

**DRAFT SUBMISSION TO THE UNITED
KINGDOM'S DEPARTMENT OF HEALTH**

**THE EUROPEAN COMMISSION'S
PROPOSAL FOR A REVISED TOBACCO
PRODUCTS DIRECTIVE**

1. Introduction

i. British American Tobacco UK Ltd and the scope of this submission

British American Tobacco UK Ltd (BAT UK) is the British operating subsidiary of British American Tobacco Plc. The UK company is run from its offices in Aylesbury, Buckinghamshire and employs some 170 people nationwide. British American Tobacco UK Ltd is the UK's third largest tobacco company with a share of the legal UK market of just over 8%. Its main brands are Pall Mall, Rothmans, Royals, Lucky Strike, Vogue, Dunhill and Cutters Choice.

Through this document, BAT UK submits its initial viewpoints on the European Commission's proposal for a revised Tobacco Products Directive ("The Directive"), launched on 19 December 2012. The proposal is now the subject of the EU's ordinary legislative procedure in the context of which Member States Governments including the UK will form negotiating positions to be progressed in the Council of Ministers.

This document focuses on the impact the Directive is expected to have on the legitimate UK tobacco market, on issues regarding the Directive's legal base and on the process via which the Directive was developed. We also hope that this document may address some of the concerns raised in the Department of Health's Explanatory Memorandum on TPD of 4 February 2013.

ii. Summary of the TPD's impact on the UK tobacco market

BAT UK believes that the Tobacco Products Directive, if passed in its current form, will have the following consequences for the British tobacco market:

- The Directive would ban pack formats accounting for 37% of the UK cigarette market and 78% of the UK Handrolling Tobacco (HRT) market. This majority of this is accounted for by the ban on packs of less than 20 cigarettes and less than 40gr RYO but it also includes bans on non-mainstream cigarette pack formats such as those that open from the side instead of the top.
- Some 10% of the UK cigarette market consists of mentholated or slim (thinner than 7.5 mm diameter) products. This proportion of the market would face an outright ban and these products could not be re-introduced in any form. This would create significant opportunities for criminals to continue to offer these products in the illegal market.
- At least £1.1bn in annual tax revenue is at risk, representing the duty currently paid on mentholated, capsule and slim cigarettes
- Changes to the UK cigarette and HRT market would affect some 4.5 million smokers
- The real risk to the legal market may be higher than the 10% mentioned above as a result of other measures such as banning packaging sizes lower than 20 cigarettes or 40 grammes HRT.

It should also be noted that many of the measures proposed have not been consulted upon by the EU Commission, including the proposed bans on capsule products and slims, as well as proposed track and trace requirements. Other measures have been previously ruled out in UK consultations, including minimum pack sizes.

2. British American Tobacco UK's key observations on the European Commission's proposal for a revised Tobacco Products Directive

- i. **The Commission's proposal would have the effect of removing differences between products and banning entire product classes, thereby significantly distorting competition. It would therefore cause significant economic damage to small businesses and government finances and drive criminality**
- The overall result of the proposal is to remove differences between competing tobacco products and packages and to remove innovation from the tobacco category.
 - The collection of measures proposed by the Commission would likely result in a very high degree of pack and product standardisation and therefore drive the market towards commoditisation. According to SANCO's own consultant the enlarged health warnings alone (even without the extra wide-ranging restrictions on branding and differentiation) would have a substantial commoditizing effect: *"with possibly less or no space on the pack to display brand logos and recognisable graphical features, it will become difficult for tobacco companies to sustain their brands and sell their products at a premium rate ... currently, highly branded cigarettes are sold with considerably higher margins than unbranded cigarettes."*¹
 - Commoditisation erodes market value by encouraging (a) consumers to trade down to the cheapest brands and (b) competition based exclusively on price. The Commission's proposals would therefore not reduce smoking overall but would reduce consumption in the premium segments of the market by shifting it into economy brands, potentially even increasing consumption given the well-understood inverse relationship between price and consumption. Loss of the premium segments implies huge economic costs e.g. retailers would lose up to €1.8 billion in margins and governments would lose up to €4.5 billion in ad valorem excise and VAT. It also jeopardises the livelihoods of others in the value chain such as various suppliers of materials to the industry.
 - The degree of standardisation implied in SANCO's proposal will both necessitate and enable tobacco, packaging and ancillary industries to modify operations and shed thousands of jobs.
 - Standardisation would also substantially reduce the costs and entry barriers to counterfeiters. The business opportunity for counterfeiters would grow significantly as the mandated removal of difficult to copy features such as complex pack design and sophisticated print techniques would facilitate counterfeit production and would make it harder for both retailers and consumers to spot fake products.
 - In addition, the Commission's proposal is highly prohibitionist in nature. Two major product categories would be banned: Slims and menthol. This alone means that almost 14 million consumers will see the products they consume banned by the EU, almost half a million of those in the UK. Approximately, 26 billion in annual cigarette sales on the legal market in the EU would be banned, 3.7 billion of these in the UK. It is well known that prohibition results in criminality by forcing those who prefer the banned product onto the black market. These measures therefore offer enormous opportunities to criminals involved in the illegal tobacco trade. The Department of Health's Explanatory Memorandum on TPD completely ignores this likely consequence should the Directive be passed.

¹ RAND Europe, "Assessing the Impacts of Revising the TPD Study to support a DG SANCO Impact Assessment – Final Report" (September 2010). (Ref section 8.3.2). Accessed at: http://ec.europa.eu/health/tobacco/docs/tobacco_ia_rand_en.pdf

- Exacerbating this already significant risk is the fact that thousands of pack formats (only the mainstream formats would remain) would be prohibited across the EU, branding would be significantly impaired and a very high minimum pack size is set for HRT. The UK would be one of the EU countries most impacted by the minimum pack size for HRT.
- The economic costs of increased illicit trade could also be significant for all parties in the tobacco value chain.
- The Commission's proposal seeks to mitigate the illicit trade risk by introducing provisions for the tracking and traceability of cigarette packages and the introduction of anti-counterfeiting features. This is misguided:
 - Major manufacturers are already implementing track and trace and the Commission's proposal introduces a degree of complexity and departure from the FCTC Protocol on Illicit Trade (which is binding on the EU and Member States) that is unhelpful. These provisions should be aligned with the Protocol.
 - The provisions requiring security features on pack would give counterfeiters the gift of a replicable government approved badge of authenticity, intensifying the risk of counterfeiting carried by this Proposal.

ii. The Commission's proposal is illegal on a number of levels, for example:

Lack of a legal basis.

The Commission's proposal for a new TPD replacing the currently applicable TPD from 2001 is based on Article 114 TFEU. Article 114 grants the EU the power to approximate the rules of the Member States in order to establish and facilitate the internal market, i.e. to secure free movement of goods. However, the Court of Justice of the EU (CJEU) has cautioned that Article 114 does not provide a general regulatory power nor does it allow the EU to act contrary to Article 168(5) TFEU, a provision which *expressly bans the EU from harmonising health legislation in the area of tobacco*. The Commission's proposal justifies the use of Article 114 by referring to disparities between national rules without actually addressing the resulting obstacles to trade. This is precisely the type of use of Article 114 that the CJEU has disallowed. Specifically, the proposal cannot be adopted on the basis of Article 114 for the following reasons:

- There is currently no internal market in tobacco products and the Commission's proposal reinforces the borders between Member States rather than removing them. The Commission's proposal fails to highlight that the EU market for tobacco products is currently segregated, inter alia, due to language requirements and national excise duties. Once products are produced and marketed for consumption in one Member State, there is generally no subsequent commercial export to other Member States (because putting them on the market in a second Member State would require complete repackaging). The Commission is well aware of this situation and has itself confirmed that cross-border trade in tobacco products between Member States "makes very little sense". Furthermore, the Commission proposes measures regarding cross-border distances sales and tracking that are specifically aimed at ensuring that packs placed on the market in one Member State are not sold in other Member States. Article 26(2) TFEU defines the internal market as "an area without internal frontiers" and a proposal which supports a market compartmentalised per Member State cannot be viewed as furthering that objective.
- The Commission's proposal does not actually break down barriers to the creation of an internal market for cigarettes. The Commission purports to pursue a wide range of pack-related measures in the name of free movement. Such measures include regulation of colour, size and shape of the pack. The Commission argues that these will make it easier for tobacco

manufacturers to benefit from the internal market because they will only have to produce one type of pack that could be used throughout the EU. However, this alleged internal market benefit will not be achieved because the rules will require the use of the official language(s) of each Member State in a large font and also that information be "irremovably printed" (as is already the case under the 2001 TPD). Furthermore a number of Member States require tax stamps to be printed on the pack. The effect is that the EU market for tobacco products will remain segregated along national lines even if the Commission's proposal were to be adopted. Consequently, it is quite obvious that the proposal does not genuinely pursue the objective of removing trade barriers between Member States and is not designed to do so.

- The proposed bans of menthol and slim cigarettes ban free movement of established products rather than promote it. A product ban removes any "free movement" of the product concerned and, therefore, cannot normally be adopted on the basis of Article 114. Rather than internal market measures, the proposed bans on menthol and slim cigarettes are undoubtedly harmonisation measures which Article 168(5) TFEU prohibits. Admittedly, the CJEU previously upheld the ban on snus but the very specific circumstances in which snus was banned are entirely different from the proposed bans on menthol and slim cigarettes (which are currently lawful in all Member States and represent up to 30% of the cigarette market in some Member States).
- FCTC Guidelines cannot impact the division of powers between the EU and the Member States. Throughout the proposal, the Commission refers to FCTC Guidelines to justify competence. In general, it claims that the existence of non-binding FCTC Guidelines support the use of Article 114 since they make future divergent regulation between Member States more likely. This reasoning is simplistic and one could equally plausibly or even more plausibly conclude that the FCTC will have a harmonising effect on the policies of the Member States. Furthermore, the reasoning followed by the Commission undermines the principle of conferred powers. According to the Commission, the adoption of non-binding political commitments in the FCTC, without any parliamentary scrutiny at Member State or EU level, would result in (i) a shift in the division of powers between the EU and the Member States; and (ii) a need to impose these non-binding FCTC commitments as binding EU law on Member States. The principle of conferred powers is a core principle of EU institutional law and the division of powers laid down in the Treaties is the result of extensive quasi-constitutional negotiations between the Member States. It cannot be the case that this can be set aside on the basis of non-binding FCTC Guidelines.

Breach of fundamental rights.

The EU Charter of Fundamental Rights as well as most Member State constitutions protect the freedom of expression and property.

- The Commission's proposals to cover most of the packaging with pictorial warning labels and restrict various brand/trademark elements are major impairments of the right to property yet no compensation provisions are included in the Directive. The lack of compensation for property deprivation makes the measures disproportionate.
- In any event there is no justification for introducing these measures given the lack of evidence that any internal market or public health benefit is likely to be achieved (see below) and given the serious negative consequences outlined above.
- There are also intolerable interferences with the freedom of expression and the proposal even goes so far as to prohibit purely factual information being conveyed to purchasers via the packaging. Again, this is unjustified and disproportionate in the context of the evidence base and the serious negative consequences.

Breach of international law

There are various infringements in the proposal of the WTO TBT Agreement (e.g. the excessive labelling provisions and the requirement that cigarettes be thicker than 7.5mm diameter) and WTO TRIPS (e.g. the restrictions on trademark use)

- The TBT Agreement clearly covers “technical regulations” such as the proposed measure that would standardise the shape and appearance of cigarettes and impose mandatory product characteristics. Article 2.2 of the TBT Agreement requires that WTO Members, including the EU, shall “ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” A violation will be found to exist if a technical regulation is more trade restrictive than necessary to achieve a legitimate objective, like the protection of health. Under the TBT Agreement, “governments must take into consideration available scientific and technical information” when preparing their technical regulations.
- A standardization requirement that limits the product’s design and functionality by requiring a single form and shape violates this important obligation under the TBT Agreement because it imposes a serious barrier to trade that is not in any way likely to contribute to the protection of health. The very limited scientific information available on the matter does not support such a requirement. Alternatively, more effective and readily available means of protecting health that are less trade restrictive should be preferred by the EU.
- Concerning the TRIPS Agreement, the EU has made its position clear in WTO dispute settlement proceedings:

...Members shall not prejudice "the right to use a trademark". That phrase alludes to the owner's right to use the sign of which the trademark consists, which is one of the two basic rights of the trademark owner, together with the right to prevent other persons from using that sign. (Panel Report, *EC – Trademarks and GI's*, Annex B-2: First Written Submission of the European Communities (25 May 2004), WTO Doc. WT/DS290/R/Add.2 (15 March 2005) para. 303.)
- The encumbrance of the use of a trademark, such would be imposed by the proposed measures, would violate the TRIPS Agreement.

iii. The Commission’s proposal goes against the public health evidence relevant to the measures proposed:

- There is a significant body of independent and peer reviewed research into what causes young people to smoke. Peer pressure, parental influence, social and cultural norms, price and access are all identified as causal factors in relation to youth initiation, but packaging and product shape are never cited.²
- In recent years, a number of studies have been produced to build a case for further pack regulation by a handful of academics, most of whom are well established campaigners against the tobacco industry. These biased studies do not examine the impact of cigarette packaging on people’s actual behaviour. Rather they assume that packaging makes people smoke and then set about demonstrating how regulation can make packages less “attractive”. In addition, they confuse the decision to smoke with the decisions taken by smokers

² See, e.g. Heckman, J., *et al.*, “An Assessment of Causal Inference in Smoking Initiation Research and a Framework for Future Research”, *Economic Inquiry*, 46(1): 37-44 (2008); Bricker, J., *et al.*, "Close friends', parents', and older siblings' smoking: reevaluating their influence on children's smoking", *Nicotine and Tobacco Research*, 8: 217-26 (2006); McVicar, D., "Estimates of peer effects in adolescent smoking across twenty six European Countries", *Social Science & Medicine.*, 73(8): 1186-93 (2011); Conrad, K., *et al.*, “Why children start smoking cigarettes: predictors of onset”, *British Journal of Addiction*, 87: 1711-24 (1992).

regarding what brand to choose. The same kind of “evidence” was relied on by the US Food & Drug Administration (FDA) when seeking to justify large top of pack graphic warnings for tobacco packages. In a recent ruling against the FDA, a US Court of Appeal³ branded such evidence as “mere speculation and conjecture”. Nonetheless, it is this kind of misleading evidence that the Commission has deferred to in producing its proposal.

- The above mentioned US Court of Appeal considered the case for and against enlarged pictorial health warnings and concluded that there is not a "shred of evidence" that they reduce smoking. The Court found that the lack of data showing a reduction in smoking rates in countries that have enacted large pictorial warnings strongly implies that “such warnings are not effective at promoting cessation and discouraging initiation.”
- The Commission’s research consultant, RAND Europe (“RAND”), was not able to produce a solid evidence base for further pack regulation. For example, it predicted that mandating graphic health warnings could reduce smoking prevalence by 0.5% over 17 years, a figure which it cautioned was likely to be an “*overestimate*”, made with a “*considerable degree of uncertainty*”, and based on an “*imprecise*” and “*blunt*” model. It also concluded that increasing warning label sizes to 50% or 75% would not reduce prevalence more than mandatory graphic health warnings.
- There has been no serious attempt to produce an evidence base to support standardising the shape of tobacco packages and products.
- As of July 2012, only two studies were available for analysis on the specific issue of product shape and construction. Neither of them provides any support for the ban on slims proposed by the Commission.⁴
- In short, the Commission has relied exclusively on the least reliable and weakest category of evidence related to the debate about tobacco pack and product regulation in formulating its proposal. It has ignored the fact that the better evidence, including real world experience of the measures proposed, indicates that the measures proposed would not reduce consumption but would instead shift consumption towards cheaper products, eroding market value and government and business revenues in the process.
- The scientific evidence indicates that a menthol ban would do nothing to reduce smoking. For example, the American Council on Science and Health (ACSH)⁵ concluded in 2010 that “*it is well known that initiation is complex and multifaceted and cannot be ascribed simply to the presence of a single cigarette ingredient*”. Furthermore, the ACSH stated that “*the evidence summarized in this section does not suggest that mentholated cigarettes are associated with any independent reduction in age of starting to smoke (“starter product for*

³ RJ Reynolds Tobacco Company v Food and Drug Administration US Court of Appeals, District of Columbia Circuit, 24 August 2012 at p 26, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/\\$file/11-5332-1391191.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/$file/11-5332-1391191.pdf).

⁴ A 2011 report commissioned by the Australian Department of Health by Gfk Bluemoon, Market Research to Determine Effective Plain Packaging of Tobacco Products Report Prepared for: Department of Health and Ageing. This study’s findings imply strongly that diversity of consumer reactions to various cigarette designs precludes any clear method for significantly reducing the objective “attractiveness” of cigarettes. Borland, Effects of Stick Design Features on Perceptions of Characteristics of Cigarettes, Tobacco Control (March 2013). This was a survey of 160 ever-smokers (80% current smokers). Subjects generally preferred (and found most “attractive”) familiar length, tipping and designs (traditional king size cigarettes) to less familiar ones.

⁵ American Council on Science and Health (Spring 2010): “The Mentholation of Cigarettes: A Position Statement of The American Council on Science and Health”

youth”)”. This was also confirmed in a comprehensive scientific literature study by Werly et al. in 2007⁶.

iv. The Commission claims that a key driver behind its proposals is a desire to address alleged consumer misperceptions relating to the relative risk of different products but addresses that concern in a completely ineffective manner

- For example, the Impact Assessment cites gold and white as examples of “misleading colours” because, it claims, they are used to indicate “light” cigarettes. This is simply wrong. The European and British brand most associated with the colour gold is Benson and Hedges Gold which is a full flavour product (delivering the highest permissible tar and nicotine yield). In addition one of the most popular full flavour products on the market – Marlboro Red comes in a box that is mostly white.
- If these concerns about consumer misperceptions relating to relative risk of different products/ packs are warranted, they could more effectively and less invasively be addressed by clarifying via the health warning labels that “all cigarettes are equally harmful for health”.

v. The Commission mischaracterizes and misuses the FCTC guidelines to justify its proposal

- One of the Commission’s justifications for this proposal according to the Impact Assessment is that it would implement the FCTC guidelines. This is an extremely weak basis for regulation for the following reasons:
 - All EU Member States are already fully compliant with their obligations under the FCTC.
 - The FCTC **Guidelines** are not commitments by Member States. The Impact Assessment’s characterisation of them as such is misleading and opposite to the spirit in which they were negotiated i.e. it was on the precise understanding that they were “only guidelines” and “non-binding” that they were agreed.
 - The Guidelines recommend that FCTC members “consider” certain measures that go significantly further than the FCTC Treaty obligations.
 - Further, if the FCTC Guidelines did have some sort of binding effect, they could never have been agreed to by the EU and its Member States because they raise significant legal questions about constitutional rights such as the right to property.

3. Conclusion

The United Kingdom considers itself in the vanguard of global tobacco control, and has been an early adopter of many tobacco control measures that have either been introduced in other countries first, e.g. the display ban, or that have been recommended for enactment by the World Health Organisation. Yet never before have such widespread measures been proposed that would ban whole sections of the legitimate UK tobacco market.

⁶ Michael S. Werley, Christopher R.E. Coggins, Peter N. Lee (2007); Possible effects on smokers of cigarette mentholation: A review of the evidence relating to key research questions; Regulatory Toxicology and Pharmacology 47; 189–203

During 2012, large retailers selling tobacco products were forced to remove tobacco products from the consumer's view, and small retailers will have to follow suit in 2015 with the object of removing packaging from view of minors to reduce prevalence of smoking. However, even before this legislation was implemented, and let alone before the effect (if any) could be measured, the Government commenced a public consultation on standardised packaging for tobacco products. The Government has not yet announced its opinion as a result of the consultation, yet the Department of Health last month issued an Explanatory Memorandum that 'broadly welcomed' the Directive, but rightly recognized that there are clearly elements in the Directive that warrant further study and analysis. This study and analysis would in our view need to include those measures that have not been consulted upon in either the UK or the EU, or indeed have been ruled out in previous UK consultations such as minimum pack sizes.

BAT UK would strongly recommend that a further evaluation of the Directive, its proportionality and its possible consequences is undertaken. This should include a robust study of the likely consequences for the replacement of legal sales by illegal sales with no or negative impact for public health, something that has thus far been sorely lacking yet is all too visible in society.