



Department  
of Health



Llywodraeth Cymru  
Welsh Government



The Scottish  
Government  
Riaghaltas na h-Alba



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

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

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

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

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

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

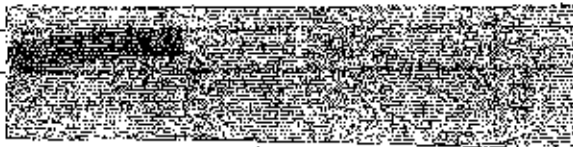
Now go to question f

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

Name of organisation (required):

German Advertising Federation (ZAW)

Name of person providing submission (required):



Job Title (required):

Contact address of organisation (required):

Contact email address (required):



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

- Yes
- No

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

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

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

If other, please tell us the type of business:

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

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

If other, please tell us the type of organisation:

The German Advertising Federation represents 43 associations and organisations of the advertising industry, the media, advertising agencies and professions as well as research.

f. Does your response relate to (required):

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

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

- No
- Yes (please describe below)

If yes, please describe:

Among the 43 members of ZAW are the Deutscher Zigarettenverband (DZV) and the Verband der deutschen Rauchtobakindustrie (VdR - German Smoking Tobacco Association)

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

### Consultation questions

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

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

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?

As already stated in the course of the 2012 consultation ZAW supports the Health Department's aim to improve public health and particularly to prevent minors from smoking. However, we still doubt that introducing standardised packaging of tobacco products is appropriate to reach this aim. ZAW does not believe that standardised tobacco packaging would contribute to improving public health:

There is still no reliable, conclusive evidence that standardised packaging can change consumers smoking behaviour. At the same time, it has an enormous negative impact on companies by suppressing freedom of communication. Plain Packaging would limit consumer's choice by destroying brands and, thus infringing trademarks and other intellectual property rights. The purpose of brands, which is mainly to differentiate the products and to provide consumer information, would be debased by plain packaging. In the absence of branding, competition would increasingly focus on price, possible reduction of prices will encourage purchase, which is the opposite to the policy objectives of the proposals. Further consequences would be the limiting of trade (also cross-border) and of the ability to compete. Future brand development and new entries into the market would no longer be possible under these conditions. Subsequently, counterfeiting would be fostered. This could endanger people's health as illicit trade with products containing unauthorised additives could increase.

The consideration to introduce plain packaging in the field of tobacco also takes on considerable importance as a signal to other industrial sectors: Similar measures are already being discussed for other sectors, for example, for manufacturers of food or of alcoholic beverages. For all market segments affected, the question arises whether in future it will still be worthwhile for enterprises to invest substantial sums to establish, develop and maintain brands. The economic implications of such a development would be devastating not only for the companies in United Kingdom but also for all trade partners in the European Single Market.

Therefore ZAW again would like to point out, that the German advertising industry objects to the introduction of all sorts of standardised packaging.

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

Thank you for participating in this consultation.

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

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

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

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

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

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

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

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

- **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

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

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**From:** [REDACTED]  
**Sent:** 05 August 2014 16:07  
**To:** Tobacco Packaging  
**Subject:** Standardised Tobacco Packaging Consultation

I read recently where standardised packaging in Australia, I think the only place where this is law, has not worked if anything quite the reverse. Stop interfering in people freedom, why should you get involved with people personal choices, if they want to smoke that is there decision surely you have a lot more urgent things to concern yourself with, you only have to read the papers to see what is wrong with Great Britain and where you should be paying much more attention to our once great country.

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DH users see Computer virus guidance on Delphi under Security in DH, for further details. In case of problems, please call the IT support helpdesk.



~~ELISI~~  
ELISI

**From:** [REDACTED]  
**Sent:** 05 August 2014 16:10  
**To:** Tobacco Packaging  
**Subject:** Plain packaging

I have no problem with trying to discourage smoking, certainly young people. I am a pensioner x smoker at least ten years, I still have friends that smoke but I am sure this move will encourage much more smuggling and fake cigarettes and we all know that these cigarettes are much more dangerous to health because they are made in terrible conditions and filled with all sorts of toxic and dangerous components. I have friends who have bought cigarettes thinking they were duty free only to find out they were fake tasting bad, tobacco looking awful but still smoked most of them because having bought them would not throw them away.

If plain packets come it will turn out to be much more harmful for smokers than it is know

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 05 August 2014 16:23  
**To:** Tobacco Packaging  
**Subject:** Standardised tobacco packaging

Dear Sir/Madam,

I did not realise it was the duty of an elected government to make on the one hand several thousands of its citizens unemployed and on the other to make it far easier for the illegal trade I would say in the tobacco trade but that would not strictly be true would it as I suspect that the tobacco content in these products would be the least of our worries in health terms.

Not only are you making people unemployed but also reducing pensions to people that worked in the past for the legal companies, who have paid millions of pounds in taxes to the treasury and set up other businesses such as Ross foods in the case of Imperial Tobacco. I like many thousands of people would not have been employed in the food industry without them.

I was a smoker, in fact the governments of the day promoted it by allowing Royal Navy personnel to buy duty free tobacco products. I gave up smoking on leaving the service as I could not afford it plus I enjoyed sport. What I am saying is leave it up to the individual to decide, we don't need politicians to make these decisions.

The illegal imports from Europe and in particular the Far East are unregulated and down right dangerous at the moment they are a serious threat to our citizens and here you are proposing to make it easier for them.

The border agencies cannot cope at the moment, observing how the way the political system works the damage will already be done before they use that well used phrase "but we can learn from this"

If this proposal goes through and there are any deaths caused by any illegal so called tobacco product I for one will want those who put us in this position be held accountable.

One last fact Australia has tried this standardised packaging, with no reduction in tobacco use but a 20% increase in illegal tobacco products.

Yours sincerely,

[REDACTED]

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Address of respondent (required):

[Redacted]

Contact email address (required):

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

Yes

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No

Yes (please describe below)

If yes, please describe:

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## Consultation questions

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

Chantler is not qualified to review a complex issue that extends beyond his immediate sphere of competence, is significantly and obviously biased and ignores evidence that contradicts his clearly partisan view. I have absolutely no confidence whatsoever in him. Subsequent to the review he has appeared on the BBC programme *Burning Desires* and demonstrated ignorance on the economics of smoking and its cost to the NHS. The Chantler review has a very narrow focus and is not objective. The DH runs the risk of being accused of misleading the public again if it continues to cherry pick evidence to suit ideologically preferred policies.

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?

Dr Ashok Kaul and Dr Michael Wolf have analysed the impact of plain packaging to date on Australian youth smoking rates. The negative conclusions arrived at by highly qualified statisticians using data from a hopefully unimpeachable source have been ignored by the DH and Chantler in favour of weak data based on psychological models produced in many cases by people with a history of anti-tobacco and anti-industry activism.

Figures released by the Australian government show an increase in youth smoking of around 36% between 2010 and 2013. This data set includes a significant period after the packaging intervention in Australia. The data is not especially strong as it is based on a household survey but it is more robust than the public health estimates and assumptions that have been used to make the case for plain packaging.

To my knowledge, no hard data has been released on the growth of the illicit trade in Australia post intervention but anecdotal evidence courtesy of a national news broadcaster suggests that it is significant and Australian authorities are blaming the increase on the packaging legislation.

Further anecdotal evidence has circulated in the media suggesting that despite the airy assurances of tobacco control, those who produce and sell illicit tobacco products view the prospect of plain packaging as very positive in terms of their business potential. A great number of people and UK enforcement organisations agree with them and the DH would be failing in its duty if it ignores this argument and the attempts to deflect it through unpleasant ad hominem attacks by the tobacco control lobby.

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?

As I completely disagree with this proposed legislation I can think of no way of improving it. Bearing in mind the psychobabble from the public health industry, the DH might want to consider the intellectual merits of an argument that seems to be based on a philosophy of reinforcing failure by shouting more loudly. The argument making warnings bigger, more noticeable and more graphic for example assumes that the current ones are having no impact because despite covering half the packs they are passing unnoticed. That is an utterly asinine notion that speaks volumes about the intellect of public health activists and their contempt for the intelligence of consumers. Personally speaking, if I were in government, I would be embarrassed to be associated with such introspection, arrogance and intellectual incapacity.

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 impact assessment as it stands is utterly unsound, extremely subjective and untrustworthy. I have rarely read anything so overtly biased in favour of a policy and had I produced anything quite so lacking in objectivity within a commercial environment I would have rightly expected to be dismissed. I would expect standards in government to be even higher than those in industry but am often disappointed.

Throughout, the assessment relies on frequently nebulous poor quality research produced by self-styled public health experts. I contest that there is no such thing as a public health expert and question the objectivity of people who are producing evidence that supports policies that they are simultaneously lobbying for.

The impact assessment relies heavily on Pechey et al 2013 to calculate potential impacts of the policy on smoking rates. Pechey et al were directly funded by the DH which is not good. However, what they produced is I am sure absolutely fine based on the evidence that they had. It is there that the problem lies. Pechey admits that these findings are based on subjective data produced by "experts". I argue that however robust the Pechey methodology the fact is that the data it is based on is unreliable due to blatant author bias. A number of the authors involved are openly anti-industry or anti-tobacco and it is hard to imagine how they could possibly be objective about policies that they have campaigned for. The source data is unsafe and almost certainly heavily biased.



I am not alone in believing that the DH has hugely underestimated the potential effects on illicit trade and has been less than thorough in its assessment of the impact on SMBs. The assumption that loss in tobacco income for SMBs will be made up for by purchase of other goods for example is pure hypothesis that ignores for example the very real possibility that the other goods may be purchased elsewhere. The DH appears to have largely ignored the tobacco industry and for that matter virtually every other commercial source in performing its assessment. Favouring the views of Cyril Chantler over KPMG in a commercial context is an example of the lack of credibility that this introduces. Over reliance on sources such as the BMA, CRUK and The RCP is unsafe as none of these are expert bodies and all have vested interests. The BMA for example is a medical trade union and what it has to say about smoking uptake is inexperienced and irrelevant. The RCP document referenced re the costs to the NHS of SHS impact on children relies entirely on multi layered estimates based on largely unjustifiable assumptions. It is not an expert analysis is not objective and has never been reviewed impartially. It is one of the most scientifically ridiculous documents I have ever read.

The most significantly flawed aspect of the impact assessment is the calculation of health benefits, which appears to be based on fantasy numbers that fail to take into account societal costs. No justification is provided for the figure of £60,000 per person year of extra longevity the policy might produce and it is hard to understand what possesses the DH to believe it can accurately monetise extra years of life, especially when quality of life cannot be taken into account. It is illogical to apply a fixed figure to longevity benefits that will obviously depend on age and state of health. If the DH insists on subjectively monetising longevity then it should at least distinguish between extra years gained for example for a productive 25 year old versus those gained for a 70 year old in poor health.

The only legitimate costs/benefit analysis within the context of a consultation such as this is a societal one in which the value of the extra years is calculated based on their contribution to society and offset by costs to society. Numerous studies have been performed in this area and the majority find that additional costs to society associated with risky behaviours such as smoking are more than offset by benefits such as fewer years in ill health, reduced pension provision etc. This is particularly true of smoking which has health impacts later in life when a person is more likely to be a beneficiary rather than a contributor to society.

The societal cost argument might be ethically challenging for the DH but does have the benefits of being quantifiable and being honest, two virtues sorely lacking in the current DH analysis. The DH may not like it but the evidence strongly supports the notion that smokers save society costs by dying young and relatively quickly. That does not mean that as a society, we should encourage smoking but failing to account for this in a financial analysis is unsound and could be construed as dishonest.

A major cost of the proposed intervention that the impact analysis fails to take into account is the time and money the DH will waste on future similar consultations

should the anti-tobacco lobby be successful. The proposed legislation will be seen as a green light for every pressure group to campaign for similar measures against whatever industry it particularly dislikes. The potential costs are very significant.

The impact assessment as it stands is not sound, not objective and is not remotely credible. No legislation should ever be enacted based on work of such quality.

Thank you for participating in this consultation.

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

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

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

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



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

**Date: 7 August 2014**



## About the UK Health Forum

The UK Health Forum (UKHF), a registered charity, is both a UK forum and an international centre for the prevention of non-communicable diseases (NCDs) including coronary heart disease, stroke, cancer, diabetes, chronic kidney disease and dementia through a focus on up-stream measures targeted at the four shared modifiable risk factors of poor nutrition, physical inactivity, tobacco use and alcohol misuse. UKHF undertakes policy research and advocacy to support action by government, the public sector and commercial operators.

We are part of the Smokefree Action Coalition, which is an alliance supported over 250 organisations including medical Royal Colleges and other medical organisations, health and children's charities such as the British Heart Foundation and Cancer Research UK, the Chartered Institute of Environmental Health, the Trading Standards Institute and others.<sup>1</sup> The consensus of medical professionals, public health and other relevant experts is that standardised packaging would make an important positive contribution to reducing the harm caused by tobacco consumption.

## Response to consultation questions

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

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

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

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

The Government should resist efforts by the tobacco industry and its surrogates to delay decision-making and laying of the regulations before Parliament.

<sup>1</sup> Smokefree Action Coalition: <http://www.smokefreeaction.org.uk/>

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

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

We wish to draw the Department's attention to the detailed response submitted by Action on Smoking and Health (ASH) which is a member of the UK Health Forum alliance, with particular reference to the evidence they present that shows the tobacco industry's arguments about potential negative unintended consequences to standardised packaging are either weak or without foundation<sup>3,4,5</sup> while their data on illicit have been shown to be highly misleading.<sup>6</sup>

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

We welcome the draft regulations, which we consider, with only minor changes, to be fit for purpose.

*Re: Exemption for tobacco products other than cigarettes and hand-rolling tobacco:*

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

*Re: Misleading brand names and brand variants:*

We recommend that the measures required to prohibit brand names and variants which have been found to be misleading (as set out in Article 13 of the EU Tobacco Products Directive) are transposed into UK legislation.

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

We refer the Department to the detailed analysis of evidence on illicit trade and cross border shopping and on the impact on retailers in the submission from ASH.

<sup>3</sup> Evans-Reeves, K.A., Hatchard, J., Gilmore, A. 'It will lead to negative unintended consequences': An evaluation of the relevance, quality and transparency of evidence submitted by the tobacco industry to the UK Consultation on standardised packaging. March 2014. European Conference on Tobacco or Health.

<sup>4</sup> Uluocanlar S, Fooks GJ, Hatchard JL, et al. Representation and Misrepresentation of Scientific Evidence in Contemporary Tobacco Regulation: A Review of Tobacco Industry Submissions to the UK Government Consultation on Standardised Packaging. PLoS Med. 2014; Vol(3):e1001629. <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001629>

<sup>5</sup> Hatchard JL, Fooks GJ, Evans-Reeves KA, et al. A critical evaluation of the volume, relevance and quality of evidence submitted by the tobacco industry to oppose standardised packaging of tobacco products. BMJ Open. 2014; Vol(2). <http://www.bmjopen.bmj.com/content/4/2/e003757>

<sup>6</sup> Gilmore A, Rowell A, Gallus S, Lugo A, Joossens L, Sims M. Towards a greater understanding of the illicit tobacco trade in Europe: A review of the PMI funded "Project Star" report. *Tobacco Control* Published Online First: 12 December 2013. doi:10.1136/tobaccocontrol-2013-051240.



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Now go to question f

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Job Title (required):

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

Yes

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Tobacco retailer (supermarket)

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No

Yes (please describe below)

If yes, please describe:

Industry pensioner

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

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

It would appear to be jumping the gun by moving this forward prior to having the information back from display bans. It is also biased in the make up of the committee.

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?

Australia has gone ahead with this legislation and it has not affected the sales overall but has increased illicit trade significantly:

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?

It will make it even easier for counterfeit producers to flood the market.

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?

see Australian figures

Thank you for participating in this consultation.

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

### **Response from the London Boroughs of Camden & Islington Joint Department of Public Health – Director Public Health**

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

It is important to highlight that the Chantler Review confirmed what public health professionals have long known about the dangers of smoking and the nature of nicotine addiction:

"One in every two long-term smokers dies prematurely as a result of smoking-related disease. Two-thirds of adult smokers report that they took up smoking before the age of 18, and two-fifths had started smoking regularly before 16. Addiction to nicotine involves multiple processes, with evidence suggesting adolescents can experience a loss of autonomy very soon after the first cigarette. None of these processes requires conscious awareness; rather there is a powerful urge to smoke in the presence of stimuli associated with previous absorption of nicotine, which increases as opportunities for smoking become more frequent, especially after the school years. Although two-thirds of current smokers report wanting to give up smoking, quitting is extremely difficult and most smokers make multiple quit attempts before they succeed. Although the number of children taking up smoking has been falling since the 1990s, an estimated 207,000 children aged 11-15 still take up smoking each year in the United Kingdom. If this rate were reduced even by 2%, for example, it would mean 4,000 fewer children took up smoking each year, greatly improving their health outcomes."

There is a widely-held belief that "smoking is done" and that public health should now turn its attention to obesity. However, nearly 80,000 people die of a smoking-related disease every year in England alone. In Camden, there are on average, 227 deaths from smoking-related illnesses every year. In Islington there are 206 deaths from a smoking-related illness every year. And for every death caused by smoking, there are approximately 20 smokers suffering from a smoking-related disease, many of which cause substantial disability.<sup>1,2</sup>

There is still much to do both at local and national levels to address the impact of tobacco use on our communities. Evidence from the Chantler Review suggests standardised packaging for cigarettes will discourage young people from taking up smoking. Early evidence from Australia, published after the Chantler Review,

<sup>1</sup> U.S. Department of Health and Human Services. How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2010.

<sup>2</sup> Cigarette smoking-attributable morbidity – United States, 2000. MMWR Weekly Report. 5 Sep. 2003

has indeed shown a fall in prevalence (although the Australian Government implemented a 25% tax increase on cigarettes at the same time as introducing the legislation which would have also played a part in this fall) – see below for further details.

**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?**

1. The chief criticism levelled at standardised packaging is that its introduction will lead to an increase in the illicit trade of tobacco products. The Chantler Review found that this is unlikely to be the case.

Australia is the only country to have introduced plain packaging to date and contrary to inaccurate claims made by the tobacco industry, the sale of illicit tobacco has not increased there. In fact, Australia does not appear to have much of a problem with illicit tobacco in general - although this may be due to its relative geographical isolation in comparison to many European countries including the UK. The Tobacco Strategy, 2012- 2017, for the Department of Health in the New South Wales Government, makes only one mention of illicit sales: that Australia should support international efforts to combat illicit trade, making reference to the WHO Framework Convention on Tobacco Control.<sup>3</sup> If the sale of illicit cigarettes was an issue in Australia then this Strategy would most likely mention it and provide strategies for combating it.

The Australian Government have rejected claims that standardised packaging has led to a rise in the illicit trade.<sup>4</sup> In addition to this denial, there appears to have been only one public reporting of a seizure of counterfeit plain packs since December 2012.<sup>5</sup>

2. Newly released figures show a drop in tobacco sales in Australia following the introduction of standardised packaging.<sup>6</sup> Total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:
  - AUS\$3.508 billion in December 2012 (when standardised packaging was introduced) compared to,
  - AUS\$3.405 billion in March 2014.
3. In addition, a study found that the number of calls to the New South Wales Quitline prior to the introduction of standardised packaging in Australia rose by 75%.<sup>7</sup> In contrast in Camden and Islington, our local Stop Smoking

<sup>3</sup> New South Wales Ministry of Health, Tobacco Control Strategy, 2012 – 2017. [Download strategy.](#)

<sup>4</sup> See p.48 of the Explanatory Memorandum to the Australian Excise Tariff Amendment (Tobacco) Bill 2014 and p.6 of Sir Cyril Chantler's report.

<sup>5</sup> Amy Corderoy, "Tobacco industry claims on impact of plain packaging go up in smoke," *Sydney Morning Herald*, 12 March 2014, accessed April 2014

<sup>6</sup> Tobacco facts and figures: Australian Department of Health. 19 June 2014

<sup>7</sup> Young JM et al. [Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis](#) Medical Journal of Australia 2014

services have reported a fall in the number of people contacting the service; thought to be due, in part, to the rising popularity of e-cigarettes. We would therefore welcome any measures which could potentially encourage more smokers to quit.

**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?**

This question is being answered in a separate submission by our Councils' Trading Standards colleagues.

**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?**

N/A

### **Conclusions**

The London Boroughs of Camden and Islington endorse the position that the introduction of standardised packaging for cigarettes would lead to fewer young people taking up smoking.

A prompt adoption of standardised packaging would bring the benefits of it sooner, thus reducing the number of new smokers and therefore, in the longer term, reduce the number of smoking-related deaths and ill health. As such, we strongly support standardised packaging and any measures which could potentially lead to a fall in smoking prevalence and the number of young people who are drawn into smoking.



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5 August 2014

By email to [tobaccopackaging@dh.gsi.gov.uk](mailto:tobaccopackaging@dh.gsi.gov.uk)

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

To the Department of Health:

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

The International Trademark Association (INTA) is a global association of trade mark owners and professionals dedicated to supporting trade marks and related intellectual property rights (IPRs) in order to protect consumers and to promote fair and effective commerce. Our membership includes more than 6,700 trade mark owners, professionals and academics from more than 190 countries, including the United Kingdom (UK), who benefit from INTA's global trade mark research, policy development, education and training, and international network. Founded in 1878, INTA is headquartered in New York City, with offices in Brussels, China and Washington, D.C., and representatives in Geneva and Mumbai.

This letter is in response to your second consultation on the issue of standardised packaging of tobacco products, published on 26 June 2014. INTA submitted a response to the 2012 consultation, a copy of which is enclosed with this letter.

At the outset, we would again like to clarify that our comments on standardised packaging and the draft regulations are limited to their potential implications on trade marks and other IPRs. We fully understand the importance of improving public health and appreciate your role and responsibility in furthering this vital objective. We take no position on public health-related issues.

Furthermore, INTA raises these concerns on behalf of all our members and as the representative of a broad spectrum of trade mark owners spanning all fields of commerce and industry. While INTA's broad membership includes tobacco companies, INTA does not have any direct or indirect links to, or receive funding from, the tobacco industry, other than membership fees applicable to all members, regardless of their

industry and country. INTA is not an association which represents or defends the interest of a specific industry or a specific member, but is dedicated to promote and support trade mark rights and related rights as rights per se.

We set out below our responses to your consultation questions:

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

Since the purpose of the Chantler Review was to consider the effect of standardised packaging on public health<sup>1</sup>, which is outside our remit as noted above, we confine our observations on this question to two points:

**I. Omission of the legal issues related to trade marks and IPRs**

The absence of references to trade marks, IPRs or any other legal issues from the policy deliberation process after the 2012 consultation and from the Chantler Review is concerning. In fact, the Chantler Review expressly excluded legal issues from its scope. The Method Statement stated: "*My Review is not concerned with legal issues, such as competition, trade-marking and freedom of choice.*"<sup>2</sup>

The Department of Health also decided not to provide for any other simultaneous investigation of the legal issues, including implications for trade marks and IPRs. This is disappointing, particularly given that the Summary report of the 2012 consultation stated: "*There were 2,264 detailed responses that addressed Question 6. Many of the businesses and business related organisations that responded to this question stated that standardised packaging could have legal implications and some suggested the measure would be illegal.*" In INTA's view, the preponderance of submissions highlighting these legal concerns made it absolutely necessary that they should be investigated further in the event that the policy was revived after the 2012 consultation closed.

When the Chantler Review's findings were published on 3 April 2014, the Department of Health announced that it was "minded to proceed" with standardised packaging. This was based on the recommendations of the Chantler Review and without any separate investigation on the legal impacts, including implications for trade marks and IPRs, despite the concerns that were raised by INTA and others in 2012.

The Chantler Review would appear to be the reason for the Department of Health being "minded to proceed" as of April 2014, since the 2012 consultation had previously led the Department of Health to a different conclusion (i.e., its former 'wait and see' position).

<sup>1</sup> See paragraph 1 at page 3 of the Chantler Review (<http://www.kcl.ac.uk/health/10035-TSO-2901853-Chantler-Review-ACCESSIBLE.PDF>)

<sup>2</sup> See page 1 of the Method Statement (<http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/method-statement.pdf>)



We would urge the Department of Health to rectify this flaw and now commission a proper study on the legal implications of implementing the draft regulations, taking full account of the concerns of legal stakeholders, including those in the area of trade marks and IPRs.

## **II. Illicit trade**

As an intellectual property organisation, INTA is very concerned by the issue of illicit trade regardless of the industry affected. Indeed, many of the protagonists involved in illicit trade in the UK also commit other IP crime offences and serious non-IP related crime such as smuggling drugs and money laundering.<sup>3</sup> This makes it an issue of much broader societal concern. The impact of standardised packaging should thus be properly considered and given full weight before deciding whether to proceed.

The European Commission published on 31 July 2014 its report on EU customs enforcement of IPR in 2013<sup>4</sup>. It stresses that customs authorities in the EU detained almost 36 million items suspected of violating intellectual property rights in 2013. Figures on tobacco smuggling (number of cases, articles and retail value of original goods) are included in this report.

We are concerned that the Chantler Review did not adequately investigate the potential for standardised packaging to exacerbate illicit trade. As a result, the Department of Health is unable to gauge the risk that standardised packaging poses, as the Impact Assessment acknowledges. We discuss this in further detail below.

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

### **I. New information on the economic value of trade marks**

Trade marks and IPRs are a vital aspect of the global economy, and play a significant role in free trade and competition. Used in virtually every type of product and service, trade marks facilitate trade, promote efficiency in commerce and play an important role in job creation, both directly and indirectly. Requiring standardised packaging could have a major impact on the economic benefits derived from trade marks.

In our response to the 2012 consultation, we referred to the report, "Trade Mark Incentives", commissioned by the UK Intellectual Property Office and published in July

<sup>3</sup> See for instance the IP Crime Annual Report 2012-13 which stated that "there are tangible links between IP crime and organised crime groups" (see pages 7, 24 and 79 available at <http://www.ipo.gov.uk/ipcreport12.pdf>).

<sup>4</sup> <http://ow.ly/zPWGk>

2011. That report explained that employment is significantly higher in firms that are trade mark active.

Since the 2012 consultation, there is further evidence of the significant value of trade marks to industry in the EU, including in the UK. According to an extensive study<sup>5</sup> jointly conducted by the European Patent Office and the Office for Harmonisation in the Internal Market, published in September 2013, approximately 50% of industries in the EU are IP-intensive. These industries generated almost 39% of total economic activity (GDP) in the EU, worth EUR 4.7 trillion, and directly support 26% (56 million) of all jobs in the EU. The study found that trade mark-intensive industries are responsible for the highest shares of both employment and GDP contribution.

## **II. A dangerous precedent**

In our response to the 2012 consultation, we stated that, in our view, regulating a particular product by placing limits on the form or style in which trade marks may be used, and, in effect, preventing the use of some trade marks, sets an extremely dangerous legislative precedent. We made it clear that we were concerned that standardised packaging provisions for tobacco products could trigger additional regulations restricting the use of trade marks on other products. Globally, there are already indications that such restrictions are being considered for other products whose impact on public health is being scrutinised. South Africa, for example, has already restricted the use of certain trade marks for infant milk<sup>6</sup>.

The Indonesian government is also currently considering adopting a regulation requiring beverages with alcohol content in excess of 20% to either carry graphic health warnings or to adopt the standardised packaging "format". Standardised packaging requirements on tobacco products may indeed be the harbinger for the erosion of trade mark rights across other industries.

## **III. Developments at the World Trade Organisation (WTO)**

As the Department of Health is no doubt aware, since the 2012 consultation closed, five countries (Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia) have initiated formal complaints at WTO in relation to Australia's law on standardised packaging of tobacco. Among the legal constraints we outlined in 2012 were provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention.

At the time of the 2012 consultation, three countries (Ukraine, Honduras and the Dominican Republic) had requested consultations with Australia in respect of its standardised packaging measures. However, no panel had yet been requested in order

<sup>5</sup> Intellectual property rights Intensive industries: contribution to economic performance and employment in the European Union ([http://ec.europa.eu/internal\\_market/intellectual-property/docs/joint-report-epo-ohim-final-version\\_en.pdf](http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf))

<sup>6</sup> Department of Health, Regulation relating to foodstuff for Infants and young children, No. 991, 6 December 2012.

to resolve the dispute. Since the 2012 consultation closed, not only have those three countries requested formal arbitration, but they have been joined by a further two WTO members (Cuba and Indonesia).

The complainants cite the very same provisions that we identified in our response to the 2012 consultation - Article 20 TRIPS (and the failure to meet the 'necessity' test under Article 8); Article 7 of the Paris Convention (and its equivalent, Article 15(4) of TRIPS), and Article 6quinquies(B) of the Paris Convention. It is noteworthy that even IP Australia, the government agency that administers IP rights in the country, considers that "plain packaging may not be consistent with Australia's intellectual property treaty obligations."<sup>7</sup>

The investigation of formal proceedings at the WTO (on some measures now the largest dispute in WTO history)<sup>8</sup> since the closure of the 2012 consultation is a reminder that the legal obstacles that we outlined in our 2012 response are not merely theoretical. This makes the omission of legal issues by the Department of Health, as noted above, even more incomprehensible. We would urge the Department of Health to redress this as a priority.

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

#### **I. Impact on the function of trade marks**

Trade marks and trade dress play an integral role in facilitating consumer choice by distinguishing products from an enterprise which consumers know and trust, from those of another entity. The draft regulations, if adopted, would make it extremely difficult to distinguish one brand from another, thereby seriously limiting consumers' ability to buy the product of their choice. Furthermore, trade marks indicate the source of goods and/or services and assure consumers of the consistency of a product's quality and proper accountability. This fundamental function could not be effectively fulfilled if registered trade marks were banned from packaging, or if such trade marks were only permitted in a prescribed, standardised form that does not correspond to the intended registered graphic representation of the trade marks.

Trade marks are not only words, names and logos, but can also be colours or the very shape or design of the package itself (trade dress or "get-up")<sup>9</sup>. Any graphical component that adds to the distinctiveness of a product can be registered as a trade mark, illustrating the role that different types of trade marks play in the consumer experience. While a standardised packaging requirement would still allow the use of

<sup>7</sup> FOI 138 of 1660, briefing by IP Australia to Parliamentary Secretary ref B09/4084

<sup>8</sup> At least 32 members of the WTO have registered as third parties with an interest in the outcome.

See for example <http://ow.ly/zUIXR>

<sup>9</sup> See Article 15 of the TRIPS Agreement, Article 4 of the Council Regulation (EC) No 2007/2009 of 26 February 2009 on the Community trade mark.

word marks on packages, it would nevertheless prevent right holders from using any of their many other registered trade marks as well as other design elements, potentially leading to consumer confusion.

## **II. Infringement of EU law, EU treaty and the fundamental rights of property and freedom of expression**

In our view, the draft regulations would clearly infringe EU law. Article 1(2) of the Regulation on the Community trade mark<sup>10</sup> provides that Community trade marks shall have unitary character, having equal effect throughout the European Union and the use of a Community trade mark shall not be prohibited save in respect of the whole Community. Article 1(2) of the Regulation on the Community design<sup>11</sup> provides the same for Community designs. Adopting standardised packaging as proposed would prevent the use of non-word Community trade marks and Community designs in the UK, thereby breaching the unitary character of these EU-wide rights.

The European Court of Human Rights (ECtHR) has confirmed that intellectual property, including trade marks, is covered by the right of property<sup>12</sup>. The UK TMA 1994, Article 22, also stresses that “a registered trade mark is personal property”. The Lisbon Treaty proclaims that the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (ECHR) shall constitute the general principles of the Union’s law. Standardised packaging would deprive trade mark owners of their property in their established trade mark rights, and would as such infringe the right to property protected by Article 17 of the Charter of Fundamental Rights of the European Union and by the ECHR. Therefore, failure to protect intellectual property would constitute a breach of EU Treaty principles.

Another important consideration is Article 10 of the ECHR and Article 11 of The Charter (following the signing of the Lisbon Treaty in 2009, the Charter became legally binding on the EU institutions and Member State governments) which both guarantee the right to freedom of expression. The European Court of Human Rights (ECtHR) has held that the right to freedom of expression also protects commercial free speech. In *Germany v European Parliament* (Case C-376/98),<sup>[4]</sup> Advocate General Fennelly noted that the effect of the ECtHR’s jurisprudence (e.g., *Casado Coca v Spain* [1994] ECHR 8 and *Markt-Intern* [ref]) was that freedom of speech protected “the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communications”.

AG Fennelly also noted that commercial speech should receive protection:

<sup>10</sup> Council Regulation (EC) No 207/2009 on the Community trade mark ( <http://ow.ly/zUO42> )

<sup>11</sup> Council Regulation (EC) No 6/2002 on Community designs ( <http://ow.ly/zUObT> )

<sup>12</sup> European Court of Human Rights, 11 January 2007, *Anheuser-Busch v. Portugal*, paragraph 72: “In the light of the above-mentioned decisions, the Grand Chamber agrees with the Chamber’s conclusion that Article 1 of Protocol No. 1 is applicable to intellectual property as such”.

*"(...) individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on any topic, including the merits of the goods or services which they market or purchase".*

The Court of Justice of the European Union (CJEU) has consistently identified the functions of the trade mark as including communication. Within the context of decisions by the courts, companies have the right to impart information to consumers through the use of their trade marks (including word marks, logos, colours and other distinguishing features of their packaging) as to the origin and quality of their products.

### **III. Impact on registered trade marks**

The draft regulations propose protecting tobacco companies' registered trade marks. However, the proposed regulations create an anomaly which would be impossible for rights holders to effectively maintain their registered trade marks in practice in the UK. We refer to each in turn below:

#### **A. Registrability of trade marks**

Under UK trade mark law, the trade mark owner is required to legitimately state that they have a genuine intention to use their trade mark in the UK<sup>13</sup>. The draft regulations seek to address the issue of bona fide intent to use and the prohibition of use in relation to UK national trade marks. They create a fiction *"if the applicant would have had such an intention but for the operation of these regulations"*<sup>14</sup>. These provisions make reference to subjective elements which are difficult, if not impossible, to prove in case of a dispute. Practically speaking, it would be impossible for owners to fulfil the requirements for registrability to prove their intention, particularly where there is no ability for owners to use their trade marks. This creates the following unintended negative consequences:

- Introducing undue risks and uncertainties for trade mark owners regarding the protection and enforceability of their trade mark rights; and
- Introducing an unethical practice for trade mark owners and their legal representatives filing trade marks.

<sup>13</sup> Article 32(3) Trade Marks Act 1994, *"The application shall state that the trade mark is being used, by the applicant or with his consent, [...] or that he has a bona fide intention that it should be so used."*

<sup>14</sup> Draft regulation 14

## B. Oppositions, validity of registered trade marks and changes in ownership

The draft regulations propose<sup>15</sup> protecting trade marks from being removed from the register and cancelled on non-use grounds on the basis that the owner had a *bona fide* intention to use the trade mark. However, if tobacco companies' trade marks were challenged it would be practically impossible to prove any *bona fide* intent to use their trade marks as their marks would be registered and protected in a vacuum of non-traditional commercial use of a trade mark.

The proposal of creating protection on ground of "proper reasons for non-use" would, under current UK trade mark law, create an exception which has historically been an unlikely ground of defence, reserved purely for unique conditions such as *force majeure*. It would in effect also grant tobacco manufacturers (and possibly other industries in future) an indefinite protection on UK non-word trade marks, inconsistent with the basic principles of trade mark law, and not available to trade mark owners of other industries.

Added to this anomaly of creating a "special" protective right for owners of trade marks for tobacco companies, the restrictions around their use would devalue their brands and impede the future assignment and licensing potential of their trade marks.

The draft Regulations are also in direct conflict with the principle that trade marks must be used to justify their continued protection. Recital 9 of the Trade Marks Directive states: "*it is essential to require that registered trade marks must actually be used or, if not used, be subject to revocation.*" Recital 10 of the Regulation on the Community trade mark provides that "*there is no justification for protecting Community trade marks or, as against them, any trade mark which has been registered before them, except where the trade marks are actually used.*"

As we noted in our response to the 2012 consultation, and as set out above, there are also international treaty obligations to consider. INTA believes that restricting or prohibiting trade marks through actions such as overly burdensome labelling provisions and packaging requirements set out in the draft regulations erode internationally protected intellectual property rights under the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), including Article 20, which prohibits unjustifiable encumbrances on the use of a trade mark in the course of trade, as well as the Paris Convention for the Protection of Industrial Property. The UK is a contracting party to the Paris Convention, and the EU is a member of the WTO: the UK is thus subject to these agreements, including TRIPS.

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<sup>15</sup> Draft regulation 15

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

INTA is also concerned that standardising or restricting labelling provisions of the packaging of products will facilitate the spread of counterfeit products by making them easier to produce and more difficult to detect. In our response to the 2012 consultation, we warned that implementing standardised packaging provisions in the UK would make producing counterfeit goods more attractive to criminals who profit from such activities and would risk creating an uncontrolled market for illegal products, potentially undermining the intention of standardised packaging legislation to reduce smoking and instead leading to a prevalence of cheaper counterfeit items.

The illicit trade in tobacco is a major problem, both internationally and in the UK. It affects not only rights holders and the IP community but also society at large.<sup>16</sup> HM Revenue and Customs estimated the loss to the UK Government at up to £2.9bn in 2012-13.<sup>17</sup> In INTA's view, standardised packaging will increase the risk of illicit trade, but the Department of Health appears unable to quantify this risk. Before proceeding, further greater effort should be made to gauge this risk effectively.

There is evidence that, since standardised packaging was introduced in Australia in October 2012, illicit trade in cigarettes in Australia has increased. A study by KPMG found that counterfeit cigarettes in Australia had increased by 187% between 2012 and 2013 following the introduction of standardised packaging.<sup>18</sup> INTA notes that the Chantler Review did not find the KPMG study credible; however, we question the robustness of some of the Chantler Review's conclusions regarding the illicit trade.

While we note that the Chantler Review's dismissal of the risks to the illicit trade are predicated on the assumption that any increased risk could be effectively mitigated by increased resources/enforcement, INTA advises the Department of Health against any complacency surrounding the ability of law enforcement to combat increased risks effectively. Notwithstanding the record of the UK authorities in reducing the illicit trade in tobacco in recent years, we note with some concern that the UK authorities are likely to face increasing challenges in making further progress, since HMRC data indicates that the illicit trade in tobacco increased in 2012-13 (the last year for which data is available), reversing a long term trend,<sup>19</sup> and resources available to law enforcement to combat the illicit trade are likely to decrease further in future years. For example, by 2016 most trading standards services in England and Wales will have been cut by an average of 40% since 2010. As a result of these cuts, more than 70% of the trading standards services that responded to a recent survey will restrict or stop some services.<sup>20</sup>

<sup>16</sup> See The IP Crime Annual Report 2012-13, op. cit.

<sup>17</sup> The upper estimate of cigarettes and hand rolled tobacco combined. See Tobacco Tax Gap Estimates 2012-13 (published by HMRC) <http://ow.ly/zQkC2>

<sup>18</sup> See KPMG's report 'Illicit tobacco in Australia' 2013 at page 29, <http://ow.ly/zQk5Y>

<sup>19</sup> See Tobacco Tax Gap Estimates 2012-13 (published by HMRC): <http://ow.ly/zQvkZ>

<sup>20</sup> See Trading Standards Workforce Survey 'Report of the TSS 2014 Survey March 2014'.

The Impact Assessment acknowledges the risk of the illicit trade increasing, but does not quantify it because the Department of Health has "no means of quantification".<sup>21</sup> However, as the Impact Assessment acknowledges, the lack of certainty presents a large risk to the cost of the policy: *"If the illicit market increased significantly it could significantly increase the costs of a standardised packaging policy."*<sup>22</sup>

INTA appreciates that there are inevitable challenges in measuring the illicit trade, which is by definition, hidden. Nevertheless, both government agencies as well as private consultancy firms produce regular studies in this area, as the Impact Assessment notes.<sup>23</sup> Given the capacity for serious harm to brand holders, society generally and the very public the draft regulations are intending to protect, we urge the Department of Health to commission a credible independent study and to publish its conclusions before deciding to implement the policy.

Finally, the absence of any discussion of the implications of standardised packaging for trade marks and IPRs means that no account is taken of the cost to businesses from the resulting loss of certainty. Inevitably this uncertainty will have consequences for business investment and therefore the broader economy.

\*\*\*\*

In summary, INTA submits that introducing standardised packaging in the UK would severely impair the function of trade marks, create a dangerous precedent for other sectors, increase the risk of consumer confusion, violate several international treaty obligations as well as EU laws, and significantly increase the risk of counterfeit products being made available on the market.

INTA respectfully urges the Department of Health not to proceed with the proposal for standardised packaging.

INTA would be happy to answer any questions you may have on these issues. Should you require further information, please contact Ms H el ene Nicora at [hnicora@inta.org](mailto:hnicora@inta.org).

Sincerely,



Chief Executive Officer

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available at <http://www.tradingstandards.gov.uk/extra/news-item.cfm/newsid/1464>

<sup>21</sup> See the Impact Assessment *op. cit.* at paragraph 142, page 36.

<sup>22</sup> See paragraph 126 at page 32, *op. cit.*

<sup>23</sup> See paragraph 182 at page 48, *op. cit.*





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3 August 2012

Tobacco Packs Consultation  
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London SE1 8UG

To the Department of Health:

**Re: Public consultation on the standardized packaging of tobacco products**

The International Trademark Association (INTA) is grateful for the opportunity to make the following submission to the UK Department of Health (DoH), in response to the public consultation on the standardization of the packaging of tobacco products which the DoH launched on 16 April 2012.

INTA would like to preface our remarks by assuring the DoH that we understand the importance of improving public health, and appreciate the UK's role and responsibility in furthering this vital objective. Our submission responds to **Question 6** of the consultation, namely "*Do you believe that requiring standardized tobacco packaging would have legal implications?*," and our comments are limited to the potential implications for trademark owners, not the public health-related issues. INTA also submits that, in response to **Question 1** of the Impact Assessment, it is strongly against option 2, namely the introduction of standardized packaging for tobacco products in the UK.

INTA makes this submission on behalf of all members of its organization. INTA is a not-for-profit membership association of more than 5,900 corporations, law firms and other trademark-related businesses from more than 190 countries throughout the world. Its membership crosses all industry lines, including manufacturers and retailers, and is united in the goal of supporting the essential role that trademarks play in promoting effective national and international commerce, protecting the interest of consumers, and encouraging free and fair competition.

**Introduction**

We are highly concerned that requiring standardized packaging could have a major impact on the economic benefits derived from trademarks. Trademarks are a vital part of the global economy and play a significant role in free trade and competition. Used in relation to virtually every type of product and service, trademarks facilitate trade, promote efficiency in commerce, and play an important role in job creation both directly and indirectly. For instance, the UK Intellectual Property Office commissioned independent researchers to investigate potential links between trademarks and performance. The resulting report

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**PowerfulNetworkPowerfulBrands.**

"Trade Mark Incentives"<sup>1</sup>, published in July 2011, explained that employment is significantly higher in firms that are trade mark active, with the authors stating that the strength of the association is such that a firm that regularly trademarks products has a workforce that is 20% larger than a similar firm which does not. The authors also suggested that the activity of developing and offering new products and brands to the marketplace increases the labor intensity of such firms as they employ more workers.

In our view, regulating a particular product by placing limits on the form or style in which trademarks may be used, and, in effect, preventing the use of some trademarks, sets an extremely unsound legislative precedent. INTA is also concerned that standardized packaging provisions for tobacco products could trigger additional regulations restricting the use of trademarks on other products.

In this submission, INTA will outline in detail the legal implications of introducing standardized packaging provisions for tobacco products, which include:

- I. Impairment of the function of trademarks;
- II. Violations of international treaty obligations;
- III. Breach of UK and EU laws;
- IV. Increased risk of counterfeiting; and
- V. Standardized packaging, an unnecessary measure.

Extracts of the relevant legal texts are set out in full in the attached Appendix.

#### **1. Impairment of the function of trademark rights**

Section 1(1) of the UK's Trade Marks Act 1994, implementing EU Council Directive No. 89/104/EEC of 21<sup>st</sup> December 1988 to approximate the laws of the Member States relating to Trade Marks, defines a "trade mark" as follows:

*"In this Act a "trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of any words (including personal names), designs, letters, numerals, the shape of goods or of their packaging."*

It is commonplace for manufacturers not only of tobacco related products, but of a wide variety of goods and services, to use a range of logos, colors, devices and non-traditional trademarks to distinguish their goods from the goods of their competitors. This not only benefits the manufacturer, but importantly, also enables the consumer to more easily exercise choice and recognize the quality of a product previously purchased. This facilitates consumers in making informed decisions about the product that they are purchasing.

<sup>1</sup> <http://www.ipa.gov.uk/ipresearch-tmincentives-full-201107.pdf>

The implementation of a standardized packaging regime in the UK would make it much more difficult to distinguish one brand from another, thereby limiting the ability of consumers to buy the product of their choice and significantly increasing the risk of consumer confusion.

It would also, in effect, prevent trademark holders from using any marks other than word marks which they own, as well as any other design elements. This would in turn expose many trademark registrations to cancellation on the basis of non-use. The requirement for use of a trademark, or at the very least, an intention to use the trademark, permeates the UK Trade Marks Act and is one of the cornerstones upon which UK trademark law is built.

There are a number of reasons why trademark owners may wish to file applications in the UK for non-word trademarks (e.g. obtaining a priority date; basis for an International Registration), and INTA would submit to the DoH that it is doubtful whether the actual registration of a trademark would be possible if it could not be used. Section 32(3) of the UK's Trade Marks Act 1994, on the conditions to be fulfilled by an application for registration, provides that:

*"The application shall state that the trade mark is being used, by the applicant or with his consent, in relation to those goods or services, or that he has a bona fide intention that it should be so used".*

As a result of a standardized packaging regime, any application filed for non-word trademarks relating to tobacco products in the UK may fall foul of this provision.

For registered marks, the issue would stem from Section 46(1) (a) and (b) of the UK's Trade Marks Act of 1994, which states that:

*"The registration of a trade mark may be revoked on any of the following grounds – (a) that within the period of five years following the date of the completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use; (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use."*

Within a standardized packaging environment, the above provision means that valuable intangible assets of tobacco manufacturers (i.e. registered trademarks) would become vulnerable to non-use because they would be prevented from using the marks on their products, regardless of a commercial interest.

## II. Violation of International Treaty obligations

The relevant articles from the World Trade Organization's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention are set out in full in the attached Appendix.

## TRIPS

Article 20 of TRIPS provides that *"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 its capability to distinguish the goods or services of one undertaking from those of other undertakings."*

However, under a standardized packaging regime, word marks would still be allowed to be used by tobacco manufacturers, but only *"in a special form,"* namely in a manner (specific size and font, etc.) defined by the Government.

Additionally, standardized packaging would effectively require tobacco manufacturers to cease using, in the UK, all "non-word" trademarks which are registered nationally, as International Registrations designating the UK, and in the European Union.

The above two scenarios would constitute an encumbrance on the use of tobacco-related trademarks and the issue is, therefore, whether it is justifiable or not.

In this respect, Article 8.1 of TRIPS provides some guidance, allowing measures which are *"necessary to protect public health...provided that such measures are consistent with the provisions of [TRIPS]"*. Presumably, the advocates for standardized packaging are relying on this language for justification. However, a standardized packaging proposal does not fall within the scope of this exception, as it fails to meet the two required conditions, namely:

- It has not been demonstrated that standardized packaging meets the test under Article 8.1 and therefore, that plain packaging is *"necessary"* to the purported objective of protecting public health; and
- The standardized packaging provisions under discussion are inconsistent with the other provisions of TRIPS, notably Article 20.

In summary, without compelling evidence that standardized packaging would achieve the intended public health objective, standardized packaging measures would be inconsistent with TRIPS and would constitute an unjustified encumbrance in breach of Article 20. Considering the lack of discernible evidence linking restrictions on trademark use to the UK's public health goals, we believe that a standardized packaging regime would not meet the requirements of necessity under the TRIPS Agreement.

## Paris Convention

Article 7 of the Paris Convention (and its equivalent, Article 15(4) of TRIPS) provides that the nature of the goods *"shall in no case form an obstacle to the registration of the mark."* However, under the standardized packaging regime under discussion, tobacco manufacturers would not be able to register and use non-word trademarks, such as logos, trade dress or get-up. The direct effect, therefore, is to restrict registration due solely to the nature of the goods, i.e. tobacco products.

Article 6quinques(B) of the Paris Convention prohibits trademarks from being either denied registration or invalidated except for a definite number of very narrow exceptions, none of which apply here. A standardized packaging regime would potentially violate this provision on both counts, by rendering registration impossible (due to lack of intention to use), and allowing invalidation by preventing use.

### III. Breach of UK and EU Law

Under UK law<sup>2</sup>, a trademark is regarded as an "*object of property*" and trademark owners are entitled to have their registered trademarks granted the consideration and protection due to all other objects of property. Similar provisions exist in the EU Trade Mark Directive (First Directive 89/104/EEC of the Council of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks) and the Community Trade Mark Regulation (Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark).

The right to property is guaranteed by Article 17(1) of the Charter of Fundamental Rights of the European Union<sup>3</sup>, which states that "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.*" Article 17(2) then expressly states that "*Intellectual property shall be protected.*"

The Charter, pursuant to Article 6(1) of the Lisbon Treaty, is now binding and has "*the same value as the Treaties.*"

Article 17 of the Charter corresponds to, and provides the same degree of protection as, Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (ECHR). The European Court of Human Rights in Strasbourg has confirmed that intellectual property, including trademarks, is covered by the right of property<sup>4</sup>. The Lisbon Treaty proclaims that the ECHR "*shall constitute the general principles of the Union's law.*"

Therefore, the destruction, or taking of, intellectual property (including trademarks), whether at EU level or by a Member State, would constitute a breach of EU Treaty principles; and INTA submits that standardized packaging requirements, by allowing only the use of the brand/product name in a standard color, font style and size, would deprive trademark owners of their property in their established trademark rights and thereby violate the above provisions of UK and EU law.

Finally, introducing standardized packaging provisions in the UK would plainly contradict Community law in relation to intellectual property rights (IPRs) including trademarks, in particular Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks<sup>5</sup>. In that respect, it must be recalled that the primary purpose of this Directive is to ensure harmonization of the laws regarding trademarks among the EU Member States (see Directive's preamble, as quoted in the Appendix). The proposed

<sup>2</sup> Trade Marks Act 1994, Sections 2(1) and 22

<sup>3</sup> [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>4</sup> See ECHR case law *Anheuser-Busch v Portugal*, GC 73049/01, Judgment of 11 January 2007 - para. 72

<sup>5</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DI:L:2008:299:0025:0033:EN:PDF>

amendment to UK law to introduce standardized packaging would impose a restriction to the exercise of trademark rights within one of the Member States of the European Union, which is not foreseen in EU law. The EU Directive mentioned above does not authorize the type of legislative exceptions to trademark rights such as the one envisaged by the DoH under this consultation.

#### IV. Counterfeiting

Combating counterfeit trade on the legislative, regulatory and enforcement fronts is a major ongoing policy initiative for the UK and the EU as a whole, and also for stakeholders like INTA. Such efforts hinge upon the maintenance of a principled, balanced and coherently articulated system of national and international treaties, laws and regulations, particularly in regards to trademarks and related IPRs.

Implementing standardized packaging provisions in the UK would make producing counterfeit goods easier and cheaper, and therefore more attractive to criminals who profit from such activities. In addition, identifying counterfeit goods would become more difficult in the absence of appropriate marking/stylization. This presents the risk of an uncontrolled market for illegal products, potentially undermining the intention of standardized packaging legislation to reduce smoking and instead leading to a prevalence of cheaper counterfeit items.

#### V. Standardized packaging: an unnecessary measure

INTA notes that in its Consultation paper, the DoH suggests exploring whether the introduction of standardized packaging in the UK would "reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking." INTA would like to emphasize that there are already efficient trademark rules, at UK and EU levels, to prevent the registration of such misleading trademarks<sup>6</sup>. Thus, in the UK:

- Section 3(3)(b) Trade Marks Act 1994 provides that "a trade mark shall not be registered if it is of such a nature as to deceive the public (for instance as to the nature, quality or geographical origin of the goods or service."
- Section 46(1)(d) Trade Marks Act 1994 provides that "the registration of a trade mark may be revoked [on the ground] that in consequence of the use made of it by the proprietor or with his consent in relation to the goods and services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services."

In light of those provisions, if registration of a trademark is granted in the UK, it must be assumed that the mark is not misleading to the public. In any case, remedies for any trademark deemed to be misleading to the public already exist in UK and EU trademark law as detailed above. Those remedies allow for any party to seek the invalidation of a

<sup>6</sup> Sections 3(3)(b) and 46(1)(d) of Trade Marks Act 1994 and Articles 7(g) and 52(1)(b) of CTMR 207/2009 of 26 February 2009 (codified)

registered trademark or oppose the registration of new trademarks which may be considered misleading. It is important to note that those provisions apply irrespective of the category(ies) of products and services to which the trademark relates.

There are additional non-trademark specific provisions in the UK and the EU which may be relied on to avoid the misleading of consumers, such as the UK Consumer Protection from Unfair Trading Regulation 2008<sup>7</sup>, the EU Tobacco Products Directive<sup>8</sup> and the EU Directive on Unfair Commercial Practices<sup>9</sup>.

A general prohibition/invalidation of trademarks related to a specific product category (In this case, tobacco products) is therefore neither necessary nor appropriate to achieve the desired result, since other remedies already exist.

### Conclusion

INTA wishes to respectfully remind the DoH that a previous similar consultation, which it ran on this topic within the UK in 2008 (the Consultation on the Future of Tobacco Control), led to standardized packaging measures not being adopted. The study also concluded that *"the evidence base needs to be developed,"*<sup>10</sup> and it is not clear whether this has been done to a sufficient extent for the purpose of the present consultation.

INTA submits that introducing standardized packaging requirements in the UK would severely impair the function of trademarks, increase the risk of consumer confusion, violate several international treaty obligations as well as UK and EU Laws, and significantly increase the risk of counterfeit products being made available on the market (ultimately defeating the original purpose of the proposed measure).

INTA urges the DoH to further consider the highly negative effects that standardized packaging legislation could have not just within the tobacco industry, but potentially across all sectors of consumer goods. Such a far-reaching measure cannot be introduced within the EU, or within one of its Member States, without a thorough and objective impact assessment and proper legal considerations, in particular regarding the implications on intellectual property legislation and international agreements to which the UK and/or the EU are signatories.

In conclusion, given the risks of increasing the availability of counterfeit and black market tobacco products to consumers, the unfair and disproportionate impact on the interests and rights of all trademark owners concerned as well as its likely adverse impact on the balance and integrity of the trademark system, INTA respectfully urges the DoH to take no further steps towards the implementation of the proposed standardized packaging requirements for tobacco products.

<sup>7</sup> <http://www.legislation.gov.uk/uksl/2008/1277/contents/made>

<sup>8</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products

<sup>9</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on Unfair Commercial Practices

<sup>10</sup> The UK consultation paper described the research evidence on plain packaging as "speculative" (see

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085114—page\\_41, paragraph\\_3.75](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085114—page_41, paragraph_3.75))

INTA would be happy to answer any questions you may have on these issues. Should you require further information, please contact Ms. Carla Schwartz at [cschwartz@inta.org](mailto:cschwartz@inta.org).

Sincerely,





**APPENDIX**

**UK TRADE MARKS ACT 1994**

**Section 1. Trade marks:**

*"(1) In this Act a "trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.*

*A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging."*

**Section 2.**

*"(1) A registered trade mark is a property right obtained by the registration of the trade mark under this Act and the proprietor of a registered trade mark has the rights and remedies provided by this Act."*

**Section 3.**

*"(3) A trade mark shall not be registered if it is-*

*(a) contrary to public policy or to accepted principles of morality, or*

*(b) of such a nature as to deceive the public (for instance as to the nature, quality or geographical origin of the goods or service)."*

**Section 22. Nature of registered trade mark.**

*"A registered trade mark is personal property (in Scotland, incorporeal moveable property)."*

**Section 32. Application for registered trade mark**

*"(3) The application shall state that the trade mark is being used, by the applicant or with his consent, in relation to those goods or services, or that he has a bona fide intention that it should be so used. (4) The application shall be subject to the payment of the application fee and such class fees as may be appropriate."*

**Section 46.**

*"(1) The registration of a trade mark may be revoked on any of the following grounds-*

*(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;*

*(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;*

*(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;*

*(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services."*

**AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (1994 - TRIPS)**

**Article 8.1 – Principles**

*"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".*

**Article 15(4) – Protectable Subject Matter**

*"4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark".*

**Article 20 – Other requirements**

*"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking".*

**PARIS CONVENTION FOR THE PROTECTION OF INTELLECTUAL PROPERTY (1883)**

**Article 6quinquies - Marks: Protection of Marks Registered in One Country of the Union in the Other Countries of the Union**

*" B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:*

*(i) when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;*

*(ii) when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;*

*(iii) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.*

*This provision is subject, however, to the application of Article 10bis".*

**Article 7 - Marks: Nature of the Goods to which the Mark is Applied**

*"The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark."*

**CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01)**

**Article 17 - Right to property**

*"1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*

*2. Intellectual property shall be protected."*

**TREATY OF LISBON (01/12/2009)**

**Article 6 (ex Article 6 TEU)**

*"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."*

*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

*2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

*3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."*

**EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF THE COUNCIL OF EUROPE**

**Protocol 1 Article 1**

*"Article 1 provides for the right to the peaceful enjoyment of one's possessions."*

**FIRST COUNCIL DIRECTIVE 89/104/EEC OF 21 DECEMBER 1988 TO APPROXIMATE THE LAWS OF THE MEMBER STATES RELATING TO TRADE MARKS**

*"THE COUNCIL OF THE EUROPEAN COMMUNITIES,*

*Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,*

*Having regard to the proposal from the Commission (1),*

*In cooperation with the European Parliament (2),*

*Having regard to the opinion of the Economic and Social Committee (3),*

*Whereas the trade mark laws at present applicable in the Member States contain disparities which may impede the free movement of goods and freedom to provide services and may distort competition within the common market; whereas it is therefore necessary, in view of the establishment and functioning of the internal market, to approximate the laws of Member States;*"

**Sent:** 05 August 2014 18:18  
**To:** Tobacco Packaging  
**Subject:** Tobacco packaging

I find the Government policy on tobacco packaging at odds with their commitment to private enterprise to market their products which are legally distributed to the Public (and from which they derive millions of pounds in duty) ,when at the same time denying the companies the means by which they can promote their brands in a meaningful way.

In view of the evidence that the level of consumption in Australia of cigarettes has not been affected by the draconian legislation in that country, the British Government's policy is wholly impossible to understand.

Sent from

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EL161

**From:** [REDACTED]  
**Sent:** 05 August 2014 18:44  
**To:** Tobacco Packaging  
**Subject:** Standardised Packaging

I strongly disagree with standardised packaging as products would not give the right image - one size does not fit all - packaging should be relevant and particular to brand/manufacturer.

Companies like their products packaged to reflect quality.

Kind regards

[REDACTED]  
Sent from Windows Mail

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Department of Health



Llywodraeth Cymru  
Welsh Government



The Scottish Government  
Riaghaltas na h-Alba



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

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

a. Are you responding (required):

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

b. Please provide your details and contact information:

Name of respondent (required)

Contact email address (required):

Now go to question f

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

Name of organisation (required):

Name of person providing submission (required):

Job Title (required):

Contact address of organisation (required):

Contact email address (required):

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

Yes

No

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

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop



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

If other, please tell us the type of business:

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

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

If other, please tell us the type of organisation:

f. Does your response relate to (required):

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

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

No

Yes (please describe below)

If yes, please describe:

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

## Consultation questions

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

yes - no consideration for the fact the decision/implementation of standardised packaging would have the opposite effect to what you are trying to achieve!

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?

yes - Australia, the only country to implement this packaging action has the following results to show - Smoking prevalence has not decreased - the illicit tobacco trade has increased by 20% - They have lost control of this market- 13.9% of all tobacco consumption is illicit trade!! There is a very good chance this figure will be 50% in the uk. Currently you have driven the illicit trade in the UK to in excess of 25% now, before you change packaging, for the worse. This one fact needs to be carefully considered your actions may have the opposite effect to what you are trying to achieve.

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?

It is not workable, to achieve the effect/aims of the action.

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?

Yes - I do believe that the campaign for standardisation /plain packaging issue has lost sight of the ultimate aim of maintaining/utilizing a regulated tobacco industry that has standards to achieve and is totally accountable. The current campaign will undoubtedly drive the unregulated tobacco black market economy to a huge market share. When you have achieved this you will have a large unregulated market place that you will have no control over whatsoever! In otherwords you will have failed in what you set out to do. It is essential that you keep control of the regulated business and work with the tobacco industry to achieve your aims - Your current course is

heading for failure and as we all know failure will be at a price - in this case the creation of a huge, unregulated and un-controlable black market economy!! Change your course and maintain control of the regulated tobacco market - the only sensible route to take!

Thank you for participating in this consultation.

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

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

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

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

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

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

[1](#)

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

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

- **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

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

E1 103

**From:** [REDACTED]  
**Sent:** 05 August 2014 19:33  
**To:** Tobacco Packaging

Please leave things alone....we all have choices in life, why must folks spoil that....we are all entitled to see what we are buying and choose!!

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**Sent:** 05 August 2014 19:37  
**To:** Tobacco Packaging  
**Subject:** Plain packaging

I strongly disagree with the Government's draft regulations for plain packaging of tobacco products. Evidence from Australia shows very little effect on curbing smoking but indicates a large increase in illicit trading.

Whilst declaring my interest as a Pensioner of Imperial Tobacco Co Ltd I also wish to make the point that I did not vote for a "Nanny State" and consider freedom of choice is our right!

Yours faithfully



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EL 165

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

Sent from my iPad. Putting all cigarettes in standard white packing would do nothing to decrease smoking, ask Australia. It would only make it easier for contraband to be introduced. If we are determined to be a nanny state, why not also package children's sweets and confectionery in a similar manner! From a slim non-smoker of 22 years.

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EL 166

**From:** [REDACTED]  
**Sent:** 05 August 2014 20:42  
**To:** Tobacco Packaging  
**Subject:** Standardised Packaging of Tobacco Products

I find it very concerning, as I'm sure many thousands of other people do, that the government still seems intent on going ahead with this futile exercise. As the facts show from the Australian implementation of this very silly attempt at stopping people from smoking, smoking prevalence has not decreased, whilst illicit trade has increased by 20% since its introduction, now accounting for 13.9% of total consumption. During the 2012 public consultation over 425,000 respondents stated that they were against standardised packaging. If introduced the proposal would affect consumers, wholesalers, retailers and businesses, not to mention the loss of revenue to the government in unpaid taxes on counterfeit and illegal sales. We are supposed to live in a democracy; yet when the voice of the people speaks, the government never listens. I would suggest that someone in government has made promises to their EU masters that, rightly or wrongly, they will get this pathetic objective implemented and stuff the consequences. I do hope I'm wrong and this draft regulation is consigned to the nearest bin ASAP!!

Best regards

[REDACTED]

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E1167

**From:**  
**Sent:** 05 August 2014 21:39  
**To:** Tobacco Packaging  
**Subject:** Standardised packaging

Standardised packaging must not be approved by parliament because of the impact it would have on so many areas of business. Stop it before it is too late.

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Department of Health



Llywodraeth Cymru  
Welsh Government



The Scottish Government  
Riaghaltas na h-Alba



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

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

a. Are you responding (required):

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

b. Please provide your details and contact information:

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

Now go to question f

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

Name of organisation (required):

Name of person providing submission (required):

[Redacted]	[Redacted]
------------	------------

Job Title (required):

CEO
-----

Contact address of organisation (required):

[Redacted]
------------

Contact email address (required):

[Redacted]	[Redacted]
------------	------------

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

Yes

No

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

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

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

If other, please tell us the type of business:

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

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

If other, please tell us the type of organisation:

f. Does your response relate to (required):

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

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

No

Yes (please describe below)

If yes, please describe:

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

## Consultation questions

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

The Report of the Chantler Review did not take into consideration the negative impacts of Plain packaging in the tobacco retail businesses due to the increase on the illicit trade of tobacco products already seen in Australia after the adoption of the measure.

Furthermore, the Report did not include some research available at the time the report was in preparation, which demonstrated Plain packaging is not an effective measure for public health (i.e. Kaul & Wolf, 2014 - available at: <http://www.econ.uzh.ch/static/workingpapers.php?id=828>).

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?

A recent report issued by KPMG (commissioned by British American Tobacco, Philip Morris International and Imperial Tobacco Limited) shows that since plain packaging was introduced in Australia, the longstanding decline in tobacco consumption appears to have begun to slow down. At the same time the report observes that the illegal tobacco trade has been boosted, with levels rising from 11.8 to 13.3% of total consumption. We know the UK has been flooded by illegal tobacco products a problem that might become worst with the adoption of Plain Packaging as already observed in Australia.

The KPMG report notes that "[i]llicit whites' have emerged as a major form of contraband over the past year. Manchester, a branded product made specifically for the black market is currently the largest illicit white brand in Australia; if it were sold legally in Australia it would have a 1.3% market share. Question is what would happen in the UK given the significant levels of cross-border trade across open European borders.

Tobacco smugglers care little about the age of those who purchase tobacco and it would therefore be expected that the availability of lower priced tobacco to youth would be increased as a result of this policy.

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?



From: [Redacted]  
Sent: [Redacted]  
To: [Redacted] *Marketing*  
Subject: Plain packs

Hi.

I understand you are consulting (again) on plain packaging on tobacco packs.

I can only repeat the opinion I expressed when you last asked, that this is a foolish move - presumably motivated by political dogma, as it has no practical merit. It is blindingly obvious that plain packs will lead to a massive increase in counterfeit sales - and will drive tobacco sales up as the market will be uncontrolled. The duty loss will be vast. I actually want to see prominent branding on tobacco products so that I can choose which (if any) legal product to buy.

I urge you to the only logical thing and abandon these proposals.



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

## Scandinavian Tobacco Group UK Submission

8/5/2014

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Scandinavian Tobacco Group United Kingdom Limited

## 1) Scandinavian Tobacco Group United Kingdom Limited

Scandinavian Tobacco Group United Kingdom Limited (STG UK) is a company employing fifty people, based in Elstree, Hertfordshire.

STG UK is a wholly owned subsidiary of Scandinavian Tobacco Group A/S (STG A/S), a private company, based in Copenhagen, Denmark.

STG UK's principal business activities are the sale and distribution of imported cigars and pipe tobacco products in the United Kingdom, including Northern Ireland and the Channel Islands.

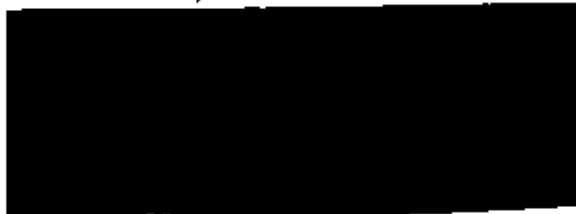
STG UK is a member of *The Imported Tobacco Products Advisory Council*; (ITPAC) a trade association which represents the interests of 14 distributors of imported tobacco products in the United Kingdom.

ITPAC has also submitted its response to this consultation and STG UK endorses its content and concurs with the observations raised within it.

The names and contact details of the STG UK respondents are as follows:



Scandinavian Tobacco Group United Kingdom Limited  
250 Centennial Park, Centennial Avenue, Elstree, Borehamwood,  
Hertfordshire, WD6 3TH.



## 2) Specialist Tobacco Products & (DRAFT) Regulations for Standardised Packaging of Tobacco Products

STG UK supports evidence-based, reasonable and workable regulation of tobacco products and encourages governments to respect the principles of adult choice, freedom of competition, trademark and international law when implementing such regulation.

STG UK is pleased to note, and therefore welcomes the fact that *Specialist Tobacco Products*; in particular; *cigars* and *pipe tobacco*, have been excluded from the *draft* regulations for standardised packaging (SP) of tobacco products. We are pleased that the Government recognises that this product category is niche, declining, and used by an older demographic of consumer.

Our submission to this consultation therefore focuses on reinforcing the recognised reasons for the Government arriving at this (draft) decision, and we are grateful for the exclusion.

STG UK however *stands opposed* to the principle of SP of tobacco products. Manufacturers have the *right to distinguish and differentiate their products from those of competitors*. Packaging guarantees *authenticity, origin and quality*. Brands and packaging designs (including iconography and typography) are often protected as registered trademarks. *SP would expropriate or fundamentally restrict the essential function of registered trademarks* and the right to distinguish products, contrary to national and international law. The development of *brand equity and goodwill* is fundamental to a market economy, *adult* consumer choice, innovation and product development.

### **3) STG UK's Responses to the consultation questions:**

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

##### **i. Chantler Review Timetable**

The Chantler Review was required to be complete within a three month timeframe (reporting back in March 2014). The amount of information (from all stakeholders) which was required for this critically important subject resulted in a particularly compressed timetable and therefore a pressurised consultation process for those involved.

##### **ii. Disproportionate Impact on Business**

The Chantler Review takes no account of the impact on businesses operating in the *specialist tobacco* supply chain and only conducted limited hearings (from which STG UK was excluded).

##### **iii. Chantler Review Conclusions**

The Chantler Review reports that:

*'It is highly likely that standardised packaging would serve to reduce the rate of children taking up smoking and is implausible that it would increase the consumption of tobacco.'*

STG UK would like to point out that the Chantler Review's focus was (in the main) whether or not *'SP would serve to reduce the rate of children taking up smoking...'*

STG UK would like to reinforce the fact that specialist tobacco products such as cigars and pipe tobacco simply don't appeal to younger smokers and that they are used by an older consumer demographic.

#### ***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?***

Although STG UK welcomes the (draft) exclusion of specialist tobacco products; we remain opposed to the principle of SP. There remains no reliable evidence to support the claim that the implementation of SP for specialist tobacco products would positively affect the tobacco-related attitudes, beliefs, intentions or behaviours of those whom the Government is seeking to protect.

**i. Non-UK Duty Paid**

Partly as a consequence of successive UK Governments' high tobacco excise duty policies, which have helped to establish substantial price disparities between the UK and most other EU countries; large quantities of tobacco products, (including cigars & pipe tobacco) are purchased abroad and brought back into the UK.

In this context, an unintended consequence of SP is likely to be:

- An increase in cross-border trade because the opportunity for adult smokers to buy a packet of cigars, or a pouch of pipe tobacco in their current familiar packaging as opposed to a standardised pack, is highly likely to add further competitive advantage over and above price to branded packs from overseas.

**ii. Specialist Tobacco Products & Older Consumer Demographics**

STG UK *fully supports* the Government's efforts to address smoking by under-age people. However, it does not consider that SP would positively affect tobacco-related attitudes, beliefs, intentions and behaviours given that specialist tobacco products, such as cigars and pipe tobacco are used by an older consumer demographic.

**iii. Retail Transaction Times**

The consultation-stage Impact assessment (IA) refers to an improvement in retail transaction times (post SP); however STG UK strongly disagrees with this assumption. Since the implementation of the retail display ban in larger stores; retail trade reports indicate that transaction times have increased as a result of consumer and trade confusion.

If SP were to be implemented, then (*in addition to the retail display ban, which will be extended to small shops from April 2015*) it will exacerbate the problem and result in further increases in transaction times; causing more frustration to consumers, and increased costs to British retailers.

A further consequence of SP would be the *disproportionate effect on specialist tobacco brands represented by SME's*; as it is likely that retailers will rationalise their ranges in-order to make the selection process easier for their staff. This will disproportionately affect specialist tobacco products in particular, because it will be easier for retailers to *rationalise small brands and product groups such as cigars and pipe tobacco*, which have much smaller segment/market shares.

In conclusion, the very nature of SP will make it harder for retailers to identify different brands as they will all look the same, thereby increasing transaction times and not reducing them as the IA suggests.

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

**i. Specialist Tobacco Products**

Given its focus on the specialist sectors of the trade, STG UK welcomes the specific exclusion of specialist tobacco products (*cigars and pipe tobacco*) from the draft regulations set out in Appendix B of the consultation document for reasons of their low rate of use, and given that they are used by an older

consumer demographic. However, aside from the aforementioned concerns in regards to the introduction of SP in general into UK law; STG UK would like to emphasise a number of specific reasons why SP would be unnecessary and disproportionate for specialist tobacco products:

**Evidence Base:**

- As has been previously stated; there is no real-world evidence base that SP will achieve the stated Public Health objectives for any tobacco product. However, in the case of specialist tobacco products, (*cigars & pipe tobacco*) which were not included in any of the research studies to date; there is no evidence whatsoever for the efficacy of SP.

**Consumption Levels:**

- The consumption levels of cigars and pipe tobaccos are declining, and their share of the UK tobacco market is very small. An industry estimate of UK market consumption by tobacco category indicated that cigars represented 0.8% and pipe tobaccos 0.3% of total tobacco consumption by volume in 2012.

**Older Consumer Demographic:**

- As stated in the Consultation document, *cigars and pipe tobaccos usage amongst young people is extremely limited. They are typically used by an older consumer demographic and certainly not used as an 'alternative' to cigarettes for reasons of taste, cost and availability in the market.*

The 2012 Omnimas Survey findings report the following usage demographics:

**Cigars: 90% of users are over 25 years old, and 78% are over 35 years old.**  
**Pipe tobaccos: 97% of users are over 25 years old, and 94% are over 35 years old.**

(2012 Omnimas)

**Portfolio/Product Range:**

- The portfolio of cigar brands and pipe tobaccos available in the UK is significantly wider and more diverse than for other tobacco products. (*Cigars for example come in a variety of shapes and sizes*)
- A recent industry survey conducted in November 2012 found that the number of brands and stock-keeping units (SKUs) of tobacco products available across the different categories is as follows:

	<u># of Brands</u>	<u># of SKUs</u>
Roll-Your-Own Tobacco	30	103
Cigarettes	59	297
Snuff	66	162
<i>Cigars</i>	<b>100</b>	<b>893</b>
<i>Pipe Tobacco</i>	<b>227</b>	<b>509</b>
<b>Total</b>	<b>482</b>	<b>1964</b>

In particular, STG UK would like to draw your attention to the specialist tobacco portfolio of cigars and pipe tobacco, which accounts for a wide proportion of

products on the market. This is due to the range of sizes and shapes in comparison to other types of tobacco products.

The implications for the retail trade, and in particular, retailers who sell cigars and pipe tobacco would be significant if SP were introduced in the UK. British retailers offer this wide choice to proportionally very few, discerning adult smokers who are loyal to their chosen brand, and indeed their chosen retailer. If SP were introduced, it would make the selection process and transaction unworkable. Further it would deteriorate consumer/retailer relations and erode economic value at both a micro and macro level. In conclusion to this point; if introduced, *SP would disproportionately disadvantage British retailers who sell niche, specialist tobacco products, and the smaller, British companies who import and distribute them.*

**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?**

**i. Quantification of Losses and Benefits**

The IA's assessment period is limited to 10 years, and the following cost impacts are defined:

- Losses to HMT £2.3 bn, the majority relating to the lifespan of smokers who quit
- Transition costs to manufacturers, packaging companies, wholesalers and retailers £176m–£181m (including £166m from brand value)
- Benefits to health from the reduced take-up of smoking £4.4bn
- Benefits from improved quit rates £21.5bn
- Benefits from retail transaction times (1.5 seconds per transaction) £0.069bn
- Manufacturing cost savings £0.3bn

STG UK is concerned at the assumptions made and the viability of these calculations. For example, as mentioned above, there is no realistic likelihood that SP will reduce retail transaction times. Further, it is not clear how the valuation of £166m for the brand value of the tobacco industry, or the remaining £10–£15m for 'transaction costs' was reached, or how these numbers can be substantiated.

It is also important to note that the IA states that *'we conclude that there is likely to be an increase in the duty unpaid segment of the market but we have no means of quantification'*.

**ii. Small and Micro Business (SMB) Assessment**

The IA makes the following statements:

- Costs to retailers in the form of increased serving time are expected to be negligible with the impact being short lived (a matter of weeks). Thereafter, *retailers are expected to see a reduction in transaction times.*
- SMBs are expected to incur costs in the form of reduced profits from their tobacco sales; also, the expected estimated fall in smoking prevalence

rates will lead to a reduction in overall tobacco consumption as well as the down trading from more profitable, higher priced brands (such as cigars) to less profitable lower priced brands. However, the IA states that, by way of compensation it is expected that consumers will reallocate their income expenditure to other goods and services in the economy and that *since SMBs are a component of the economy, losses from reduced tobacco sales may be offset by consumption of their other products.*

Responses to the first consultation in 2012 suggested that tobacco may account for up to 30% of the revenue of a convenience store although, anecdotally, the profit margins on the sale of tobacco may be relatively low. *Small retailers such as Convenience Tobacco News Stores (CTNs), in order to thrive in this changing world (e.g. internet sales, economic cycles, big supermarket competition and demographic changes) already need to be planning their future business strategies, considering diversifying, and thinking about how to cope with all the trends and shocks that are likely to affect them.*

STG UK would challenge these assumptions on the basis that there is absolutely no realistic evidence to support the assertion in the first point (*'reduction in transaction times'*), that the assumption made in the second point (*'... since SMBs are a component of the economy, losses from reduced tobacco sales may be offset by consumption of their other products'*) is economically unviable, and that the third point (*'small retailers ..... already need to be planning their future business strategies'*) is unreasonable given the major challenges which SP would place on an important economic sector which is already under pressure and facing considerable regulation.

#### **4) Conclusion**

STG UK *stands opposed* to the principle of SP of tobacco products. Manufacturers have the *right to distinguish and differentiate their products from those of competitors. SP would expropriate or fundamentally restrict the essential function of registered trademarks* and the right to distinguish products, contrary to national and international law.

Given its focus on the specialist sectors of the trade however, STG UK welcomes the specific exclusion of specialist tobacco products (*cigars and pipe tobacco*) from the draft regulations set out in Appendix B of the consultation document for reasons of their low rate of use, and given that they are used by an older consumer demographic.

For these reasons and the further points that we raise in this consultation; we urge the Government to maintain the exclusion of cigars & pipe tobacco in any final regulations.



## 5) Annex - Apparent Regulatory Anomaly

STG UK would like to draw the Department's attention to an apparent anomaly in the Draft Regulations.

The anomaly relates to *'Provisions which apply to all tobacco products or to both cigarettes and hand rolling tobacco'* in Part 4 of the Draft Regulations in Appendix B of the Consultation document (pages 30 and 31). In Part 4, Sections 11 and 12 clearly apply to cigarettes and hand rolling tobacco. However, Part 4 Section 10 (*Product presentation*) appears to apply to *all* tobacco products. In this Section paragraph 3(d) states that the labelling of these products may not contain any element or feature which *'refers to taste, smell or any flavourings or other additives, or the absence of such thing'*.

This means that, whilst these products may contain flavourings or other additives *they cannot refer to them on the packaging.*

In the revised Tobacco Products Directive (2014/40/EU), Article 7 Section 12 *exempts non-cigarette RYO products from the 'characterising flavours'* requirements; however Article 13 (*Product presentation*) states that the *labelling and any outside packaging* of these products shall not contain any element or feature which *'refers to taste, smell, any flavourings or other additives or the absence thereof'*

Although the Draft Regulations for SP are consistent with the Tobacco Products Directive, STG UK would reiterate that this will have a considerable impact on specialist tobacco flavoured products, such as cigars and pipe tobacco.

Therefore, any relief which the Department might be able to secure from this apparent anomaly for this small, specialist sector of the trade which is already under considerable pressure, would of course be particularly welcome.



Department  
of Health



Llywodraeth Cymru  
Welsh Government



The Scottish  
Government  
Riaghaltas na h-Alba



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

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

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

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

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

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

Now go to question f

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

Name of organisation (required):

British Dental Association

Name of person providing submission (required):

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

Job Title (required):

Health and Science Policy Adviser

Contact address of organisation (required):

64 Wimpole Street, London W1G 8YS

Contact email address (required):

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

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

Yes

No

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

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

Tobacco retailer (other type of shop or business)

Specialist tobacconist

Duty free shop

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

If other, please tell us the type of business:

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

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

If other, please tell us the type of organisation:

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

United Kingdom

England only

Scotland only

Wales only

Northern Ireland only

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

No

Yes (please describe below)

If yes, please describe:

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

## Consultation questions

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

The BDA strongly supports the conclusions of the Chantler Review. We agree that the introduction of standardised packaging is likely to contribute to important public health gains, in conjunction with other tobacco control measures. We note that since the protracted consultation process began in 2012, an estimated 200,000 people in the UK will have died from smoking-related causes (ASH, 2013) and over 400,000 children aged 11 to 15 will have taken up the habit (Hopkinson et al., 2013); we urge the Government to adopt the standardised packaging legislation as quickly as possible to minimise further harm. As the Chantler Review acknowledges, randomised controlled trials of the type demanded by the tobacco industry will not be forthcoming because they are unethical and impractical, and the Review's recommendations are based on the best available evidence of positive public health benefit - particularly for children - and lack of likely impact on the illicit trade. Therefore, there is no justification for further delay.

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?

Figures released by the Australian government in July 2014 have indicated a 15 per cent fall in smoking rates in the period between the introduction of standardised packaging in December 2012 and the 12.5 per cent increase in tobacco duty in December 2013 (2013 National Drug Strategy Household Survey; Australian Institute of Health and Welfare). Proxy measures of the volume of tobacco on the Australian market also showed a decrease in this period, countering the claim by tobacco companies that standardised packaging would boost cigarette sales by triggering a price war.

We also note the recent paper "Tobacco industry manipulation of data and press coverage of the illicit tobacco trade in the UK" (Rowell et al., 2014). This examined published data from transnational tobacco companies on the illicit trade, including a comparison with independent data, and reporting by tobacco companies of HMRC data on illicit tobacco; press articles citing industry data were also analysed. The authors concluded that industry claims of a sharp increase in illicit cigarette use between 2008 and 2013 are inconsistent with both independent data and historical trends, and that tobacco companies are overstating the prevalence of illicit tobacco by commissioning surveys with opaque methodology ("empty pack" surveys), planting misleading stories and exaggerating HMRC data.

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 BDA supports the draft regulations and believes that the Australian experience points to the likelihood that implementation will be successful and relatively straightforward. We note that, according to the Impact Assessment, complying with the proposed standardised packaging regulations would lead to a negligible additional cost to manufacturers in reconfiguring packaging equipment, above that of implementing the requirements of the European Tobacco Products Directive.

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

Thank you for participating in this consultation.

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

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

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

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

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

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

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

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

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

- **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- **Posting your response to**

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



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

### **Response from Warrington Borough Council**

Warrington Public Health has a long tradition of partnership working with the local government in recognition of the important role that council services plays in protecting and improving the health and wellbeing of local people. Warrington Public Health team is now an integral part of the council, and this has meant that there is now even greater opportunity and scope to influence the wider issues that affect the health of our residents; particularly with the aim of reducing health inequalities across the town.

Over a number of years Warrington has seen a big reduction in the number of people who smoke tobacco products. However, results from the 2013 local lifestyle survey found that there are still over 20,000 smokers in the town with the vast majority living in the most disadvantaged areas. As smoking is still the number one cause of preventable illness and early death, Warrington Borough Council is committed to support every measure that will contribute to helping current smokers quit and to prevent uptake in future generations.

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

Tobacco Free Futures believes that standardised packaging should be introduced if the available evidence supports the conclusion that the introduction of standardised packaging would be likely to:

Lead to a reduction in the numbers of young people starting to consume tobacco; and  
 Together with other policy initiatives, contribute significantly over time to a reduction in smoking prevalence rates

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

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

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

Plain packaging will reduce smoking initiation among youth and young adults.  
 Plain packaging will promote smoking cessation among established smokers.  
 Plain packaging will support former smokers to remain abstinent.  
 Plain packaging will help to denormalise tobacco use."

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

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

The Government should resist efforts by the tobacco industry and its surrogates to delay decision-making and laying of the regulations before Parliament. As outlined below, there is now strong evidence that the industry's arguments are either weak or without foundation 3 4 5 while their data on illicit have been shown to be highly misleading. 6

Smoking remains the major preventable cause of premature death and disease in the UK, with half of all long term smokers dying from their addiction. 7

Smoking is the leading cause of health inequalities. The richest smokers die earlier than the poorest non-smokers as found in Gruer et al (2009) 8 who concluded that the scope for reducing health inequalities related to social position is limited unless many smokers in lower social positions stop smoking.

Tobacco use is the leading cause of premature death and preventable disease. In the North West, 13,000 people die each year from smoking related illnesses – that's 35 deaths every day. 9

Around 18,000 children in the North West are known to try smoking every year. 10 We need to do all we can to ensure that this number reduces to negligible levels.

83% of people in the North West who try smoking do so before the age of 14. 11

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

Standardised packaging needs to be part of a comprehensive strategy

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

Standardised packaging was introduced in Australia as part of a comprehensive strategy. This included larger health warnings (75% rather than the 65% in the TPD), mass media campaigns and reducing affordability by increasing taxation. Australia is committed to annual increases in tobacco taxation of 12.5 per cent over inflation each year for four years, starting in December 2013<sup>12</sup>, a far higher increase than the current escalator in place in the UK which is only 2% above inflation. The Australian strategy has been very successful with a significant increase in calls to the quit line, and a significant decline in tobacco consumption immediately following implementation of plain packaging. <sup>13</sup>

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

- Increasing funding for sustained mass media campaigns in advance of standardised packaging coming into effect;
- making stop smoking services mandatory and ensuring delivery to a high quality standard;
- supporting enforcement through adequate funding of trading standards departments, regional partnerships against illicit trade, and work on illicit trade by HMRC and the UK Border Force;
- introducing tax rises on tobacco products over and above the existing escalator, particularly to counteract any possible negative effects from brand-shifting or price cutting;
- restructuring taxation to minimise the variance in tax between handrolled tobacco and manufactured cigarettes and the taxation between different price categories of manufactured cigarettes; and
- introducing further levies on the industry to fund stop smoking services and other tobacco control initiatives, and to meet health costs caused by tobacco consumption.

Support for standardised packaging in the North West

Support for standardised packaging is at an all-time high with 64% of people in the North West in favour and only 10% opposing<sup>14</sup>. Nationally, public support is equally high, and perhaps surprisingly more people that smoke support standard packs (32%) than oppose (30%) with the remainder ambivalent or undecided. Our experience of talking to smokers on this issue suggests most people that smoke are very keen for their children not to start.

81% of young people in the North West think that the Government should do more to tackle smoking.<sup>15</sup>

Impact of standardised packaging on the illicit market

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

Research and leaked industry documents have now established that claims by industry that rates of illicit tobacco use are increasing markedly in the UK and will increase further following standardised

packaging should be seen simply as part of the tobacco industry's public relations campaign to prevent the policy.<sup>16</sup> Analysis shows that the number of press articles citing industry data on illicit increased suddenly once standardised packaging emerged on the policy agenda, that industry data significantly exaggerate the scale of illicit and claim trends are upwards when independent data show the opposite.<sup>16</sup> Further, evidence cited in industry submissions to support its claims that standard packaging will increase illicit has been shown to be very poor quality and effectively manufactured by the industry to support its case – all such 'evidence' was produced by industry or those funded by it and none was peer-reviewed.<sup>3</sup>

Official figures show the illegal tobacco market has in fact decreased in the UK as a result of effective enforcement over a number of years in spite of the efforts of the industry as highlighted in November 2013 by the Chair of the Public Accounts Committee who accused tobacco multinationals of deliberately oversupplying European markets, with the tobacco smuggled back into the UK. Committee Chair Margaret Hodge said:

"The supply of some brands of hand-rolling tobacco to some countries in 2011 exceeded legitimate demand by 240 per cent. HMRC must be more assertive with these manufactures. So far it has not fined a single one of them."

Part of this strategy has been to fund a growing number of third parties – organisations and individuals (notably ex-policemen) - who provide a more credible voice in debates, produce reports which are presented as independent while reinforcing industry messages. Yet the links to industry have rarely been disclosed.<sup>3 17</sup>

More broadly, growing evidence from a number of jurisdictions now suggests that tobacco company commissioned data and evidence on illicit, including that published by leading accountancy firms, will tend to over-estimate the scale of the illicit trade, exaggerate the upward trend (either by exaggerating current levels or by revising historical figures downwards) and mis-represent the nature of the trade in order to down-play the extent of tobacco industry involvement. <sup>18 19 20 21 22 23 24</sup>

In a public climb-down following criticism of its previous data which suggested that in 2012 rates of illicit in the UK had suddenly increased countering previous trends, KPMG's latest report, this time commissioned by all four transnational tobacco companies, has revised its illicit estimate for the UK illicit trade downwards stating that "alternative data sources suggest this [the 2012 estimate] may have overstated non-domestic incidence for the full year" <sup>25</sup> They claim that additional data which were not previously available to them "suggest there has been a more gradual decline from 2011 to 2013" (pages 300-302). It is a moot point whether these figures would have been revised without academic criticism of KPMG's data for industry both in the UK<sup>18</sup> and Australia<sup>26</sup> and this revision undermines the industry's public claims about illicit.

Growing evidence also suggests that the tobacco manufacturers continue to facilitate the illicit trade in their products and at best are failing to control their supply chains.<sup>27 18</sup> In October last year the Chair of the Public Accounts Committee said that: "The supply of some brands of hand-rolling tobacco to some countries in 2011 exceeded legitimate demand by 240%. HMRC must be more assertive with these manufacturers. So far it has not fined a single one of them." <sup>28</sup>

There is no plausible mechanism of action because all the key security features on existing packs of cigarettes would also be present on standardised packs. These include coded numbering and covert anti-counterfeit marks. Jane Ellison, Parliamentary Under-Secretary of State for Health, said in a November 2013 Parliamentary debate that: "I am grateful to those hon. Members who have made

the point that if we were to adopt standardised packaging, it would not mean plain packaging. Approaches such as anti-smuggling devices could be built into standardised packaging, if we choose to go down that route.” 29

Article 15 of the Tobacco Products Directive states that: “Member States shall ensure that all unit packets of tobacco products are marked with a unique identifier. In order to ensure the integrity of the unique identifier, it shall be irremovably printed or affixed, indelible and not hidden or interrupted in any form, including through tax stamps or price marks, or by the opening of the unit packet.” 30

Outside packaging is in any case a very poor indicator of whether a pack of cigarettes is genuine or illicit<sup>31</sup>. The only obvious circumstances in which external packaging could be useful in this respect is precisely if standardised packaging is introduced – which would of course enable easy visual identification of “cheap white” brands (ones with no licit market in the UK) and diverted licit brands (where the first destination market was in a country without standardised packaging, and the product has been diverted into illicit channels). The headlines from the latest Department of Health/Trading Standards Institute Tobacco Control Survey 2013/14, released on the 2nd July at the TSI Conference, show that the most common illicit product found by Trading Standards Officers is actually diverted licit brands which would not be in standardised packaging and would stand out for easy identification.

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

Andrew Leggett, Deputy Director for Tobacco and Alcohol Strategy at HM Revenue and Customs has said about standardised packaging that “we’re very doubtful that it would have a material effect [on counterfeiting and the illicit trade in tobacco]”. 32 This conclusion was supported by the House of Commons Home Affairs Select Committee, in its report on the illicit tobacco trade published in June 2014. The Committee reported that: “We believe that the decision on standardised packaging should be driven by health reasons and the imperative need to reduce the numbers of young people who start smoking. We note the statement of Sir Cyril Chantler to the effect that he was not convinced that standardised packaging would bring about an increase in the illicit market; even if this were the case, we believe that the proper response would be a more vigorous effort on enforcement rather than any lessening in the Government’s drive towards introducing standardised packaging.” 33

#### **Evidence from Australia on Illicit Tobacco**

The tobacco industry has repeatedly claimed that the level of illicit trade in Australia has increased since, and as a result of, the introduction of standardised packaging. For example, BAT told investors in March 2014 that total illicit activity in Australia had risen by more than 30 per cent since the introduction of standardised packaging. 34

These claims were examined during the Chantler Review and shown to be unsupported, a fact that was effectively admitted during Review meetings with representatives of the tobacco industry in Australia.<sup>35</sup> The Australian Government and customs officials have also rejected tobacco industry claims that illicit trade in Australia has risen since the introduction of standardised packaging.<sup>36</sup> In March 2014 the Sydney Morning Herald reported that there had been only one seizure of counterfeited plain packs since December 2012.<sup>37</sup>

In response to this article, the paper was contacted by Sonia Stewart, the former Head of Corporate Affairs & Legal for Imperial Tobacco Australia, who has now left the industry. In her job at IT Australia she had "commented numerous times in the media during 2011-2013 about the anticipated impact of plain packaging", claiming for example that "the legislation will make the counterfeiters' job both cheaper and easier by mandating exactly how a pack must look". 38 She wrote to the paper that "based on these figures from Australian Customs authorities, there doesn't appear to be any evidence that plain packaging itself has caused an increase in tobacco smuggling." She added: "Imperial Tobacco did expect to see an increase in tobacco smuggling because of plain packaging, but based on the figures from Australian Customs it looks like those predictions were simply wrong." 39

Research in Victoria, Australia found there was no increase in the availability of illicit tobacco in small retail outlets after the implementation of standardised packaging, 40 and despite predictions by the tobacco industry of a marked increase in the sale of counterfeit cigarettes, post-legislation in 2013 only 2.6% of cigarette smokers reported having purchased one or more packets in non-compliant packaging in the past three months. 41

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

Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised packaging in Australia in 2012 was associated with a sharp rise in the number of calls to the New South Wales Quit line service. 42 Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc.) suggested that the number of calls to Quit line NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later and a significant increase in calls was sustained over time.

Guillaumier A et al, University of Newcastle, Australia, reported in June 2014 that 'following the implementation of plain packaging, perceptions of the quality and taste of cigarettes have changed'. Thematic analysis of six focus groups with 51 participants revealed some participants reporting reductions in product quality. For example, 'I've noticed the reduction in the grading of the tobacco.' 43

Tobacco retailers in the UK have suggested that the introduction of standardised packaging means that it will take longer to serve customers and so convenience stores will lose custom. As the Impact Assessment concludes there is no evidence at all that this is the case from the experience in Australia; indeed transaction times have tended to decline post-implementation not increase. Most recently, research published at the end of May, which may not have been taken into account in the IA, reported that the claim that plain packaging would negatively impact on small tobacco retailers by making it harder to locate and retrieve cigarette packs, thereby increasing transaction times, has not eventuated in Australia. 44 45

#### **Other evidence from the UK**

Tobacco companies are spending considerable efforts in opposing any moves towards the introduction of standardised tobacco packaging. In the North West, JTI entered into a partnership arrangement with the Manchester Evening News which featured three weeks' worth of JTI-funded advertising on illegal tobacco and published a series of articles generated by the company. Tobacco Free Futures issued a written response to the Manchester Evening News, and a response was received. The response was unwilling to admit to entering a partnership with JTI or agree to the inclusion of a more balanced article which would have countered the misinformation provided by JTI and outline that the illicit market is on a sustained long-term decline, that there is no evidence that standardised packaging would lead to an increase in the illicit trade and that all tobacco – legal or illegal – will kill one in two of its long term users.

A briefing on the tobacco industry and their tactics in using illegal tobacco arguments to oppose tobacco control measures can be found here: <http://www.illegal-tobacco.co.uk/wp-content/uploads/2014/03/Illegal-Tobacco-The-facts-about-the-Tobacco-Industry-V3-28-05-14.pdf>

The tobacco industry has repeatedly claimed that the level of illicit trade in Australia has increased since, and as a result of, the introduction of standardised packaging. For example, BAT told investors in March 2014 that total illicit activity in Australia had risen by more than 30 per cent since the introduction of standardised packaging introduction. 46

Comprehensive regional illicit tobacco programmes change the social norms around illicit tobacco, reducing the size of the illicit tobacco market, reducing the proportion of smokers buying illicit tobacco and increasing the public's likelihood to report intelligence. For example, in the North West between 2009 and 2011, following partnership development, two bursts of social marketing activity and enhanced intelligence and enforcement models:

The number of smokers admitting that they bought illegal tobacco dropped from 19% to 17%.

The number of 16 to 24 year-old smokers admitting that they bought illegal tobacco dropped from 28% to 23%.

A willingness to report trading increased from 26% to 30% and remained high (74%) if selling to children.

The proportion of adults who buy illicit tobacco believing that 'everybody does it' shrunk from 65% in 2009 to 53% in 2011.

A major Trading Standards survey in the North West of England has shown that fewer young children are accessing illicit tobacco products. Between 2011 and 2013 there were reductions in:

The proportion of young people who have bought cigarettes from sellers such as neighbours, car boots and ice-cream vans from 42% to 27%.

The proportion of young people who have bought fake cigarettes, down from 28% to 22%.

The proportion of young smokers who have ever bought single cigarettes, from 67% to 49%<sup>47</sup>.

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

Tobacco Free Futures welcome the regulations and feel they are well drafted, which we consider, with only minor changes, to be fit for purpose. The changes we recommend are set out below.

We do have some suggestions to strengthen the regulations to achieve the desired outcome of protecting children and ensure they are possible to enforce once enacted.

The draft regulations apply only to cigarettes and hand rolling tobacco which can be used after retail sale for making cigarettes. In our response to the original consultation on standardised packaging, TFF said "all tobacco products should be treated in the same way to protect the health of ALL communities" and our view has not changed. We believe that the regulations should apply to all tobacco products, including pipe tobacco, cigars, cigarillos, blunts and other niche products and shisha. The latter in particular is of increasing attractiveness to young people, with 20% of 14 to 17 year olds reporting trying it in the Trading Standards North West Survey of 18,000 young people in Spring 2013.

The draft regulations do not propose any requirement relating to the size or length of cigarettes. Slim cigarettes could potentially be re-positioned as cigarillos thereby avoiding any need to comply with the regulations as currently drafted. We would recommend stipulating a minimum size of cigarettes.

The draft regulations do not propose requirements relating to the size of cigarette packets. We recommend that as in Australia, the regulations specify the dimensions of the pack to prevent manufacturers using this as a method of differentiation. While this differentiation may be pleasing to manufacturers, it is likely to cause difficulty for retailers in stocking products also.

The draft regulations at 10.3 (e) prohibits packaging that resembles a food or cosmetic container. This could lead to confusion as many perfume products for example, are packaged in cuboid boxes. Specifying the dimensions of the pack would remove the need for this clause.

Regulation 4(7) with regards to pack quantity, while prohibiting packs containing less than 20 cigarettes allows manufacturers to compete on number by including more than 20 cigarettes. In Australia this has been a tactic used by the industry and extra cigarettes have been introduced into some brands for the same price as a promotional tool. Such extra free cigarettes are known colloquially as "loosies" and Imperial Tobacco has gone further and registered a brand name called "Peter Stuyvesant + Loosie" and made 21 cigarettes to a pack. One way of preventing this would be by mandating that packs 'must contain 20 cigarettes' to prohibit additional cigarettes being included as a promotional tool

The requirements only apply to tobacco packaging at retail level. We feel it would be preferable to apply also in warehouses to reduce confusion over definitions of warehouses or in those premises where retail and wholesale sales are carried out, e.g. Costco.

The effect of Regulation 2(6) and (7) appears to be that a distance retail sale from outside the UK to a UK consumer is to be treated as if it were a supply in the UK. The business would therefore commit an offence. How would this be enforced by local TS Officers across international borders?

Regulation 23(2) provides the penalty of imprisonment on summary conviction to be half that for offences under the Consumer Protection Act 1987. The Act deals with offences in relation to consumer goods that are usually unsafe because of design or production defects rather than being unsafe because of their very nature, whereas the Regulations deal with offences in relation to goods that when used as intended by the manufacturers, are lethal. Not all toys or electrical goods etc are unsafe, all cigarettes are. It therefore seems inequitable that the penalty for the supplier of an unsafe toy is double that of the supplier of non-compliant cigarettes.

Local Authority Trading Standards Officers will be tasked with enforcing the legislation. We feel it is most important for government to recognise the vital role that LA TS Officers play in public health and invest in support to enable LA Ts Officers to carry out the enforcement role effectively.

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

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



We welcome the decision to review the policy after five years which will allow time for early impacts to become clear although it needs to be borne in mind that long term impacts such as reduced youth uptake, reductions in smoking prevalence and improvements in public health will take many years to manifest.

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

We do not agree with the inclusion in "other key non-monetised costs" of "possible losses from a potential increase in consumption of illicit product and/or product legitimately bought outside the UK".

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

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

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

The benefits of introducing standardised packaging identified in the impact assessment far outweigh the costs, many of which can be quantified at North West level:

Overall, the main smoking related diseases are conservatively estimated to cost the NHS across the North West £397 million per year.

The cost of smoking-related early deaths in the North West alone is calculated to be more than £602 million per year.

An additional £367 million is lost to the regional economy each year through increased levels of absence from work from smokers compared to their non-smoking counterparts.

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- <sup>8</sup> <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2645845/>
- <sup>9</sup> Public Health England Local Tobacco Control Profiles <http://www.tobaccoprofiles.info/profiles/tobacco-control/data#gid/1000110/pat/6/ati/102/page/9/par/E1200002/are/E0600049>
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- <sup>14</sup> YouGov survey for ASH, March 2014. Fieldwork undertaken between 5th-14th March 2014
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- <sup>28</sup> PAC publishes report on tackling tobacco smuggling. Public Accounts Committee press release. 10<sup>th</sup> October 2013
- <sup>29</sup> Hansard: backbench business debate. 7 November 2013 column 477
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<sup>34</sup> Greenbalf, E. Plain packaging making 'no impact' on Australian smokers, say tobacco chiefs; Sydney Morning Herald, 4th March 2014

<sup>35</sup> Chantler Review Notes-of-Australia-based-meetings: See, for example, exchange with Mark Connell of BAT Australia, page 38.

<sup>36</sup> See p.48 of the Explanatory Memorandum to the Australian Excise Tariff Amendment (Tobacco) Bill 2014 and p.6 of Sir Cyril Chantler's report.

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<sup>46</sup> Plain packaging making 'no impact' on Australian smokers, say tobacco chiefs; The Australian 4th March 2014

<sup>47</sup> [http://tobaccofreefuture.org/wp-content/uploads/2013/08/8353\\_TSNW-Young-Persons-Alcohol-Tobacco-Report\\_130805\\_V3.pdf](http://tobaccofreefuture.org/wp-content/uploads/2013/08/8353_TSNW-Young-Persons-Alcohol-Tobacco-Report_130805_V3.pdf)

EL173

**From:** [REDACTED]  
**Sent:** 06 August 2014 09:32  
**To:** Tobacco Packaging  
**Subject:** Please Do Not make Cigarettes in Plain Packaging

Dear Sir / Madam

I write from Heera International Food Store, we are a local convenience store and urge you to not make all cigarettes plain packaging.

the reasons for this are:

• Legitimate sales from shops lost to

• Illegal smugglers

• Products will be harder to find

• Longer transaction times will affect

• customer services

• Stock-taking will become a much more

• difficult and time consuming activity

• Smokers may look to purchase cheaper products

• and this will hit shop turnover and profits



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The Scottish Government  
Riaghaltas na h-Alba



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

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

a. Are you responding (required):

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

b. Please provide your details and contact information:

Name of respondent (required)

Address of respondent (required):

Contact email address (required):

Now go to question f

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

Name of organisation (required):

Name of person providing submission (required):

Job Title (required):

Contact address of organisation (required):

Contact email address (required):

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

Yes

No

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

Tobacco retailer (supermarket)

Tobacco retailer (convenience store)

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

If other, please tell us the type of business:

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

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

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

### Consultation questions

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

We agree with the observations in the report of the Chantler Review and believe that there is strong enough evidence to refute claims regarding increased tobacco consumption through lowering the price of tobacco and increasing the availability of counterfeit cigarettes. There is overwhelming evidence that tobacco packaging increases the appeal of tobacco products and that standardised packaging will reduce this appeal.

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

There is increasing evidence from those countries where legislation has been in place for a while to suggest that standardised packaging has a positive impact on public health by:

- Discouraging young people from taking up smoking;
- Encouraging people to give up smoking;
- Discouraging people who have quit or are trying to quit smoking from relapsing;
- Reducing people's exposure to smoke from tobacco products.

(Germain et al, 2010; Guillaumier et al., 2014; Wakefield et al., 2013; Zacher et al, 2014).

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?

Section 12. Are there measures in place to prevent tobacco manufactures providing branded cigarette holders – therefore enabling smokers to decant from a standardised package.



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

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

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

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

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

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

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

- o **Emailing your response to:**

TobaccoPackaging@dh.gsi.gov.uk

- o **Posting your response to**

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

**Consultation on the Introduction of regulations for standardised packaging of tobacco products  
response from Sefton Health and Wellbeing Board July 2014**

- 1.0. This is a response on behalf of the Sefton Health and Wellbeing Board. The main objective of the Board is to work together to improve the Health and Wellbeing of the Sefton population. The Board is chaired by Cllr Ian Moncur, Cabinet Member for Children, Families and Leisure and includes key Council Directors, CCG Board Members, NHS England and Sefton Healthwatch. Sefton Health and Wellbeing Board are supported by the Deputy Chief Executive of Sefton Council.
- 1.1. Sefton Health and Wellbeing Board recognise the significant impact tobacco has on health locally and nationally:
- Smoking remains the major preventable cause of premature death and disease in the UK, with half of all long term smokers dying from their addiction.<sup>1</sup>
  - Smoking is the leading cause of health inequalities. The richest smokers die earlier than the poorest non-smokers as found in Gruer et al (2009)<sup>2</sup> who concluded that the scope for reducing health inequalities related to social position is limited unless many smokers in lower social positions stop smoking.
  - Tobacco use is the leading cause of premature death and preventable disease. In Sefton it is estimated that 903 people die each year from smoking related illnesses - that's 2 deaths every day.<sup>3</sup>
  - Around 18,000 children in the North West are known to try smoking every year.<sup>4</sup> We need to do all we can to ensure that this number reduces to negligible levels.
  - 84% of people in Sefton who try smoking do so before the age of 14.<sup>5</sup>
- 1.2. The organisations represented on the Health and Well Being Board have worked together over the last ten years to successfully reduce smoking prevalence in Sefton. We believe that to successfully reduce the harm caused by tobacco, to the people who live and work in Sefton, we need to ensure that young people do not become addicted to tobacco. We believe introducing standardised packaging of tobacco products will help to support this aim.
- 1.3. We are therefore writing to demonstrate our support to the introduction of standardised packaging and set more detailed responses to each consultation question below. We also ask that standardised packaging for all tobacco products are implemented at the earliest opportunity.
- 1.4. We can confirm that we do not have any direct or indirect links to, or receive funding from the tobacco industry

<sup>1</sup> ASH Smoking Statistics 2014 [http://www.ash.org.uk/files/documents/ASH\\_93.pdf](http://www.ash.org.uk/files/documents/ASH_93.pdf)

<sup>2</sup> <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2645845/>

<sup>3</sup> Public Health England Local Tobacco Control Profiles <http://www.tobacoprofiles.info/profile/tobacco-control/data#gid/1000110/pat/6/at/102/page/9/par/E12000002/are/E06000049>

<sup>4</sup> Cancer Research UK 2011 <http://www.cancerresearchuk.org/about-us/cancer-news/press-release/more-than-200000-ukchildren-start-smoking-every-year>

<sup>5</sup> Tobacco and Young People in the North West of England (Global Youth Tobacco Survey of young people, 2011)

this argument, since there is no plausible mechanism of action, and evidence published since the 2012 consultation suggests that it is false.

- 3.2. There is no plausible means that standardised packaging, as set out in these regulations, will lead to an increase in illicit tobacco. All of the key security features on existing packs of cigarettes would also be present on standardised packs. These include coded numbering and covert anti-counterfeit marks.
- 3.3. Outside packaging is often a poor indicator of whether a pack of cigarettes is genuine or illicit<sup>9</sup>. Standardised packaging would enable easy visual identification of "cheap white" brands (ones with no licit market in the UK) and diverted licit brands (where the first destination market was in a country without standardised packaging, and the product has been diverted into illicit channels). The headlines from the latest Department of Health/Trading Standards Institute Tobacco Control Survey 2013/14, released on the 2<sup>nd</sup> July at the TSI Conference, show that the most common illicit product found by Trading Standards Officers is actually diverted licit brands which would not be in standardised packaging and would therefore stand out for easy identification.
- 3.4. Article 15 of the Tobacco Products Directive states that: "Member States shall ensure that all unit packets of tobacco products are marked with a unique identifier. In order to ensure the integrity of the unique identifier, it shall be irremovably printed or affixed, indelible and not hidden or interrupted in any form, including through tax stamps or price marks, or by the opening of the unit packet."<sup>10</sup> To ensure that we meet this Directive standardised packaging will be subject to the same stringent requirements as branding packaging to ensure that illicit packaging can be identified.
- 3.5. Article 8.3 of the Illicit Trade Protocol states that: "With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party".<sup>11</sup> Again standardised packaging will also need to meet these strict requirements ensuring that illicit tobacco can be identified.
- 3.6. It should be noted that Philip Morris International has developed a coding system called "Codentify", which the company has licensed for free to JTI, IT and BAT. The four tobacco multinationals have set up a "Digital Coding and Tracking Association", based in Zurich. According to PMI, the system is based on unique twelve digit codes, which enable enforcement authorities to determine key information including: date, time, factory and line of production and intended target market. Since the codes are based on a secure algorithm, it is claimed that it would be a simple matter to identify "fake" codes on illicit packaging. PMI's promotional material claims that "Codentify"... "makes the leap into the digital age and can meet the demands of governments that want to improve tax revenue collection, the robustness of verification processes and supply chain security ... When it comes to protecting government tax revenues, securing the supply chain and fighting illicit trade, Codentify offers a highly advanced, secure and cost-effective solution for the 21st century".<sup>12</sup>

<sup>9</sup> Joossens L. Smuggling, the Tobacco Industry and Plain Packs Cancer Research UK, Nov. 2012

<sup>10</sup> Text of the revised Eu Tobacco Products Directive: Article 15

<sup>11</sup> Text of the Illicit Trade Protocol: Article 8.3

<sup>12</sup> [http://www.pmi.com/eng/documents/Codentify\\_E\\_Brochure\\_English.pdf](http://www.pmi.com/eng/documents/Codentify_E_Brochure_English.pdf)

- 3.11. The tobacco industry in Australia has reported an increase in tobacco sales from 21.015bn sticks in 2012 to 21.074bn in 2013,<sup>19</sup> and the industry and its front groups in the UK have claimed that this showed standardised packaging was not working. Although the industry reported a small (0.28%) increase in sales year on year, they did not report the increase in the Australian population between 2012 and 2013. Adjusted for population, tobacco sales per person by their measure of consumption would in fact have fallen, from 920.4 per person in 2012 to 906.9 in 2013,<sup>20</sup>
- 3.12. The tobacco industry has also claimed that tobacco consumption in Australia has risen since the introduction of standardised packaging. Again, independent evidence does not support this view. In November 2013 a study by the consultancy firm London Economics, funded by Philip Morris, reported that since the introduction of plain packaging in Australia their survey showed no statistically significant change in smoking prevalence. This report has been sharply criticised by, among others, the Cancer Council of Victoria, since: The report used an online survey panel, which was not representative of the general population (for example, the panel's smoking prevalence rate was higher than the Australian average) The survey had a sample size of 5,000, which could only demonstrate statistical significance if smoking prevalence rates had fallen by around two percentage points in less than a year, which would be a sharper decline than has ever been recorded in such a short period in the history of tobacco control policy. To measure a statistically significant decline of, for example half a percentage point, would have required a sample of around 90,000.
- 3.13. The Australian Government's Department of Health has released figures showing that total consumption of tobacco and cigarettes in Australia in the first quarter of 2014 was the lowest ever recorded, as measured by estimated expenditure on tobacco products:
- \$5.135 billion in September 1959;
  - \$3.508 billion in December 2012 (when standardised packaging was introduced);
  - \$3.405 billion in March 2014.
- 3.14. This is supported by figures from the Australian Treasury showing that tobacco clearances (including excise and customs duty) fell by 3.4% in 2013 relative to 2012 when tobacco plain packaging was introduced. Clearances are an indicator of tobacco volumes in the Australian market.<sup>21</sup>
- 3.15. We would also like to draw your attention to evidence from Australia that demonstrates that motivations to quit smoking improved amongst smokers during the implementation of standardised packaging. Young JM et al, University of New South Wales and Cancer Institute New South Wales, reported in January 2014 that the introduction of standardised packaging in Australia in was associated with a sharp rise in the number of calls to the Quitline New South Wales service.<sup>22</sup> Statistical modelling to screen out the impact of other factors on the number of calls (such as health advertising campaigns, changes in price, etc) suggested that the number of calls to Quitline NSW rose by 75% from the week before standardised packs were first introduced in the Australian market to four weeks later.

<sup>19</sup> [Labor's plain packaging fails as cigarette sales rise: The Australian](#), 6 June 2014

<sup>20</sup> [Is Smoking Increasing in Australia?: Guardian Datablog](#), 6 June 2014

<sup>21</sup> [Tobacco facts and figures: Australian Department of Health](#), 19 June 2014

<sup>22</sup> [Young JM et al. Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis](#) Medical Journal of Australia 2014

- 4.4. The draft regulations do not propose requirements relating to the size of cigarette packets. We recommend that as in Australia, the regulations specify the dimensions of the pack to prevent manufacturers using this as a method of differentiation or as a way to interest younger smokers.
- 4.5. The draft regulations at 10.3 (e) prohibits packaging that resembles a food or cosmetic container. This could lead to confusion as many perfume products for example, are packaged in cuboid boxes. Specifying the dimensions of the pack would remove the need for this clause.
- 4.6. The requirements only apply to tobacco packaging at retail level. We feel it would be preferable to apply also in warehouses to reduce confusion over definitions of warehouses or in those premises where retail and wholesale sales are carried out, e.g. Costco.
- 4.7. The effect of Regulation 2(6) and (7) appears to be that a distance retail sale from outside the UK to a UK consumer is to be treated as if it were a supply in the UK. The business would therefore commit an offence. We feel that this would be difficult for enforcement by local Trading Standards teams and consideration on how this would be enforced would need further consideration.
- 4.8. Local Authority Trading Standards Officers will be tasked with enforcing the legislation and ensuring that only standardised packs are sold within their locality. We feel it is most important for government to recognise the vital role that Local Authority Trading Standard Officers play in public health and invests in support to enable Trading Standards Officers to carry out the enforcement role effectively to ensure high compliance to these regulations when introduced.
- 5.0. **Consultation Question 4: Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the consultation-stage impact assessment?**
- 5.1. The Sefton Health and Wellbeing Board welcome the overall recommendations of the consultation-stage impact assessment, particularly the statement that the implementation of standardised tobacco packaging is worth pursuing now and that the cost of delaying a decision is too great in public health terms. We agree with this whole heartedly and would ask that these regulations are implemented at the earliest opportunity.
- 5.2. The Sefton Health and Wellbeing Board agree with the decision to review the policy after five years as this will allow time for early impacts to become clear. We do want to highlight that the long term impacts of these regulations such as reduced youth uptake, reductions in smoking prevalence and improvements in public health will take many years to be clearly demonstrated.
- 5.3. We do not agree with the inclusion in "other key non-monetised costs" of "possible losses from a potential increase in consumption of illicit product and/or product legitimately bought outside the UK". The impact assessment considers the potential costs that may arise through increases in the demand for and the supply of illicit tobacco. However, we draw the consultation team's attention to:
- Chantler is not convinced that standardised packaging would increase the illicit market and found no evidence that standardised packaging is easier to counterfeit.

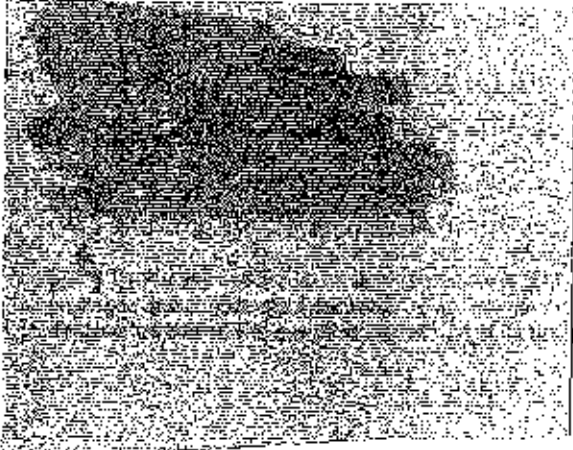
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**From:** [REDACTED]  
**Sent:** [REDACTED]  
**To:** Tobacco Packaging  
**Subject:** FW: UK Standardised Packaging

**From:** [REDACTED]  
**Sent:** [REDACTED]  
**To:** [REDACTED]  
**Subject:** RE: UK Standardised Packaging

**From:** [REDACTED]  
**Sent:** [REDACTED]  
**To:** Tobacco Packaging, [REDACTED]  
**Subject:** UK Standardised Packaging

Dear Sir,  
Please find the ITPAC Consultation Submission on UK standardised packaging of tobacco products.  
We are core members of ITPAC and we entirely agree with this submission.  
Regards



(where + is the IDD access)  
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