyles. The researchers also noted:

"Whether or not we support government involvement, we clearly believe responsibility for maintaining a healthy lifestyle remains in the hands of individuals, at least to a large extent.

⁸⁵ Department for Health Systematic Review, April 2012 Plain tobacco packaging : A systematic review

⁸⁶ <http://www.stir.ac.uk/media/schools/management/documents/Plain%20Packaging%20Studies%20Update.pdf>

⁸⁷ <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/method-statement.pdf>

⁸⁸ Ipsos MORI: *Understanding Society - Great Britain: The way we live now*, January 2014

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Only five per cent of the British public strongly believe it is the job of the NHS to keep people healthy – this compares to a far greater proportion (39%) who strongly believe it is the individual’s responsibility to keep themselves healthy.”

Unintended consequences are not exclusive to the tobacco category. It is therefore essential to consider the unintended consequences of irrational and disproportionate regulation; and in doing so, avoid effectively coercing members of society into purchasing from illicit, and unregulated, channels.

2.11 The measure would be illegal

We set out in detail in response to question 3 below why standardised packaging would contravene domestic, European and international law.

2.11.1 International context: World Trade Organization and Bi-lateral Investment Treaty Arbitration

As outlined above, following the introduction of plain packaging legislation, the government of Australia has faced claims from five WTO members (Ukraine, Cuba, Honduras, Indonesia and the Dominican Republic) in the WTO dispute resolution framework. The claims outline contraventions of the Agreement on Trade Related Aspects of Intellectual Property Rights, the Paris Convention for the Protection of Industrial Property and the World Trade Organization Agreement on Technical Barriers to Trade – all agreements to which the UK is a signatory.

In addition, Australia is currently defending a claim brought by Philip Morris Asia under the Australia-Hong Kong BIT.⁸⁹ The UK is subject to other relevant BITs which may give rise to a claim if the UK Government decides to introduce standardised packaging.

2.11.2 International context: USA

It should also be noted at this point that in 2012, a US court blocked a FDA initiative to introduce pictorial health warnings⁹⁰ under the First Amendment of the US Constitution which guarantees freedom of speech including freedom of commercial speech. According to the

⁸⁹ http://www.pmi.com/eng/media_center/company_statements/Pages/bilateral_investment_treaty.aspx

⁹⁰ http://www.nytimes.com/2012/08/25/business/tobacco-groups-win-ruling-on-graphic-cigarette-warnings.html?_r=0

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ruling, rightful owners of intellectual property cannot be forced to give up part or all of their packaging for government messages that are designed to discourage consumers from purchasing or using a legal product.

2.11.3 National context: claims for compensation

Given the illegality of the proposed measure⁹¹ and that tobacco companies would be effectively deprived of the benefit of their valuable trade marks, any decision to enact standardised packaging would expose the UK Government to the risk of litigation being brought in the Courts of England and Wales, and which would be fought at taxpayers' expense. These legal challenges could include claims for significant compensation. A number of papers have recently quoted an Exane BNP Paribas report⁹² giving a figure of £9-11bn for compensation claims.

Therefore, if the UK Government decided to introduce standardised packaging, it risks subjecting itself to: legal action at international and national level, including for compensation; a finding that standardised packaging legislation is invalid; sanctions; payment of compensation; and undermining its reputation on an international level as a jurisdiction that respects intellectual property rights. Furthermore, and contrary to claims from tobacco control groups, there is no obligation on the parties of the World Health Organization (“WHO”) Framework Convention on Tobacco Control (“FCTC”) to implement plain or standardised packaging.

As reiterated during all the Conferences of the Parties (“COP”), FCTC guidelines are non-binding proposals as to how the FCTC *could* be implemented by the Parties. The guidelines do not extend the binding obligations of the FCTC and they do not constitute a subsequent agreement on the interpretation of the FCTC. This is the basis on which the guidelines are adopted.

It is therefore clear that any reliance upon non-binding FCTC guidelines will not protect the UK Government from any legal challenge.

⁹¹ See below in answer to Question 3.

⁹² Exane BNP Paribas Tobacco Regulation Note *The Plains Are Coming*, 23 June 2014

2.12 Dangerous precedent in the UK

Standardised packaging would severely curtail consumers' ability to make a choice about which products they want to buy. It would be a dangerous precedent for similar restrictions on choice by consumers in other FMCG businesses and sectors operating in the UK.

For example, this type of policy has been considered for other sectors, including by Non-Governmental Organisations ("NGOs"), of which there are plenty of recent examples of new NGO-led campaigns to target peoples' diets and lifestyles including obesity (fast food), sugar (fizzy drinks) and alcohol (binge-drinking).

Many public health groups already support cigarette-style graphic warnings for alcohol as well as a tobacco-style total ban on alcohol advertising. Campaigners in Australia have called for plain packaging and graphic warnings for junk food. As Chris Snowdon stated,

"Since the ostensible aim of plain packaging is to dissuade consumption by the young, the policy could logically be extended to alcohol and certain food. The Indonesian Government is already talking about it for alcohol."⁹³

Imperial Tobacco understands that Mars submitted a response to the DH's Consultation in 2012 raising concerns about similar legislation being introduced in the chocolate, other food and non-alcoholic beverage industries.⁹⁴

Example of how shops might look in the future if brands are threatened across the FMCG sector:

⁹³ <http://www.confectionerynews.com/Regulation-Safety/Mars-complaint-over-tobacco-plain-packaging-unearthed>

⁹⁴ A Mars spokeswoman reportedly said: "The 2012 response was not a comment on the specific policy. We were highlighting the need to ensure any legislation did not have unintended knock-on effects on brand equity and intellectual property within other categories." The Times, Sweet-makers warn of plan packet fears, Michael Savage, 25 July 2014

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2.13 Risk of significant adverse impact on UK plc and businesses

Imperial Tobacco is concerned that standardised packaging could threaten existing levels of Foreign Direct Investment (“**FDI**”) or inward investment, for the UK. Such arguments were raised directly to the Irish Government during recent discussions around standardised packaging and by their main trading partners who shared similar concerns about the impact standardised packaging could have on their sectors, and the resulting levels of investment. For the UK specifically, the FDI flowing into the UK was £35.4 billion in 2012, according to the Office of National Statistics.⁹⁵ In addition, according to the Government’s recent Inward Investment Report 2012/13⁹⁶, FDI created 59,153 new jobs and safeguarded 110,943 jobs in the UK in 2012/13.

Standardised packaging is also an unjustified interference with legitimate intellectual property rights. Removal of branding disrupts competition in a market economy as manufacturers would have their ability to compete effectively for existing smokers significantly reduced.

Standardised packaging would have significant adverse impacts on hundreds of SMEs – both directly and throughout the supply chain. Cogent research⁹⁷ stated:

- over 70,000 people rely directly or indirectly on the UK tobacco companies’ activities for their jobs;
- 20,000 of these are in companies who supply the industry with goods and services;

⁹⁵ <http://www.ons.gov.uk/ons/rel/fdi/foreign-direct-investment/2012-ma4/index.html>

⁹⁶ http://webarchive.nationalarchives.gov.uk/20140403154217/http://ukti.gov.uk/gb_gb/investintheuk/investintheukhome/item/553980.html?null

⁹⁷ Cogent factsheet, published Q2 2014: <http://www.the-tma.org.uk/policy-legislation/employment/>

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- over 46,000 jobs are in distribution and retailing and are dependent on the industry; and
- in the UK, over 5700 people, many of them highly skilled, are directly employed by Imperial Tobacco and the other tobacco companies.

2.14 The new policy is unnecessary

2.14.1 The European context – The revised Tobacco Products Directive

Since the previous Consultation, the revised European Union (“EU”) Tobacco Products Directive⁹⁸ (“TPD2”) has been adopted. At the end of a long deliberation process, the institutions of the EU came to the conclusion, in December 2013, that graphic health warnings covering 65% of the front and back of pack surface are appropriate to introduce in the 28 Member States. The UK Government should await evidence regarding the effectiveness of this measure before considering the introduction of standardised packaging. The Consultation should consider not only if standardised packaging is likely to lead to a decrease in the consumption, but also if it would have the effect of achieving any decrease above and beyond what the TPD2 may achieve when it is scheduled to come into effect in May 2016. It is, perhaps, because of this that the UK and Ireland are alone among the EU Member States in even consulting on standardised packaging. At least three Member States (Bulgaria, Portugal and Slovakia) have issued detailed opinions in response to Ireland notifying the Public Health (Standardised Packaging of Tobacco) Bill 2014 to the EU Commission under the Technical Standards Directive⁹⁹ and the deadline for submitting detailed opinions has not yet passed. Amongst other issues, these opinions oppose the Irish measure because it “may create obstacles to the free movement of goods within the internal market”.¹⁰⁰ The receipt of these detailed opinions extends the standstill period (and prevents the adoption of the draft measure) for a further three months to a total of six months from the date of receipt of Ireland’s notification by the Commission.

TPD2 replaces and repeals the existing Tobacco Products Directive.¹⁰¹ It introduces further regulation of tobacco products and is intended to approximate the rules on the manufacture, presentation and sale of tobacco and related products between the Member States in the EU.

⁹⁸ Directive 2014/40/EU

⁹⁹ Directive 98/34/EC

¹⁰⁰ Article 9, Technical Standards Directive 98/34/EC

¹⁰¹ Directive 2001/37/EC

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Significantly, despite consideration during the consultation process of whether standardised packaging ought to be included in TPD2, standardised packaging is deliberately *not* included in TPD2.

Article 24(2) of TPD2 purports to give Member States the power to adopt further requirements in relation to the standardisation of the packaging of tobacco products. However, the validity of that provision (amongst others) is already the subject of legal challenges involving several companies, including Imperial Tobacco.¹⁰² Imperial Tobacco submits that, if Article 24(2) is found to be invalid, the UK Government will be prohibited from introducing standardised packaging requirements because, contrary to Article 24(1) of TPD2, these requirements would prohibit or restrict the marketing of tobacco products that comply with TPD2.

In the legal challenge to TPD2, the Government has already accepted that the correct interpretation of Article 24(2) raises "*a fundamental issue of interpretation*" that is relevant to this consultation and that the Court of Justice of the European Union ought to rule on this question, and the validity of Article 24(2), on an expedited basis.¹⁰³ The English Court has already granted permission for the claims to proceed and observed that expedition would be appropriate.¹⁰⁴

Imperial Tobacco also understands that on 22 July 2014 the Plenipotentiary of the Republic of Poland¹⁰⁵ filed a complaint with the Court of Justice of the European Union as a direct challenge to TPD2.

Whilst this uncertainty exists, the Government ought, at the very least, to await the outcome of the legal challenge to TPD2 before considering the introduction of standardised packaging.

In any event, the introduction of standardised packaging in the UK would go **further** than the requirements of TPD2. There is no good reason for doing so and, as a minimum; it would be prudent to assess the impact of TPD2 in practice (should it be implemented) before considering whether standardised packaging is required as an additional measure.

¹⁰² The Queen on the application of British American Tobacco UK Limited –v- The Secretary of State for Health (Claim No. CO/2971/2014); and The Queen on the application of (1) Philip Morris Brands SARL and (2) Philip Morris Limited –v- The Secretary of State for Health (Claim no. CO/2969/2014)

¹⁰³ Secretary of State for Health's Summary Grounds for Contesting Claims No.s CO/2971/2014 and CO/2969/2014 dated 17 July 2014.

¹⁰⁴ Order of Mr Supperstone dated 31 July 2014.

¹⁰⁵ The Ministry of Foreign Affairs

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The Consultation RIA wrongly characterises Option 1 of requiring changes to legislation to bring the UK in line with the TPD2 as “essentially a “do nothing” option”. This is misleading. Option 1 is better characterised as “do nothing further” beyond the considerable change that will affect the presentation and sale of tobacco products following the implementation of TPD2, should it survive the legal challenges to its validity.

2.14.2 Existing regulatory context and the impact on public health

The proposal to introduce standardised packaging makes no sense in the existing regulatory context. The Government has introduced a number of far reaching tobacco control measures, the last of which – the ban on display of tobacco products in retail outlets - will not fully come into force until April 2015.¹⁰⁶ The common denominator in all of these regulatory measures is that they do not address the reasons why people start or continue to smoke. The 2014 Consultation and Impact Assessment were no different and ignore all of the well-established research on the main reasons for smoking initiation by young people and the factors that influence quitters, and completely fail to provide any analysis of how standardised packaging would address those reasons.

2.15 Assess current legislation before proposing additional legislation

The Government asked in the 2012 Impact Assessment accompanying the Consultation if standardised packaging would deliver benefits “over and above existing tobacco control measures”.

It is incumbent on the Government to undertake a comprehensive and considered analysis of the effect of the existing regulatory framework, including a rigorous assessment of the impact of “the existing tobacco control measures” and their effect before it considers standardised packaging. However, the existing tobacco control measures have not been properly evaluated - either during the 2012 Consultation and Impact Assessment, the Chantler Review, or since - for their effectiveness or for delivering the outcomes or benefits that were originally expected or promised. In the UK, we are only two thirds of the way through the implementation of a ban on the display of tobacco products. Imperial Tobacco believes the impact of this measure should be properly evaluated and analysed before the Government can assess whether any further

¹⁰⁶ Please see Appendix A

tobacco control measure would have an appreciable effect on improving public health over and above existing measures and before considering the next regulatory measure.

It is therefore impossible for the Government to assess whether any further tobacco control measure would have an appreciable effect on improving public health over and above existing measures.

2.16. Alternative solutions

Imperial Tobacco believes that as part of the Consultation process the possibility of alternatives to standardised packaging must be considered. It is incumbent on the Government to assess the best and least restrictive way of achieving its policy objectives and any assessment of standardised packaging must be made in that context.

Imperial Tobacco would propose the following alternative approaches:

2.16.1 Enforcing existing legislation and providing additional resources

We do not want children to smoke and we support effective measures to ensure tobacco products do not get into the hands of children. Existing legislation should be supported with greater enforcement of current laws via the relevant enforcement agencies. The Government should provide additional resources to support enforcement agencies and retailers in their efforts to tackle under-age smoking. Imperial Tobacco supports appropriate penalties for retailers who knowingly break the law by selling tobacco to children or illicit tobacco. In addition, we would like to ensure increased enforcement, in the form of penalties and prosecutions, to tackle the illicit trade.

2.16.2 Strengthening current legislation in preventing youth access

We do not market our products to anyone under the age of 18 or to non-smokers. We adhere to all legislation, and where none exists, our International Marketing Standards.¹⁰⁷ We support retailer programmes designed to discourage tobacco sales to children such as our support for the 'No ID, No Sale' retailer awareness campaign¹⁰⁸ and the CitizenCard proof-of-age

¹⁰⁷ http://www.imperial-tobacco.com/files/environment/marketing_standard_2009.pdf

¹⁰⁸ <http://www.noidnosale.com>

scheme¹⁰⁹ which have helped prevent under-age sales. The Government should give greater support to proof-of-age schemes, which have contributed to a decrease in youth smoking prevalence (11-15 year-old regular smokers in England) from 13% in 1996 to the **lowest ever figure of 3%**¹¹⁰ in 2013, and to 3% (average 13 years old – lowest figure since 1982) in Scotland.¹¹¹

2.16.3 Education programmes – German model

Germany, which permits the advertising and display of tobacco products and has no plans for standardised packaging, has significantly fewer young people taking up smoking than in the UK, which has some of the most draconian anti-smoking laws in the world. Germany has a tobacco control strategy with intelligent education embedded at its core, and it delivers proven results. These programmes, rather than merely telling teenagers that smoking is not good for them, address the factors that trigger underage trial – rebelliousness, low self-esteem, peer pressure and parental example.

As part of the Consultation process, the DH should engage with their German counterparts - who have a significantly lower youth smoking rate than the UK - to explore how they have successfully reduced youth smoking rates, and consider how such proven measures could be implemented successfully in the UK. See Annex B for specific German statistics.

On a similar note, the recently published UN World Drug Report 2014 shows that problems linked to drug use dramatically reduced in countries where users were given support and advice rather than being prosecuted.

In summary, increasing education and retailer programmes to prevent children being able to purchase tobacco products, together with preventing access via the illicit trade and strengthened enforcement against both retailers and those attempting to purchase tobacco for others, are the most effective methods of preventing children purchasing or accessing tobacco and therefore achieving the public health objectives.

Imperial Tobacco also believes that an evidence led policy requires the UK Government not to consider the introduction of standardised packaging until its effects in Australia have been

¹⁰⁹ <http://www.citizencard.com>

¹¹⁰ <http://www.hscic.gov.uk/catalogue/PUB14579/smok-drin-drug-youn-peop-eng-2013-rep.pdf>

¹¹¹ http://www.drugmisuse.isdscotland.org/publications/local/SALSUS_2010.pdf

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properly studied. Those studies need to be based on population-wide, independent, robust national statistics and the Australian Government has committed to such a review in December 2014.

We do not believe that legislation should be pursued until what is a highly controversial policy with potentially very significant unintended consequences is proven to reduce consumption amongst under-age smokers.

3. Response to 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?

The draft regulations should not be implemented because they are illegal and, therefore, unenforceable.

Imperial Tobacco notes that in response to the 2012 Consultation on standardised packaging, the UK Government received detailed responses from several well-respected intellectual property organisations, including ECTA, ITMA, MARQUES, INTA and APRAM. The content of these submissions does not appear to have been taken properly into account in the draft regulations. We refer the UK Government to these submissions¹¹² and any new submissions that these or other, similar organisations may submit in response to the Consultation.

For the reasons set out elsewhere in this submission, the draft standardised packaging regulations would not work and would have very serious adverse consequences. As outlined elsewhere in this document,¹¹³ the data from Australia so far demonstrates that smoking prevalence remains in line with trend and that youth smoking has in fact increased.

Imperial Tobacco expects that this will be demonstrated further in due course by the data that emerges from Australia as part of the review to be conducted in December 2014. The Government previously committed to waiting until the evidence of the effect of the measure from Australia could be assessed. In 2013 it announced that *"[H]aving carefully considered these differing views, the Government have decided to wait until the emerging impact of the decision in Australia can be measured before we make a final decision on this policy in England."*¹¹⁴ It ought, at the very least, to maintain that position. Sir Cyril Chantler also found that *"it is too early to draw definitive conclusions"* and *"data is only just becoming available"*.

¹¹² ECTA (European Communities Trade Mark Association) -

http://www.ecta.org/IMG/pdf/ecta_consultation_on_plain_packaging_form_final_2_july_2012.pdf

ITMA (Institute of Trade Mark Attorneys, UK) <http://www.itma.org.uk/search?for=standardised+packaging>

Marques (Association of European Trade Mark Owners). <http://www.marques.org/PositionPapers/default.asp>

INTA (International Trade Mark Association) -

http://www.inta.org/Advocacy/Documents/INTA2012_UK%20DoH%20consultation.pdf

APRAM (Association des Praticiens du Droit des Marques et Modeles, French speaking) - <http://apram.com/wp-content/uploads/2012/08/Aug-1-2014-Apram-Uk-consultation.pdf> (in response to the 2014 Consultation)

¹¹³ Particularly in answer to question 1 and in section 2.2 above.

¹¹⁴ See <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130712/wmstext/130712m0001.htm>

Imperial Tobacco notes that the Consultation states that “*the Government has not yet made a final decision on whether to introduce standardised packaging of tobacco products*”.¹¹⁵ We trust that this is the case and that the enactment of section 94 of the Children and Families Act 2014 does not indicate a predisposition.

Standardised tobacco packaging would be unlawful. It would contravene domestic, European and international law. The introduction of standardised tobacco packaging would, therefore, result in legal action against the Government and could lead to a compensation bill that could run to billions of pounds.

Neither the Consultation nor the IA addresses the substance of the submissions that were made by Imperial Tobacco in the previous consultation in 2012 regarding the legal implications of the introduction of standardised packaging. The Chantler Report also excluded the legal implications of the introduction of standardised packaging. These are significant omissions.

As a preliminary point, and as explained in section 2.14.1 above, the proper interpretation and validity of Article 24(2) of the revised Tobacco Products Directive (which purports to give Member States the power to adopt further requirements in relation to the standardisation of tobacco products) is the subject of legal challenges which are currently pending before the English courts.¹¹⁶ This point has important implications for the legality of the possible introduction of standardised packaging in the UK. The Government has accepted in those proceedings that this is a fundamental issue which ought to be resolved by the Court of Justice of the European Union on an expedited basis.¹¹⁷ On its own case, therefore, the UK Government should, at a minimum, await the court’s determination of this point.

3.1 Legal protection of intellectual property rights

The right of the owner of any product that is lawfully manufactured and sold, to acquire, own and exploit intellectual property connected to that product is enshrined in law. Standardised packaging would affect Imperial Tobacco's intellectual property rights and most significantly its trade marks. It is recognised that trade marks enable a manufacturer to impart information to

¹¹⁵ UK Consultation on the introduction of regulations for standardised packaging of products, page 2, para 1.1

¹¹⁶ The Queen on the application of British American Tobacco UK Limited –v- The Secretary of State for Health (Claim No. CO/2971/2014); and The Queen on the application of (1) Philip Morris Brands SARL and (2) Philip Morris Limited –v- The Secretary of State for Health (Claim no. CO/2969/2014)

¹¹⁷ Secretary of State for Health’s Summary Grounds for Contesting Claims No.s CO/2971/2014 and CO/2969/2014 dated 17 July 2014.

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customers about the product and to distinguish their product from those of their competitors by communicating the qualities and essential characteristics of their product.¹¹⁸

The importance of trade marks to tobacco manufacturers has already been recognised by the Court of Justice of the European Union (the "**CJEU**") when considering a challenge to the first European Tobacco Products Directive (Directive 2001/37/EC). It was a key aspect of the Court's finding in that case that "*the restrictions on the trade mark right ... do not constitute a disproportionate and intolerable interference, impairing the very substance of that right*".¹¹⁹ In contrast, standardised packaging would do precisely this: completely restrict the use of the trade mark for its intended purpose, to inform and communicate with adult customers.

3.2 Property rights under domestic and European law

Standardised packaging would breach the protection of property rights afforded to Imperial Tobacco under the European Convention on Human Rights (the "**ECHR**") and the Charter of Fundamental Rights of the European Union (the "**Charter**"). The ECHR is incorporated into domestic law via the Human Rights Act 1998.

It is well established that intellectual property rights are "possessions" for the purposes of Article 1 of the First Protocol ECHR ("**A1P1**")¹²⁰ and section 22 of the UK Trade Mark Act 1994.

The ECHR guarantees rights which are "*practical and effective*"¹²¹ and it is therefore necessary to consider the substance of the action that is taken, and its effects, when determining whether there has been a "deprivation" of possessions for the purposes of the second rule within A1P1. As a result of the existing regime of control mechanisms on tobacco advertising and the display of tobacco products at point of sale, the last remaining opportunity for Imperial Tobacco to use its trade marks in any meaningful way (i.e. to communicate and inform the users of those products) is on its packs. The proposed legislation introducing standardised packaging would directly and wholly prevent Imperial Tobacco from using its relevant intellectual property in this way. This amounts to a clear deprivation of Imperial Tobacco's valuable intellectual property rights and would be unlawful.

¹¹⁸ Among other relevant cases, see Case 487/07 L'Oreal SA v Bellure NV.

¹¹⁹ Case C-491/01 The Queen and Secretary of State for Health, ex parte British American Tobacco (investments) Ltd and Imperial Tobacco Ltd supported by Japan Tobacco Inc. and JT International SA [2002] ECR I-11453, paras 149-153.

¹²⁰ Anheuser Busch Inc v Portugal (2007) 44 EHRR 42.

¹²¹ Airey v Ireland (1979) 2 EHRR 305

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Article 17(1) of the Charter of Fundamental Rights of the European Union provides similar protection as A1P1; and Article 17(2) specifically provides for the protection of intellectual property rights.¹²² The CJEU has adopted an approach similar to that of the European Court of Human Rights in relation to A1P1.¹²³

3.3 Compensation

A deprivation of possessions without payment of an amount reasonably related to their value cannot be justified under A1P1.¹²⁴ The draft legislation put forward by the Government contains no provision whatsoever for compensation to be paid to the tobacco companies in respect of the unlawful interference with their valuable intellectual property rights.

The fundamental principle in the jurisprudence of the European Court of Human Rights underlying the award of compensation is, so far as possible, to place the applicant in the same position as if his rights had not been infringed.

The Impact Assessment is woefully deficient and inadequate in its consideration of the impact of the proposals on the intellectual property rights and costs to the tobacco industry.¹²⁵ If the Government introduced the regulations as drafted, it would face significant claims for compensation that could run to billions of pounds. The Australian Government is facing a very significant damages claim as a result of introducing similar legislation.

3.4 International legal obligations

The introduction of standardised packaging would also amount to a breach of the Government's international treaty obligations under the Agreement on Trade Related Aspects of Intellectual Property ("**TRIPs**").

Article 20 of TRIPS provides:

"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as ... use in a special form or use in a manner detrimental to

¹²² Since 1 December 2009, the Charter has "the same legal values as the Treaties" (Article 6(2) TFEU).

¹²³ Case C-360/10 SABAM v Netylog NV (judgment dated 16 February 2012) at paras 41-44

¹²⁴ Gladysheva v Russia [2012] HLR 19, para. 67; Papachelas v Greece (2000) 30 EHRR 923 at para. 48 and R(SRM Global Master Fund LP) v Treasury Commissioner [2009] EWCA Civ 788 at para. 73.

¹²⁵ Please refer to our response to Question 4 in this submission.

its capability to distinguish the goods or services of one undertaking from those of other undertakings."

Standardised packaging would fall squarely within the prohibition set out in Article 20. The special requirements imposed by standardised packaging would include both use in a special form and use in a manner detrimental to the mark's capability to distinguish its products. For the reasons set out below, standardised packaging could not be regarded as creating a "*justified*" encumbrance on the use of trade marks.

Imperial Tobacco acknowledges that Article 8 of TRIPs provides that:

"Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

However, Article 8 does not provide for an exception from any of the substantive obligations of the TRIPs Agreement as it applies only to measures which are "*consistent with the provisions of [TRIPs]*". Nor, for the reasons set out below, could it be shown that standardised packaging is "*necessary*" to protect public health. Accordingly, the Government could not invoke Article 8 in order to justify standardised packaging.

Standardised packaging would also constitute a breach of the obligations of the UK under the WTO's Technical Barriers to Trade Agreement. Contrary to Article 2.2, the introduction of standardised packaging would impose technical regulations which would create unnecessary and unjustified obstacles to international trade and which would be more restrictive than necessary to achieve the Government's objective. Breach of these international treaties would likely lead to WTO complaints against the UK.¹²⁶

3.5 The harmonised regime for the protection of intellectual property rights

Standardised packaging would also conflict with established trade mark law. In particular, under European law, a comprehensive and harmonised regime has been established for the protection of intellectual property rights at a national and Community-wide level.¹²⁷ That regime

¹²⁶ Please refer to section 2.4 above.

¹²⁷ Directive 2008/95/EC approximating the laws of the Member States relating to trade marks and Council regulation No 207/2009 on the Community Trade Mark.

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would be completely undermined by the introduction of standardised packaging. In particular, it would undermine the unitary character of Community trade marks and establish a different regime in the UK for trade marks that apply to tobacco products in comparison to other products, and a different regime in the UK in comparison to other Member States. This would defeat the harmonising objective of the European trade mark legislation and would, therefore, be unlawful.

3.6 The right to free movement of goods

Standardised packaging would also undermine other fundamental principles of European law. The free movement of goods is protected by Article 34 of the Treaty on the Functioning of the European Union (the "TFEU").

Standardised packaging would detrimentally affect the free movement of tobacco products between Member States because (at a minimum) imported products would have to be altered to conform to those requirements. Moreover, as already noted above, following the extensive restrictions on tobacco advertising and the introduction of bans on display at point of sale, packaging is the last significant mechanism by which a tobacco manufacturer may communicate with adult smokers in order to differentiate its products from those of its competitors. It is, therefore, critical to the ability of new products and manufacturers, including from other Member States, to enter the UK market. So far, at least three Member States have issued detailed opinions in response to Ireland notifying its standardised packaging measure¹²⁸ to the EU Commission under the Technical Standards Directive¹²⁹ on the basis that the measure may create obstacles to the free movement of goods within the internal market.¹³⁰

3.7 The right to freedom of expression

Freedom of expression is a fundamental right that is recognised as an essential element of a democratic society. It is protected under Article 10 ECHR and Article 11 of the Charter. It includes the right of (a) commercial entities which manufacture and sell a lawful product to impart information about the nature and essential characteristics of that product and (b) consumers of that lawful product to receive that information. This includes, but is not limited to,

¹²⁸ Public Health (Standardised Packaging of Tobacco) Bill 2014, TSD notification number 2014/277/IRL http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&iYear=2014&inum=277&lang=EN&NLang=EN

¹²⁹ Directive 98/34/EC

¹³⁰ Article 9 Technical Standards Directive

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the right of a manufacturer to communicate, in the form that it chooses,¹³¹ such fundamental matters as: what the product is; who makes it; where it originates from and how it differs from its competitors.¹³² Standardised packaging would strike at the very essence of this fundamental right and would, therefore, be unlawful.

3.8 The right to conduct a business

The right to conduct a business is also an established principle of European law and recognised in Article 16 of the Charter. The Explanations which accompany the Charter state that this is based on CJEU case law which has "*recognised [the] freedom to exercise an economic or commercial activity*" and Article 4(1) and (2) TFEU which "*recognises free competition*".¹³³ This includes the manner in which a company operates and its role as a competitor in a free market economy.

Standardised packaging would also constitute a breach of this established principle.

3.9 Justification

Imperial Tobacco acknowledges that the majority of the legal rights referred to above are not absolute. In particular, depending on the legal provision, interference with those rights can in principle be justified by reference to the protection of public health. The precise nature of the tests varies according to the legal context. Imperial Tobacco also accepts that the protection of health is a legitimate objective.

However, in respect of each of the legal measures of protection set out above, the burden would be on the Government to show that standardised packaging was justified. For the reasons set out below and elsewhere in this submission, standardised packaging fails all the tests for justification.

In summary:

- it is lawful to manufacture and sell tobacco products;

¹³¹ *Women on Waves v Portugal*, Application No. 31276/05, 3 February 2009

¹³² *Markt Intern Verlag GmbH v Germany* (1989) 12 EHRR 161, [26]; *Casada Coca v Spain* (1994) 18 EHRR 1, [35]; and *Stambuk v Germany* (2003) 37 EHRR 42, [39]

¹³³ Charter Explanations, OJ 2007 C 303/23

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- the ability to differentiate the nature and characteristics of products, and to communicate those differences to consumers, is an essential pre-requisite to the creation and functioning of a lawful competitive market;
- standardised packaging would completely remove the last significant means by which Imperial Tobacco and other tobacco manufacturers can impart information to adult smokers about their products, including as regards their quality, origin and brand values;
- standardised packaging would be unparalleled: there is no market for lawful products that has imposed such a restriction;
- there is no credible evidence that standardised packaging would achieve the Government's stated objectives. In fact, the evidence from Australia, if anything, points the other way;
- there are less restrictive alternatives and alternative tobacco control measures already introduced, but not yet fully in force, with the aim of meeting the objectives that are being pursued. In particular, in all material respects, the Government's stated aims behind the introduction of both the ban on tobacco vending machines and the ban on the display of tobacco products were the same as its stated policy objectives for standardised packaging. It is incumbent on the Government to assess the impact in practice of the tobacco control measures it has already introduced¹³⁴ before it considers standardised packaging. The display ban has not even been fully implemented, let alone its effects, if any, assessed; and
- standardised packaging would have significant negative and unintended consequences, including in relation to illicit trade, costs for manufacturers and retailers, and trade and competition.

For the reasons set out in this section of our response, the draft regulations would be unlawful and would, therefore, be unenforceable.

¹³⁴ The ban on the display of tobacco will not be brought into force for large shops until 2015.

4. Response to 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 Consultation Stage Impact Assessment (the "IA") is flawed in a number of significant respects and does not provide an adequate basis for assessing the possible introduction of standardised packaging in the UK. In many cases, these defects are the same, or materially similar, to issues that Imperial Tobacco and the Regulatory Policy Committee have drawn to the Government's attention when commenting on previous Impact Assessments.

In this response, Imperial Tobacco has sought to focus only on the most significant comments on the IA. In doing so, we highlight the further evidence and information that is required to address the deficiencies in the IA. By way of overview:

- The IA fails to provide a credible basis for the alleged health benefits;
- The IA does not properly assess the impact of standardised packaging on competition or the implications of increasing taxation levels to try and address the impact on competition;
- the analysis of the costs that would follow from the introduction of standardised packaging is unreliable and understates the likely costs that would be incurred;
- in particular, the IA fails to assess the impact of standardised packaging on illicit trade;
- the IA fails to properly consider the regulatory context in which the introduction of standardised packaging would take place or to consider at all the alternative options to standardised packaging; and
- the IA's analysis of the losses in consumer welfare is incomplete and unexplained.

Each of these points is explained below.

4.1 The IA fails to provide a credible basis for the alleged health benefits

The IA makes no attempt to use the available empirical evidence following the introduction of standardised packaging in Australia.

Sir Cyril Chantler reached the view that *"it is too early to draw definitive conclusions"* from the introduction of standardised packaging in Australia.¹³⁵ In those circumstances, and as Imperial Tobacco has noted elsewhere in this submission, the Government's decision to proceed with

¹³⁵ Chantler, C. (2014), "Standardised packaging of tobacco: Report of the independent review undertaken by Sir Cyril Chantler", page 23, paragraph 3.21, Box 1

this consultation contradicts its previously stated position that it would wait for reliable data that emerged from Australia.¹³⁶ In contrast, the IA itself states that a ten year period would be required to appraise the impacts of standardised packaging upon smoking behaviour.¹³⁷

Instead, as matters stand, the preferred option in the IA is to proceed with the introduction of standardised packaging in circumstances where the data that is available from Australia suggests that standardised packaging would not work. Instead, the IA relies on an inherently qualitative and unreliable approach to quantify the potential benefits of the introduction of standardised packaging.

The data that has emerged from Australia is dealt with in our response to question 1 and elsewhere in this document.¹³⁸ In summary, smoking prevalence levels have remained in line with trend and there has been no acceleration in decline brought about by standardised (plain) packaging in Australia.

Against the backdrop of the evidence that has emerged from Australia on smoking prevalence levels; the IA relies on the *Pechey et al* study¹³⁹ as the basis for assessing the benefits of standardised packaging. This involved obtaining an estimate of the impact of standardised packaging on smoking prevalence from 33 so-called "experts" in North America, Australasia and the UK. These experts were asked to provide their "best guess", "upper bound guess" and "lower bound guess" as to the likely impact of the policy two years after it had been introduced.¹⁴⁰ The IA takes the median of the "best guesses" to arrive at an estimate of a reduction in smoking prevalence of one percentage point and it then applies this to its estimate on the reduced take up of smoking and improved quit rates.¹⁴¹

Imperial Tobacco makes the following comments:

- A qualitative, "best guess" approach is no substitute for reliance on actual data. A reliance on "actual data" is much more likely to reflect (potential and current) smokers'

¹³⁶ Written Statement 12 July 2013: "Having carefully considered these differing views, the Government have decided to wait until the emerging impact of the decision in Australia can be measured before we make a final decision on this policy in England."

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130712/wmstext/130712m0001.htm>

¹³⁷ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 3, Policy Option 2

¹³⁸ Please refer to section 1 and 2.2 above.

¹³⁹ Pechey, R., Spiegelhalter, D., & Marteau, T. M. (2013) "Impact of plain packaging of tobacco products on smoking in adults and children: an elicitation of international experts' estimates", BMC Public Health 2013, 13:18, available at <http://www.biomedcentral.com/1471-2458/13/18>

¹⁴⁰ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, pages 58 - 59, paragraphs 230, 234

¹⁴¹ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 60, paragraph 237

responses to the introduction of standardised packaging than a small group of experts' guesses as to how people might respond. In particular, the use of "actual data" would allow for changes in other factors that might affect smoking prevalence over time to be explicitly, and transparently, controlled for, which is not possible when using experts' best guesses.

- Up to eighteen months of data from Australia would have been available at the time the IA was prepared. As explained above, the data that is available supports the conclusion that standardised packaging would not reduce tobacco consumption.

Imperial Tobacco has commented previously on the dangers of relying on a subjective (rather than objective), qualitative (rather than quantitative), "guess the impact" approach. In summary:

- There does not appear to be any attempt in the *Pechey et al* study at controlling for selection bias amongst the experts and there is no information about the factors that the experts took into account. If the experts are, for example, associated with or receive funding or work from anti-smoking lobbies, they would be likely to overstate the impact of the policy.¹⁴² Moreover, the best guesses of experts might have taken into account factors that an approach using "actual data" would have revealed to be irrelevant in the assessment of the impact of standardised packaging.
- There does not appear to be any attempt to control for possible self-selection bias by the experts i.e. those experts who thought there would be an impact of standardised packaging would be those most likely to respond, such that the estimate of the impact is inherently biased towards finding that standardised packaging would have a positive impact.¹⁴³
- The number of experts sampled (33) is very small. Indeed, one of the article's reviewers noted that a sample of 33 experts is "*much too small*".¹⁴⁴ This is important because it means that the weight placed on each expert's guess is very high and it increases the risk that, for the reasons explained above, the IA's reliance on the impact of standardised packaging actually reflects factors that are irrelevant and unimportant.

¹⁴² We understand that the authors of studies used in Moodie et al. "Plain Tobacco Packaging: A Systematic Review" had affiliations with anti-tobacco groups and that these links and potential biases were not controlled for in the systematic review (see "Bad for business; bad for consumers; good for criminals", Imperial Tobacco's response to the UK DH consultation on standardised packaging of tobacco products, dated 6 August 2012, page 65).

¹⁴³ This is analogous to "publication bias" in which there is a bias towards scientific journal articles only being published if the study they conducted found a statistically significant effect, while studies of the same area that did not find a statistically significant effect are not published, thereby biasing an average based on the estimate of the effect included in published articles (similar to the estimate based on expert's guesses here) towards finding an effect.

¹⁴⁴ See Matthew Rimmer's Reviewer's Report dated 3 September 2012, available at http://www.biomedcentral.com/imedia/8790882277989560_comment.pdf

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- It is unclear why only experts from North America, Australasia and the UK were selected to provide their guesses. In particular, there are no experts from the same trading area as the UK (i.e. European countries), the inclusion of which would also have increased the sample size used in the estimated impact of standardised packaging.
- The identity of the experts was not disclosed.¹⁴⁵ This is very unusual and unexplained.
- The reliability of experts' qualitative views as a basis for the implementation of standardised packaging is called into question by a number of prior studies. For example, a study by Tetlock (2006) found that the accuracy of experts at predicting political and economic events was little better than an approach based on random guessing.¹⁴⁶ Trueman (1994) suggests that experts' forecasts are strongly affected by 'herding behaviour' in that a single expert might base their forecast on prior expectations, at the expense of new information, such that "*calculating a consensus [expert] forecast by averaging individual [expert] forecasts is inappropriate*".¹⁴⁷
- Ultimately, the *Pechey et al* study provides opinion, not evidence. Imperial Tobacco has explained previously that the evidence related to predictors of youth smoking demonstrates that packaging and branding is not one of the factors that cause initiation amongst young people.¹⁴⁸

The IA's approach to deriving an aggregate estimate from the individual experts' estimates is also highly questionable. The IA relies on the experts' guesses as to the impact of the policy two years subsequent to implementation and it assumes that the impact of the introduction of standardised packaging in the first year is half the impact two years after it is implemented.¹⁴⁹ However, that is inherently unlikely for a number of reasons.

Imperial Tobacco has responded previously to the 'evidence review' and refers to those comments¹⁵⁰ rather than repeat them here.

¹⁴⁵ Imperial Tobacco understands that the Department of Health deliberately used a third party employed by a not-for-profit company and hence not subject to Freedom of Information requests (see the letter from the Department of Health to Richard Ross of Imperial Tobacco dated 31 December 2012).

¹⁴⁶ Tetlock, P. (2006), "Expert Political Judgment: How Good Is It? How Can We Know?", cited in <http://freakonomics.com/2011/06/30/freakonomics-radio-hour-long-episode-4-%E2%80%9Cthe-folly-of-prediction%E2%80%9D/>

¹⁴⁷ Trueman, B. (1994), "Analyst forecasts and herding Behavior", Review of Financial Studies, paragraph 7(1)

¹⁴⁸ Please refer to section 2.6 above and Appendix C, section 3.3

¹⁴⁹ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 59, paragraph 234

¹⁵⁰ Please refer to section 2.9.1 above and to Appendix C pages 65-68.

4.2 The IA does not properly assess the impact of standardised packaging on competition or the implications of increasing taxation levels to try and address the impact on competition

Imperial Tobacco has explained previously that standardised packaging would result in increased price competition: the removal of branding from packaging limits the ability of tobacco manufacturers to distinguish their product to end consumers on any basis except quality and price.¹⁵¹ According to economic theory, the resulting increased emphasis on price competition will result in a decrease in the average price of tobacco products and in turn attract higher consumption levels.

The Impact Assessment recognises this risk but is inconsistent in the way that it treats the potential for standardised packaging to affect price competition:

- On the one hand, it seeks to positively rely on this factor because it cites downward pricing pressure resulting from the introduction of standardised packaging as a factor that mitigates a potential increase in cross-border and illicit trade.¹⁵²
- However, on the other hand, it quotes and relies upon a conclusion in the report by Sir Cyril Chantler that *"the risk of prices falling is small"*.¹⁵³ Sir Cyril Chantler is not a pricing and marketing expert. Maybe therefore, the Chantler Report concludes that the price per pack of tobacco products in Australia has increased without understanding the full history of price changes following the introduction of plain packaging in Australia. In fact, after the introduction of plain packaging, and before the price increase, there was a price war. This was partly generated by the down-trading effect of consumers moving to the economy and sub-economy segments of the commoditised market, and, in some cases, manufacturers quickly re-positioning existing mid-price brands to meet this demand. There was subsequently a planned tax increase which explains most of the increases in prices after plain packaging was introduced. Therefore, just concluding that prices have gone up is overly simplistic and does not conclude any impact of plain packaging on pricing behaviour. The Chantler Report also notes that tobacco

¹⁵¹ Appendix C, "Bad for business; bad for consumers; good for criminals", Imperial Tobacco's response to the UK DH consultation on standardised packaging of tobacco products dated 6 August 2012, pages 21 - 23

¹⁵² "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 34, paragraph 134

¹⁵³ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health, 17 June 2014, page 18, paragraph 67

manufacturers offered some "free" cigarettes along with a usual pack of 20.¹⁵⁴ Imperial Tobacco's understanding is that this initiative was only with one brand.

The IA also states that lower tobacco prices could be offset by taxation.¹⁵⁵ However, high taxation is a key factor driving illicit trade in tobacco products. We have explained elsewhere that standardised packaging would increase illicit trade levels.¹⁵⁶ Standardised packaging coupled with increases in taxation has the potential to present a very serious problem for the growth of the illicit market in the UK.

4.3 The IA fails to assess the impact of standardised packaging on illicit trade and cross border sales

The IA acknowledges that the introduction of standardised packaging could make it easier for illicit products to flourish and/or make it more difficult for consumers to distinguish between UK duty-paid tobacco and NUKDP including illicit tobacco products.

Imperial Tobacco has consistently sought to explain and emphasise the impact that the introduction of standardised packaging would have on illicit trade. This is dealt with elsewhere in this submission¹⁵⁷ but, in summary:

- The increase in, and availability of, illicit trade would make illegal tobacco more affordable and accessible, especially to young people who are particularly sensitive to price;
- it would increase general exposure to illicit products, illegal markets and dangerous people;
- due to the lack of regulation, illicit products would undermine all tobacco product regulations because their contents are unknown and unregulated; and
- it would result in a significant loss to the Exchequer in terms of tax revenue foregone (the specific treatment of this point in the IA is dealt with below).

The IA identifies the potential increase in the illicit market and cross-border shopping as "the two key risks" associated with the introduction of standardised packaging. However, the IA

¹⁵⁴ Chantler, C. (2014), "Standardised packaging of tobacco: Report of the independent review undertaken by Sir Cyril Chantler", page 38, paragraph 6.4

¹⁵⁵ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 65, paragraph 246

¹⁵⁶ Appendix C, "Bad for business; bad for consumers; good for criminals", Imperial Tobacco's response to the UK DH consultation on standardised packaging of tobacco products, dated 6 August 2012, pages 14 – 17; and sections 2.2.3 and 2.8 above.

¹⁵⁷ Sections 2.2.3-4 and 2.8 of this document

claims that there is "no means of quantification" available to assess the impact on illicit trade and adopts a "critical value approach" to explore the increase in the illicit market that would be required to yield a zero NPV (net present value).¹⁵⁸ This approach contradicts the IA's stance with respect to the impact of standardised packaging on tobacco consumption, where (as noted above) in the absence of any evidence of such an effect, despite 18 months experience in Australia, the authors of the IA were happy to resort instead to reliance on a flawed and non-transparent opinion poll, based on a small sample of experts' best guesses, for the key factor that drives the IA's overall conclusion.

It is not the case that the impact on illicit trade is incapable of quantification and the difficulty of obtaining an estimate is no justification for not attempting this task, particularly in circumstances where pure guesswork is provided as a basis for estimates elsewhere in the IA. Most obviously and importantly, the IA could, and should, have drawn on the implementation of plain packaging in Australia to estimate the impact on illicit trade. The data contained in a study carried out by KPMG following the introduction of plain packaging in Australia noted an increase of the market share of illicit tobacco of over 2% in just the first year after the implementation of the ban.¹⁵⁹

The IA refers to, and appears to rely upon, Sir Cyril Chantler's rejection of the KPMG report. The following points must be noted:

- As a starting point, the KPMG report is an independent piece of work, which gives a reliable insight into the level of illegal tobacco consumption.
- The methodology used by KPMG, criticised by the Australian Government, is adapted from methodology that KPMG agreed with OLAF, the European Commission's Anti-Fraud Office, which Imperial Tobacco understands that this methodology is widely used and independently validated. Sir Cyril Chantler refers to the comments of the Australian Government Departments of Health and Customs. They dismiss the KPMG Report on the basis of official Customs data, which – they say – shows no significant effect on illicit tobacco following the introduction of plain packaging. Imperial Tobacco's understanding is that this is simply incorrect and that the Australian Customs & Border Protection Service Data for the period 2012 to 2013 shows a rise in unbranded loose tobacco and a much greater rise in manufactured cigarettes, just as the KPMG report did.

¹⁵⁸ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health, 17 June 2014, page 34, paragraph 135

¹⁵⁹ KPMG's "Illicit tobacco in Australia", dated 3 April 2014, available at https://www.imperial-tobacco.com/assets/files/cms/KPMG_FY2013_Illicit_Trade_Report___FINAL___11_April_2014.pdf

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- Sir Cyril Chantler also suggests that the Customs data is "*backed by analysis undertaken by the Cancer Council Victoria (based on data from the National Drug Strategy Household Survey) that suggests that illicit tobacco in Australia is only 10-20% of the level proposed by KPMG*". As to this, Imperial Tobacco's understanding is that data is incomparable because it covers a different period (it is taken from a consumer study undertaken in 2010 and therefore not comparable with 2013 data). Further, the National Drug Strategy Household Study was not designed to assess illicit trade. The Cancer Council Victoria makes various unreliable assumptions in order to extrapolate illicit tobacco figures from the household survey (for example it makes assumptions about daily use because the survey did not ask about amounts consumed).

In short, the data in the KPMG Report provides robust, cogent and independent evidence that the introduction of standardised packaging would have a serious impact on illicit trade. The specific features of the UK market, and in particular its position as a European trading hub, will increase the effect of illicit trade and cross-border sales in comparison with Australia. On any view, the IA's failure to quantify the impact on illicit trade is an important and serious deficiency.

Standardised packaging would also lead to an increase in cross-border trade. The IA adopts the same flawed approach to the potential increase in cross-border trade as it does in respect of illicit trade. Specifically, the IA assumes that the study on which it bases its estimate of the impact of standardised packaging on smoking prevalence already takes into account consumers switching to cross-border sales. No justification is provided for this assumption and it appears that no attempt was made to check with the authors of the study if this was the case. As explained below, an increase in cross-border sales reduces UK tax revenues. It would also impact the claimed health benefits resulting from the introduction of standardised packaging.

The IA therefore needs to properly assess the impact of standardised packaging on illicit trade and cross border sales, drawing on the evidence from Australia while reflecting the specific features of the UK market (which are likely to result in an even greater increase in illicit trade and cross border sales). The UK, as a member of the European Union, cannot restrict cross-border shopping from other EU Member States and all consumers can buy unlimited amounts of tobacco products as long as these are for private consumption or gifts (any limits are only indicative).

4.4 The analysis of the costs that would follow from the introduction of standardised packaging is unreliable and understates the likely costs that would be incurred

Imperial Tobacco notes the comments of the Regulatory Policy Committee (the "**RPC**"), in ascribing an amber rating to the IA, that it: *"should provide a fuller discussion of a number of the costs, along with some indication of their likely extent where possible"*.¹⁶⁰

The RPC has previously stated that: *"tobacco Impact Assessments tended to provide a full analysis of benefits, but failed to estimate the full economic costs to producers and retailers"*.¹⁶¹

We agree. The current IA suffers from the same failings.

4.5 The costs to tobacco manufacturers

The most striking example of this flaw is in the section entitled "Profits to the tobacco industry and retailers", the failure of the IA to appropriately account for the profits that would be lost by tobacco manufacturers. The IA appears to proceed on the basis that the lost profits of tobacco manufacturers would be minimised due to capital being re-allocated elsewhere, the fact that tobacco companies have foreign based shareholders (such that the impact of any lost profits would not be felt in the UK), and the fact that manufacturers of other products would benefit due to expenditure switching from tobacco to other goods and services.¹⁶² On this basis, the IA arrives at the conclusion that the only relevant losses to tobacco manufacturers are due to consumers switching from high price brands to low price brands at a higher rate than might otherwise occur. For the reasons set out below, this conclusion is simplistic and wrong:

- Most fundamentally, this analysis ignores the crucial role that packaging and branding plays in the ability to distinguish products to the end consumer on any basis except price¹⁶³ and the loss of brand equity and goodwill that would result from the introduction of standardised packaging. Imperial Tobacco has made a substantial investment in its intellectual property rights, which are worth billions of pounds.¹⁶⁴

¹⁶⁰ Regulatory Policy Committee opinion on Standardised packaging for tobacco products, Department of health, RPC14-DH-1229(2) dated 29 May 2014, page 1

¹⁶¹ "Improving Regulation", Regulatory Policy Committee, paragraph 2.56

¹⁶² "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 24, paragraph 89

¹⁶³ Please refer to section 2.6.3 above and Appendix C, "Bad for business; bad for consumers; good for criminals", Imperial Tobacco's response to the UK DH consultation on standardised packaging of tobacco products, dated 6 August 2012, pages 21 - 23

¹⁶⁴ Appendix C, "Bad for business; bad for consumers; good for criminals", Imperial Tobacco's response to the UK DH consultation on standardised packaging of tobacco products, dated 6 August 2012, pages 19, 46-56

- The assumption that capital can be re-allocated elsewhere to eliminate lost profits is incorrect.¹⁶⁵ It proceeds on the assumption that it will be possible to repurpose all aspects of the tobacco industry for other uses. No explanation or justification is provided for that assumption. In practice, this would require a change in the entire focus of Imperial Tobacco's business (at the same time that the same exercise is being undertaken by all of the other tobacco manufacturers).
- Even to the extent that refocusing business would be possible, the IA proceeds on the basis that it would, or could, occur straight away, which is very unlikely to be the case in practice and the transition costs would be enormous.
- The assumption of capital re-allocation does not account for the problem that any such re-allocation would inevitably be a "second choice" in comparison with the tobacco industry prior to the introduction of standardised packaging, and would yield lower revenue and profit (otherwise capital would already have been re-allocated to that alternative industry).
- The IA assumes that current consumer spending on tobacco products would be directed completely to purchasing other goods and services, such that the overall level of business profitability in the economy would remain unchanged. This relies on a number of highly theoretical assumptions, all of which would be likely to be borne out in practice. These include:
 - The assumption that the margins made by retailers and manufacturers of other products are exactly the same as those made on tobacco products. If the margins are lower, then the overall level of business profits would decrease. Moreover, it is known that tobacco drives a significant amount of "footfall" for small and medium sized retailers in particular. If the margins lost on tobacco could not be made up by increased margins on other products, the cost would disproportionately fall on small and medium sized retailers experiencing the lost tobacco revenues and reduced number of customers even entering their premises to buy other products (and if the margins obtained by larger retailers are lower than the margins obtained by smaller retailers, this allocation of expenditure away from smaller retailers towards larger retailers would result in a decrease in total business profits); and
 - The assumption that all of the money spent on tobacco products would be spent on other goods and services. Even if such switching might occur, some portion

¹⁶⁵ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 24, paragraph 89

- of that money would invariably be used for other purposes, such as saving, thus decreasing the overall level of business profits.¹⁶⁶
- The assumption that not a single consumer would switch their spending to illicit tobacco products, or legitimately purchase tobacco products from elsewhere in the EU – both of which would decrease not only UK tobacco industry profits (and therefore GDP) but would also result in losses for the Exchequer.
 - The IA's assessment of the lost tax revenue arising from down-trading from high-priced brands to lower priced brands is flawed and almost certainly understated. It uses a "static" estimate based on the current difference in ad-valorem taxes and margins to estimate the losses that would arise from the implementation of standardised packaging.¹⁶⁷ In fact, the difference between high-price and low-price brands in terms of ad-valorem taxes and margins is "dynamic": it is increasing over time.

4.6 Lost tax revenue

The IA's treatment of lost tax revenue is also flawed:

- The IA assumes that all of the money switching away from tobacco products would be spent on other goods and services that are subject to an average VAT rate of 13.2%.¹⁶⁸ As already noted, even assuming that such a switching away from tobacco products might occur, it is unlikely that all of the money would be spent on other goods and services as opposed to, for example, being saved, spent on illicit products, or products legitimately purchased elsewhere in the EU. All of the VAT charged on that portion of tobacco expenditure (now-saved or taken by the illicit market) would be lost.
- The IA's analysis of the potential impact of standardised packaging on tax revenues by its impact on cross-border sales and illicit trade is fundamentally flawed. The IA merely assumes that the study on which it bases its estimate of the impact of standardised packaging on smoking prevalence already takes into account consumers switching from UK tobacco to cross-border/illicit tobacco.¹⁶⁹ No justification is provided for this assumption and it appears that no attempt was made

¹⁶⁶ The "propensity to save" underlying this argument generally refers to the proportion of additional income that is saved, but the principle (of people not spending the entirety of any "additional" money they receive) remains the same in this case.

¹⁶⁷ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 56, paragraph 218

¹⁶⁸ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 30, paragraph 119

¹⁶⁹ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, pages 32-34, paragraph 127

to check with the authors of the study if this was the case. Therefore, the IA may significantly underestimate the costs that would flow from lost tax revenue.

- The IA fails to include other potential losses in tax revenue. This includes lost corporation tax revenue from the decrease in the business profits of tobacco manufacturers (see above); increases in unemployment benefits and decreases in income tax revenues resulting from job losses from tobacco manufacturers in the UK or other industries (such as small retailers) affected by the policy. For example, earlier this year Imperial Tobacco was forced to announce the closure of its factory in Nottingham, which employed 540 people, citing in part the difficult operating environment caused by increased Government regulation and the pressures on manufacturers of genuine, UK duty paid product of the thriving illicit market and that followed the closure of its factory in Bristol in 2010.
- Tobacco products include excise and VAT at around 87% of the consumer spending. Other products include, as stated by the IA, only 13.2% average VAT. This leads to a significant loss of government revenue (70% of the consumer spending) even if all consumer spending switched from legal tobacco to other products.

4.7 The IA fails to properly consider the regulatory context in which the introduction of standardised packaging would take place or to consider at all the alternative options to standardised packaging.

As the RPC opinion notes, the Government is gold-plating the TPD2 by going beyond its minimum requirements. This is despite the fact that, as the IA acknowledges, smoking prevalence has fallen steadily in England since its peak in the mid-20th century.¹⁷⁰

The IA fails to consider how the introduction of standardised packaging would interact with - and why it would be justified in addition to - the existing regulatory measures, some of which are not even in force yet e.g. the introduction of the display ban in small retail outlets in 2015.

The IA also fails to consider alternative options, including:

- more effectively tackling the illicit trade problem which Imperial Tobacco has explained above and elsewhere;

¹⁷⁰ "Standardised packaging of tobacco products", Impact Assessment produced by the Department of Health dated 17 June 2014, page 5, paragraph 9

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- assessing the development of the market for electronic cigarettes which has been cited as a potential benefit to consumers who want to quit. NICE have stated: “many smokers are finding unlicensed electronic cigarettes helpful [in quitting]”;¹⁷¹
- investing resources in educational programmes that are proven to work and address the root causes of smoking initiation among young people such as peer pressure.¹⁷² Imperial Tobacco has explained previously the lessons that can be learnt from countries like Germany.¹⁷³

4.8 The IA’s analysis of the losses in consumer welfare is incomplete and unexplained

The IA effectively “gives up” on the consumer surplus question and states that trying to analyse the net effect of the introduction of standardised packaging is too complex.¹⁷⁴

Contrary to the suggestion in the IA, branding is very unlikely to be a “zero sum game” whereby the loss of consumer surplus is offset by potential benefits.¹⁷⁵ Imperial Tobacco also notes that, although the IA states that approximately 22% of smokers fall into the premium and mid-price segment (and hence, the IA suggests, would be most affected by the loss of consumer surplus), the graph on page 64 of the IA suggests that this figure is actually close to 40%.¹⁷⁶ The losses in consumer surplus would therefore be higher (and the gains lower) than the IA suggests. In any event, there is no justification or explanation provided for the conclusion that they would simply cancel each other out.

For the reasons set out above, we do not believe that the IA provides a coherent or accurate premise upon which to base such a draconian policy. We note that the Regulatory Policy Committee agrees.

¹⁷¹ June 2014 ASH factsheet http://www.ash.org.uk/files/documents/ASH_715.pdf

¹⁷² Appendix C, “Bad for business; bad for consumers; good for criminals”, Imperial Tobacco’s response to the UK DH consultation on standardised packaging of tobacco products dated 6 August 2012, page 13

¹⁷³ Please refer to Appendix B

¹⁷⁴ “Standardised packaging of tobacco products”, Impact Assessment produced by the Department of Health, 17 June 2014, page 40, paragraph 166

¹⁷⁵ “Standardised packaging of tobacco products”, Impact Assessment produced by the Department of Health dated 17 June 2014, page 69, paragraph 263

¹⁷⁶ “Standardised packaging of tobacco products”, Impact Assessment produced by the Department of Health dated 17 June 2014, page 64, paragraph 242

5. Imperial Tobacco's View

Imperial Tobacco believes that public policy interventions in the tobacco sector should be both designed and shown to address the well-established reasons why people smoke. Any Government policy on standardised packaging would fail to do this. In summary, this is because:

1. the Chantler Report is partial and subjective, does not provide robust and compelling evidence that the policy would be effective, and is, therefore, an insufficient basis on which to legislate. Sir Cyril Chantler himself had to concede that "it is too early to draw definitive conclusions";
2. there is growing evidence that the policy in Australia has had no impact on consumption of genuine, duty-paid products and has, in fact, led to an increase in the illicit trade, and youth smoking has increased;
3. the Australian Government has yet to review the policy and the UK Government told Parliament that it would not take a decision until the impact in Australia had been measured;
4. the lack of robust and credible evidence supporting the policy means its introduction would breach the UK Government's better regulation principles;
5. if implemented, TPD2 would introduce major revisions to tobacco packaging, the impact of which should be measured before gold-plating EU regulation;
6. the TPD2 does not contain a provision mandating standardised packaging. Article 24(2) TPD2 (which purports to give Member States the power to adopt further standardised packaging requirements) is subject to legal challenges which are currently before the English High Court;
7. introducing the policy would infringe national, European and international laws, treaties and agreements and would expose UK taxpayers to a potential compensation bill of billions of pounds;
8. criminals have openly welcomed the prospect of the policy being introduced within United Kingdom;
9. a significant majority of law enforcement officers polled on the issue have expressed concerns about the policy;
10. retailers are against the policy;
11. introducing the policy would set a dangerous precedent for the UK. The international business community and companies in other sectors have expressed concern about the

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implications of the policy for intellectual property rights and this could, in turn, affect investment into the UK; and

12. introducing the policy could spark trade disputes with other countries.

As outlined above, there are a number of alternative solutions that would be both less restrictive and actually target the problems associated with youth smoking, in particular.

For the reasons set out in this submission, Imperial Tobacco urges the UK Government to choose Option 1. It should not, in any event, introduce standardised packaging for tobacco products.

Appendix A - Current tobacco control measures

The existing UK regulatory context includes:

- the ban on advertising (2002);
- one of the most punitive tobacco tax regimes in the world;
- the ban on smoking in public places (2006 - Scotland, 2007 - England, Wales and Northern Ireland);
- the use of pictorial health warnings (2007);
- Age of Sale of Tobacco Products increased from 16 – 18 years (2007 - UK)
- the ban on tobacco vending machines (2011 - UK, 2013 - Scotland);
- Tobacco Retailers' Register implemented and a ban on proxy purchasing (Scotland - 2011) and England & Wales (2014);
- the ban on the display of tobacco at the point of sale - despite the Coalition parties having opposed it in Opposition on the grounds of a lack of evidence, which hasn't changed (2012 - smaller shops, and 2015 - larger premises in England and Wales, 2013 - smaller shops, and 2015 - larger premises in Scotland)¹⁷⁷ and, most recently,
- a proposed ban on smoking in vehicles with children present in England and Wales.

Appendix B - Education on tobacco in Germany

According to Eurobarometer 2012, 28% of UK smokers have started under the age of 15 compared to an EU average of 17%. The German rate is also 17%. In Germany smoking among under aged people between the age of 12 and 17 has seen a significant decline from 27.5 % in 2001 to 11.7 % in 2012.¹⁷⁸ Even among elder people smoking is in decline.

Germany permits advertising and display of tobacco products and has fewer young people taking up smoking than Ireland which has some of the most draconian anti-smoking laws in the world. Germany has a tobacco control strategy with education embedded at its core and it seems to be working. The German tobacco control approach identifies three different target groups:

¹⁷⁷ <http://www.telegraph.co.uk/news/politics/3463980/Tories-to-oppose-tobacco-restrictions.html>;

http://www.24dash.com/news/Central_Government/2008-12-09-Tobacco-display-ban-nanny-state-going-too-far-Lamb

¹⁷⁸ Bundeszentrale für gesundheitliche Aufklärung, 2012

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- Education for the entire population
- Education for valuable groups, for example children or pregnant women
- Education and support for current consumers

Every measure has to take into consideration:

- possible reasons for up taking
- familial environment
- gender related specifics
- age related specifics

Examples of measures that are in place in relation to tobacco

1. "Class2000" - Strong and healthy in elementary school": "Class2000" is the largest national education program to promote health, addiction and violence prevention in elementary school. Since 1991, it has reached more than 930,000 children. The educational programme is financed by donations in the form of sponsorships for individual classes (200 euros per class and school year). The most important partners is the Lions Clubs in Germany. (www.klasse2000.de)
2. "ClearSight" - Join-In Circuit on tobacco and alcohol: Education on risks associated with smoking, focused on school children aged from 12 to 18. In 2012, 52 events were held. 16,089 people attended: 13,826 students and, among others, 822 educational escorts and teachers and 165 media representatives. The project is hosted by the Federal Centre for Health Education (BZgA). (www.klasse2000.de)
3. "Be Smart – Don't Start": Non-smoking competition for school classes to motivate young people to remain smoke-free. Classes of students aged between 12 and 15 agree in the competition that they'll be smoke-free for the contest period of half a year. Since its start in the school year 1997/98 130,000 school classes with more than three million students have participated in the competition. It is hosted, among others, by the Federal Centre for Health Education (BZgA), the German Cancer Aid and the German Heart Foundation. (www.besmart.info)
4. "Smoke-Free" campaigns of the Federal Centre for Health Education (BZgA): The youth campaign's goal is to continuously increase the number of non-smokers. In addition, young people are encouraged to stop smoking. Central Element of the campaign is the Internet platform www.rauch-frei.info. It offers access to information material, interactive elements as online-trainings and is a free source for media that can be used by teachers in schools. The website recorded more than 62,000 visits in 2012.

The campaign aims to promote non-smoking in the adult population. This provides information about the health risks of smoking. To promote quitting the campaign also offers various free media, including the booklet "Yes, I'll be smoke free". The "smoke-free starter pack" contains this brochure, a "calendar for the first 100 days after quitting" and a "stressball". In addition to print media, the Internet platform www.rauchfrei-info.de is a central element of the campaign. The Internet platform was accessed about 270,000 times in 2012 by a total of about 175,000 visitors.

5. Youth Movie Days "Nicotine and Alcohol - everyday life drugs in focus": 16 Events every year in various cinemas across Germany. In 2012 Youth Movie Days reached more than 140,000 participants, of which approximately 9,000 were teachers. The Movie Days are hosted by the Federal Centre for Health Education (BZgA) in cooperation with the Association of Private Health Insurances.
6. Internet based education for specific risks during pregnancy: Education and support platform "IRIS" (www.iris-plattform.de). Participants are supported on the platform for twelve weeks, the treatment is anonymous. In addition, it provides weekly e-mail contact with an e-coach. The platform is hosted by the University of Tübingen and receives financial support from the Ministry for Health.
7. Round table "Youth Protection - Improving law enforcement": The website www.jugendschutzaktiv.de additionally provides videos, flyers etc. for various groups, for example parents, teachers and retailers. The project is hosted by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth in cooperation with the associations of retail, restaurant and petrol station industry.
8. "Smoke free PLUS"¹⁷⁹ - health centers for counseling and smoking cessation: The German network Smoke-Free Hospitals & Health facilities (DNRfK) continues the pilot project funded by Ministry of Health and develops it further. This is supported by many different opportunities to non-smoking and smoking cessation.

The "Report on Drug use and addiction 2013"¹⁸⁰ published by the German Ministry for Health contains more than 100 best practice examples regarding education on tobacco and other substances. Those measures are offered by national authorities as well as non-governmental organizations.

Please see additional documents supplied:

¹⁷⁹ www.rauchfrei-plus.de

¹⁸⁰ http://drogenbeauftragte.de/fileadmin/dateien-dba/Service/Publikationen/BMG_Drogen-_und_Suchtbericht_2013_WEB_Gesamt.pdf

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Appendix C - Imperial Tobacco submission to DH standardised packaging consultation – August 2012

Appendix D - Australian Study on Illicit Trade (KPMG) – April 2014

Appendix E - 'The impact of 'Denormalisation' policies on Smoking Rates' - September 2013

Appendix F - Imperial Tobacco Submission to the Chantler Review – January 2014

GLOSSARY OF TERMS

AITP	Anti-Illicit Trade Protocol (WHO FCTC)
BIS	Department of Business, Innovation and Skills (UK)
COP	Conference of the Parties (WHO FCTC)
COUNTERFEIT	Cigarettes that are illegally manufactured and that carry the trade mark / branding of a legally sold brand without the consent of the trade mark owner
DH	Department of Health (UK)
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ETS	Environmental Tobacco Smoke
EU	European Union
FCTC	WHO Framework Convention on Tobacco Control
HRT	Hand rolling tobacco (also known as roll your own - RYO)
HWLs	Health warning Labels
ILLICIT TRADE	Trade in illicit tobacco products – includes counterfeit and contraband (including illicit whites)
ILLICT WHITES	A form of contraband. Illicit tobacco products that are typically not available in the country of manufacture and that are made for the sole purpose of smuggling into high tax / price countries
LIP	Lower Ignition Propensity
MS	EU Member State
NAO	National Audit Office
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
PHWs	Pictorial Health Warnings
PMI	Philip Morris International
SP	Standardised (plain) packaging
RYO	Roll your own tobacco (also known as HRT)
TAPA	Tobacco Advertising and Promotion Act
TCP	Tobacco Control Plan
TNCO	Tar, nicotine and Carbon Monoxide
TPD	EU Tobacco Products Directive (initial version, 2001)
TPD 2	Revised EU Tobacco Products Directive (2013)
WHO	World Health Organization