

UK STANDARDISED PACKAGING CONSULTATION

RESPONSE OF BRITISH AMERICAN TOBACCO UK LIMITED

08 August 2012

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Sterling Kingsize						Mayfair Kingsize					
Smoking kills						Smoking seriously harms you and others around you					
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Smoking kills						Smoking seriously harms you and others around you					
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Lambert & Butler Silver						Lambert & Butler Gold					
Smoking seriously harms you and others around you						Smoking seriously harms you and others around you					
£6.94						£6.94					

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ABOUT BRITISH AMERICAN TOBACCO UK LIMITED

British American Tobacco UK Limited is a member of the British American Tobacco group of companies and is responsible for the importation, distribution and sale of tobacco products in the UK (principally cigarettes, but also hand-rolling tobacco (HRT)). British American Tobacco UK Limited has an approximate 8% share of the UK market in cigarettes, with brands such as LUCKY STRIKE, DUNHILL, PALL MALL, ROTHMANS, CONSULATE, CRAVEN A, PETER STUYVESANT, PICCADILLY, ROYALS, ST MORITZ and VOGUE. British American Tobacco UK Limited also has a share of over 13% of the UK Market in HRT with the brands CUTTERS CHOICE, PALL MALL and SAMSON.

ABBREVIATIONS

British American Tobacco, BAT or We – British American Tobacco UK Limited.

Consultation – the Department of Health Consultation on standardised packaging of tobacco products, April 2012.

Equality Impact Assessment – the Department of Health Consultation on standardised packaging of tobacco products, Equality Impact Assessment, April 2012.

FCTC – the World Health Organisation Framework Convention on Tobacco Control Treaty.

Impact Assessment – the Department of Health Impact Assessment on standardised packaging of tobacco products, April 2012.

PHRC Review – the Department of Health commissioned review of the evidence on plain packaging undertaken by the Public Health Research Consortium (PHRC). Moodie, C., *et al.*, “Plain Tobacco Packaging: A Systematic Review” PHRC (2012).

Plain Packaging – standardised packaging as described in the Consultation.

Response – this document.

WHO – the World Health Organisation.

WTO – the World Trade Organisation.

EXECUTIVE SUMMARY

British American Tobacco is strongly opposed to Plain Packaging because:

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

The Department of Health Consultation document states that the objective of Plain Packaging is to improve public health by "*discouraging young people from taking up smoking....*" and "*encouraging people to quit.*"¹

We agree that youth should not smoke and that people who want to quit should be encouraged to do so. The Government has a key role to play in achieving these objectives. However, it does not make sense to pursue these goals through a Plain Packaging policy, as it is clear from the existing peer reviewed evidence, funded by both governments and tobacco control bodies, that packaging is not a factor that influences either youth initiation or quitting behaviour.

¹ Consultation at 5.

Indeed, a very recent survey report, the May 2012 *Special Eurobarometer 385 Survey of the Attitudes of Europeans Towards Tobacco*,² commissioned by the EU Health Department, concluded that the most significant elements that made UK smokers start smoking were:

- friends smoking (77%);
- parents smoking (24%); and
- affordability (12%).³

Even when specifically prompted to consider packaging as a significant element in their decision to start smoking, and notwithstanding that respondents could choose more than one element, 99% of UK respondents did not choose packaging as a relevant factor.

These conclusions are consistent with an earlier report for Health Canada, Goldberg, *et al.*⁴ which concluded that:

*"it is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarette from friends. There is no brand choice - the choice is simply to smoke or not to smoke."*⁵

Similarly, in relation to quitting, one of the UK Government's most recent survey reports establishes that the leading behavioural drivers for smoking cessation include concerns about the current and future health effects of smoking, the cost of smoking, and pressure from family to quit.⁶ None of the survey respondents quoted packaging as having any impact on the decision to quit.

2. The Department of Health has not considered the relevant research and relies on insufficient and unreliable evidence that fails to make the crucial link between packaging and any reduction in smoking

The Department of Health has not considered the relevant evidence discussed above. Nor for that matter has it identified significant new evidence since it considered this issue in 2009, when it first sought feedback on Plain Packaging.⁷ At that time the Department of Health concluded that there was no evidence that plain packaging reduced smoking uptake amongst minors or helped people to quit. Indeed the then Minister of State for Public Health stated:

² TNS Opinion & Social. Special Eurobarometer 385, "Attitudes of Europeans towards tobacco", (May 2012), available at http://ec.europa.eu/health/tobacco/docs/eurobaro_attitudes_towards_tobacco_2012_en.pdf.

³ *Ibid.* at 70.

⁴ Goldberg M, Liefeld J, Kindra G, Madill-Marshall J, Lefebvre J, Martohardjono N, Vredenburg H. "When packages can't speak: Possible impacts of plain and generic packaging of tobacco products - Expert panel report for Health Canada", (March 1995), available at <http://legacy.library.ucsf.edu/tid/rce50d00/pdf;jsessionid=5121065E400BCA2A7C7D8B158D82549A.tobacco03>.

⁵ *Ibid.* at 184.

⁶ The UK Office for National Statistics, "Opinions Survey Report No. 40 Smoking-related Behaviour and Attitudes, 2008/09", (2009) at Table 3.5 at 20, available at <http://www.ons.gov.uk/ons/rel/lifestyles/smoking-related-behaviour-and-attitudes/2008-09/smoking-related-behaviour-and-attitudes--2008-09.pdf>.

⁷ The Department of Health's 2008 Future of Tobacco Control Consultation.

*“No studies have been undertaken to show that plain packaging of tobacco would cut smoking uptake among young people or enable those who want to quit to do so. Given the impact that plain packaging would have on intellectual property rights, **we would undoubtedly need strong and convincing evidence of the benefits to health**, as well as its workability, before this could be promoted and accepted at an international level.”⁸*

Instead, the Department of Health relies on much of the same Plain Packaging literature it found to be insufficient in 2009, which, in the views of many experts, is not methodologically sound and, in any event, does not justify the introduction of Plain Packaging because it fails to make the key link between packaging and actual smoking behaviour.

By way of example, in the opinion of Dr. Jonathan Klick, a Professor of Law and Economics at the University of Pennsylvania and Erasmus Chair of Legal Studies at Erasmus University, Netherlands, there are fundamental limitations in the Plain Packaging literature.⁹ Given this, the assertion by the authors of the PHRC Review that the consistency of findings across the studies provides confidence about the observed potential effects of Plain Packaging is unjustified. As noted by Dr. Klick:

“consistent results from studies that uniformly have the same methodological problems provide zero confidence in any conclusion except, perhaps, that the research designs were flawed in consistent ways.” (Klick Opinion at 4)¹⁰

A combination of unreliable and flawed studies does not and cannot create a reliable evidence base upon which to properly support policy decisions.

Acknowledging that there is a lack of evidence on the public health impact of the measure, the Department of Health’s solution is to appoint an ‘expert panel’. However, it is hard to see how a so-called ‘expert panel’ will be able to provide the much needed evidence to support this unjustified and disproportionate policy measure. As further detailed in this Response, such panels are notoriously inaccurate predictors of real world outcomes – a factor exacerbated by the explicit acceptance that experts in this instance will not be disqualified on the basis of bias or conflict of interest.¹¹

3. Plain Packaging would exacerbate an already significant illicit trade problem in the UK

It is accepted by a wide range of commentators, academics, law enforcement officials and members of the business community – and also by the authors of the Impact Assessment – that Plain Packaging is a policy option that comes with a real risk of increasing illicit trade.

It is generally accepted that one of the biggest risks with Plain Packaging is that it would increase price sensitivity and consumers’ focus on price across all cigarette market

⁸ Parliamentary Debate (26 June 2009), available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s09.htm>.

⁹ For the views of other experts, see footnote 43.

¹⁰ Dr. Klick’s Opinion is attached to this Response as Appendix A.

¹¹ See our response to Question 14.

segments. Accordingly, Plain Packaging would provide a huge advantage to the person able to supply the lowest cost product – i.e., the illicit trader.

In addition, illicit traders would benefit from a policy which makes it easier for them to manufacture undetectable fakes and which creates a new demand for illegally imported branded products from outside the UK.

This concern is shared by a group of 24 former senior police officers and customs officers, who have observed that:

“The introduction of standardised packaging would make it even easier for criminals to copy and sell these products to the unsuspecting public, including children. This would place further pressure on already stretched law enforcement agencies and at a time when the Government needs to secure much needed tax revenues.”¹²

An increase in illicit tobacco would also exacerbate the already substantial loss of excise revenue to the Exchequer and undermine public health by:

- supplying tobacco products to minors;
- increasing smoking prevalence through the supply of cheap products; and
- exposing consumers to unregulated products with no controls on hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

The risk that Plain Packaging would increase illicit trade of tobacco is one of the express concerns raised in the Impact Assessment.¹³ Indeed, a spokesperson for the Department of Health recently stated:

“In coming to a view on the impact of standardised packaging, the availability of illicit tobacco will obviously be important, but we do want to see good, hard evidence on this.”¹⁴

However, the Department of Health has not attempted to quantify this risk, stating that:

“It is hard to predict the potential on the complex and dynamic nature of the illicit trade in contraband and counterfeit tobacco.”¹⁵

¹² Waller, M., et al., "Standardised packaging would make it even easier for criminals to copy and sell tobacco products to the unsuspecting public" The Times, (28 June 2012).

¹³ Impact Assessment at 3 (“Any risk that standardised packaging could increase illicit trade of tobacco will be explored through consultation as there is insufficient evidence on which to include analysis in this IA”); at para. 45 (“The main uncertainties associated with the policy explored herein (beyond the impact upon smoking behaviour itself) relate to impacts upon price and the illicit tobacco trade.”).

¹⁴ Milton, Anne. Parliamentary Under-Secretary of State for Health. Hansard, Commons Debates, (17 April 2012), column 299-300, available at: <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120417/debtext/120417-0004.htm>.

¹⁵ Impact Assessment at 19 para 75.

4. Plain Packaging would have other significant adverse unintended consequences such as lowering prices and thereby increasing smoking, reducing government revenue, and harming small business

As noted above, Plain Packaging would drive prices down across all cigarette market segments. This clearly risks undermining the whole rationale for Plain Packaging by making cigarettes more affordable for everybody, but especially for those people this policy option is specifically targeting – *i.e.*, youth and potential quitters.

This is also a risk clearly identified by the authors of the Impact Assessment when they state that:

“...To the extent standardised packaging can be expected to influence this interaction [supply and demand], it could be argued that the result will be a fall in prices and an increase in consumption.”¹⁶

The downward pressure on prices caused by Plain Packaging would also have additional adverse unintended consequences for the profitability of all businesses in the UK involved in the tobacco industry. These include:

- tobacco manufacturers who would be deprived of the value of their brands and would be required to transform their current brand led business model in the UK;
- small retailers who would expect lower margins as well as a loss of business to larger chains and illicit traders;
- the carton and packaging industry, who have invested heavily to meet the needs of the tobacco industry, including the regulatory requirements directed by Government;
- component suppliers (such as filter, paper, dyes, ingredients, etc.);
- creative packaging designers and developers; and
- machinery manufacturers in the EU (who design and manufacture machinery used to manufacture tobacco products).

5. Plain Packaging is unlawful as it would not only breach several UK, EU and international laws and agreements but would constitute a wholesale expropriation of BAT's valuable intellectual property, requiring payment by the Government of very significant compensation

The Government cannot introduce Plain Packaging merely because lawful products are controversial. Plain Packaging would amount to a wholesale expropriation of an industry's brands and trade marks and also represents an unprecedented assault on commercial expression. Introducing Plain Packaging would put the UK in breach of several international trade agreements, EU, ECHR and UK obligations such as those pertaining to the right to property and free commercial expression, free movement of goods and harmonised EU trade mark protection.

¹⁶ *Ibid.* at 17.

Therefore plain packaging would place the UK at risk of expensive litigation, leading to the measure being overturned, as well as significant claims for compensation for depriving the tobacco companies of their trade marks, copyrights, packaging patents and design rights, and valuable goodwill built over years in their brand portfolios. One cannot exclude the possibility of the UK not only facing domestic challenges under UK, ECHR and EU law, but also international legal challenges similar to those that Australia may soon face for breaching international trade obligations under WTO rules or foreign investment protection obligations provided by the myriad bilateral investment treaties to which the UK has subscribed.

The Department of Health is mistaken in trying to justify the introduction of Plain Packaging by referring to the WHO Framework Convention on Tobacco Control (FCTC).¹⁷ The provisions of the FCTC do not impose an obligation on Parties to adopt Plain Packaging. The binding Articles of the FCTC do not even mention Plain Packaging. The Guidelines on Articles 11 and 13 of the FCTC, which the Department of Health acknowledges are not binding, only propose that Parties should “*consider adopting*” Plain Packaging, and recognise that such measures may be restricted by domestic or international laws.

Indeed, the WHO has assessed the UK (and other countries) as fully compliant with FCTC obligations without Plain Packaging.¹⁸

6. Given the acknowledged risks, the Department of Health has not demonstrated that the benefits would outweigh the adverse consequences of Plain Packaging

Given the numerous concerns regarding Plain Packaging, the Department of Health is required to present a robust and compelling case establishing that Plain Packaging is legal, would reduce smoking prevalence and that any public health gains would not be undermined by adverse unintended consequences.

The Department of Health has not demonstrated that the benefits would outweigh the downsides of Plain Packaging.

The Impact Assessment is silent on whether plain packaging is lawful. As noted above (and discussed further in our response to Question 6) Plain Packaging is unlawful and cannot be introduced.

As for the public health benefits and potential for adverse unintended consequences arising from the introduction of Plain Packaging, the Impact Assessment considers these to be the “*main uncertainties associated with the [plain packaging] policy*.”¹⁹

One would expect that any government wishing to push ahead with Plain Packaging would want to be certain that it would have the desired public health outcome. However, the best that the authors of the Impact Assessment can come up with in this respect is a conclusion that:

*“The evidence review suggests a **possible** impact on consumption in the intended direction. A substantial impact on consumption is **plausible** but*

¹⁷ Consultation at 5-6; Impact Assessment at 4.

¹⁸ World Health Organization. “WHO Report on the global tobacco epidemic”, (2011), available at http://www.who.int/tobacco/global_report/2011/en/.

¹⁹ Impact Assessment at 13, para 45.

we need a better idea of its likely scale (from our expert panel), its cost implications and any impact on duty free imports.”²⁰ (emphasis added)

The Department of Health's proposal to fill its evidentiary gaps by eliciting the subjective views of a group of tobacco control proponents is inherently biased and unreliable, and, in any event this 'evidence' has not even been provided in order to inform responses to the Consultation.

Furthermore, the Impact Assessment acknowledges that there are real risks of adverse unintended consequences of Plain Packaging, including increased cigarette consumption as a result of price competition and increased illicit trade. However, the Department of Health has not quantified any of these risks and there is no proposal for how these risks will be assessed or managed.

As the Department of Health has acknowledged:

*“without a quantified assessment of the range of impact, and of the differential impact of different options, **we will not be in a position to assess whether any intervention option justifies the costs imposed and the freedoms circumscribed.**”²¹*

The required assessment of the range of impacts of Plain Packaging does not exist. Nor is there any evidence of the “*differential impact of different options*”, as the Department of Health has considered Plain Packaging to the exclusion of all other options. Thus, by the Department of Health's own admission, it is not “*in a position to assess whether any intervention option justifies the costs imposed and the freedoms circumscribed.*”

In the opinion of Mr. Stephen Gibson, an economist and consultant, who has over 24 years of extensive experience in leading major economic and strategy projects across a broad range of industries, and whose expert report is submitted with this Response (see Appendix B):

“As can be seen the evidence on both costs and benefits is incomplete, subject to biases and flaws and subject to large margins of error - in some cases the numbers assumed are simply plucked out of the air with no supporting justification. Effectively the [Impact Assessment] is saying that the [Department of Health] have no idea what the costs or benefits of standardised packaging will be.” (Gibson Opinion at 4)

Pursuing a Plain Packaging policy now, would risk undoing the gains that have been made in reducing overall smoking rates, and in particular youth smoking rates. A large amount of new tobacco control regulation has also been introduced in recent years, including the ban on retail displays that is presently in the process of implementation. The Government should wait to see if the retail display ban, and other regulation that has been introduced, yields the results the Department of Health promised it would deliver before considering yet another novel and questionable measure.

²⁰ *Ibid.* at 23.

²¹ E-mail From: UK Department of Health, To: Mark Petticrew (PHRC), (13 May 2011) (emphasis added).

7. There a number of alternative evidence-based options that are proportionate, effective, workable and can achieve public health objectives

Given all of the difficulties associated with pursuing Plain Packaging, we strongly recommend that the Government consider the following alternative measures to achieve its public health objectives. These alternatives (discussed in our response to Question 1) are:

1. Implementing more targeted youth education programmes;
2. Implementing a consistent tax policy;
3. Increasing measures to prevent the trade of illicit tobacco;
4. Enforcing existing laws forbidding retailers to sell to children;
5. Introducing a prohibition on 'proxy purchasing' for tobacco products;
6. Exploring the use of more targeted warnings to address any perceived information deficits; and
7. Using existing laws to address claims that particular trade marks or colours used on tobacco packaging mislead consumers.

These measures are feasible, apt to contribute to the Government's objectives and would not give rise to the many major issues highlighted above.

1. QUESTION 1

Which option do you favour?

- o Do nothing about tobacco packaging (i.e. maintain the status quo for tobacco packaging);*
- o Require standardised packaging of tobacco products; or*
- o A different option for tobacco packaging to improve public health.*

BAT favours option one maintaining the status quo for tobacco packaging as Plain Packaging would not work. We do however recommend a number of alternative measures that would be effective.

There is no reliable evidence that Plain Packaging would help reduce smoking prevalence rates. Furthermore, this is a policy option that comes with real risks of adverse unintended consequences (as evidenced in the Impact Assessment).

The Government should assess and review the impact of existing policies on the pre-existing downward trends in smoking prevalence rates, and focus on policies that work rather than introduce a policy that risks reversing the gains that have been made.

The WHO Framework Convention on Tobacco Control (FCTC) does not require Plain Packaging.

In addition, there are several other measures set out below that we recommend the Government should consider. These measures would more effectively contribute to the Government's policy goals but do not present the risks of adverse unintended consequences associated with Plain Packaging, or unjustifiably and impermissibly deprive legitimate businesses of their extremely valuable intellectual property.

1.1 Plain Packaging would not work and would have serious unintended consequences

As we explain in more detail in our response to Question 3:

- There is a significant body of evidence commissioned by various governments which demonstrates that youth initiation, adult quitting and relapse are driven by factors other than packaging.
- The body of evidence that the Department of Health relies on does not provide reliable evidence that tobacco packaging causes young people to begin smoking, impedes smokers from quitting, or drives former smokers who have quit to relapse.

Many respected commentators and academics also agree that there are very real risks of adverse unintended consequences which might not only undermine the essential public health rationale for this policy option but also impact many other elements of government and society (see our response to Questions 5, 7, 8, 9 10 and 11).

1.2 Smoking prevalence is reducing without the need for risky additional measures

The Government's current Tobacco Control Plan for England sets the following targets for reducing adult and youth smoking prevalence:

- To reduce adult smoking prevalence in England to 18.5 percent or less by the end of 2015; and
- To reduce rates of regular smoking among 15 year olds in England to 12 percent or less by 2015.²²

The number of adult smokers has decreased from 39% in 1980 to 21% in 2009²³ and the number of regular smokers among 15 year olds has already reduced to the Government's target of 12%.²⁴ Overall youth (11 to 15 year olds) smoking rates have reduced to 5% in 2010 (well below the Government's earlier target of 9%).²⁵ These downward trends in adult and youth smoking prevalence are depicted in the Government's own data presented in the Impact Assessment.²⁶

As we explain in more detail in our response to Question 5, the downward pressure Plain Packaging would have on cigarette prices and the impetus it would provide to illicit trade would actually increase consumption and thereby reverse these downward trends.

The Government has also introduced a large amount of tobacco control regulation in recent years, including the ban on smoking in enclosed public spaces introduced in 2007, the introduction of graphic health warnings on packaging in 2008, the ban on cigarette sales from vending machines in 2011, and the ban on tobacco retail displays that is presently in the process of implementation. The Secretary of State is required to review the effectiveness of the retail display ban every five years after implementation,²⁷ and the Government should wait until the impact of all of these regulatory measures is known.

1.3 The FCTC does not require Plain Packaging

The Department of Health is mistaken in trying to justify the introduction of Plain Packaging by referring to the Framework Convention on Tobacco Control (FCTC).²⁸ The provisions of the FCTC do not impose an obligation on Parties to adopt Plain Packaging. The binding

²² HM Government. "Healthy lives, healthy people: A tobacco control plan for England", (March 2011), at 6, available at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_124917.

²³ The NHS Information Centre, Lifestyles statistics. "Statistics on smoking: England", (2011), at 14, available at http://www.ic.nhs.uk/webfiles/publications/003_Health_Lifestyles/Statistics%20on%20Smoking%202011/Statistics_on_Smoking_2011.pdf

²⁴ National Centre for Social Research and the National Foundation for Educational Research. "Smoking, drinking and drug use among young people in England in 2010", (2011), at Table 2.2, available at <http://www.ic.nhs.uk/pubs/sdd10fullreport>.

²⁵ Department of Health. "Smoking kills: A white paper on tobacco", (1998), at 82, available at http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4006684.

²⁶ Impact Assessment at 6-7 (Figures 1 and 2).

²⁷ Regulation 10 of the Tobacco Advertising and Promotion (Display) (England) Regulations 2010.

²⁸ Consultation at 5-6; Impact Assessment at 4.

Articles of the FCTC do not even mention Plain Packaging. The Guidelines on Articles 11 and 13 of the FCTC, which the Department of Health acknowledges are not binding, only propose that Parties should “*consider adopting*” Plain Packaging, and recognise that such measures may be restricted by domestic or international laws.

Indeed, the WHO has assessed the UK (and other countries) as fully compliant with FCTC obligations to ban tobacco advertising, promotion and sponsorship, without a Plain Packaging policy.²⁹

1.4 Effective alternative measures

There are a number of effective alternative measures that the Government could implement to further reduce tobacco use and youth access to tobacco.

The following measures, some of which are identified in the Government’s current Tobacco Control Plan for England, are more effectively aimed at reducing tobacco use and youth access than Plain Packaging, and do not require the unlawful and unjustified expropriation of companies’ intellectual property rights:

- (a) **Implementing more targeted youth education programmes** aimed at preventing young people from taking up smoking. A significant body of research, including research by the Nobel prize-winning economist James Heckman, establishes that early childhood interventions that affect personality traits and cognitive skills supportive of health can be effective policy tools in preventing unhealthy behaviour, such as smoking.³⁰
- (b) **Implementing a consistent tax policy** that maintains the price of tobacco products at levels that impact on smoking prevalence, while taking account of and controlling for impacts on illicit trade.
- (c) **Increasing measures to prevent the trade of illicit tobacco.** Illicit tobacco is a major problem in the UK. The HMRC estimate of the non-UK duty paid market share for cigarettes for 2009/10 is up to 16% and for Hand Rolled Tobacco is up to 50%.³¹ The latest results from the tobacco industry-commissioned empty pack collection survey show non-UK duty paid cigarettes at 14.9% of the market. Illicit tobacco undermines public health by:
 - supplying tobacco products to minors;
 - increasing smoking prevalence through the supply of cheap products; and

²⁹ World Health Organization. “WHO Report on the global tobacco epidemic”, (2011), available at http://www.who.int/tobacco/global_report/2011/en/.

³⁰ Heckman J. “Skill formation and the economics of investing in disadvantaged children” *Science*, 312(5782), 1900-1902 (2006); Feeny T. “The case for investing in early childhood. A snapshot of research by Professor James Heckman (University of Chicago, USA) and Dr. Richard Tremblay (University of Montreal, Canada)”, (April 2006), available at http://www.thesmithfamily.com.au/webdata/resources/files/Heckman_Tramblay_Snapshot_April_2006_B4F68.pdf.

³¹ HM Revenue & Customs, “Measuring Tax gaps”, (21 September 2011), at 25-26, available at <http://www.hmrc.gov.uk/stats/mtg-2011.pdf>; The problem is growing in scale and adversely impacts the revenues and budgets of every EU member state, costing Member States €10 billion annually in lost revenue. European Commission Press Release: European Commission and British American Tobacco sign agreement to combat illicit trade in tobacco, Ref: IP/10/951, 15 July 2010.

- exposing consumers to unregulated products with no controls on hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

Accordingly, we see it as vitally important that governments do not implement policies that create conditions that encourage illicit trade and that they establish strong border controls and effective enforcement of laws to combat illicit trade.

- (d) **Enforcing existing laws forbidding retailers to sell to children.** The Government has taken welcome actions to reduce under age access to tobacco products by raising the minimum age for sale to 18 years, and strengthening the penalties for retailers who break the law. We support more rigorous enforcement of these laws, which already contain tough but largely unused sanctions for breach.
- (e) **Introducing a prohibition on ‘proxy purchasing’ for tobacco products** (*i.e.* the purchase of cigarettes on behalf of underage youth). At present, it is illegal for an adult to purchase alcohol for a minor, but it is not illegal to purchase tobacco products on behalf of those under 18 years of age. A proxy purchasing offence has been introduced in Scotland and we strongly support its introduction in England and Wales. Proxy purchasing is common among 11 to 15 year olds in the UK. A recent survey carried out for the NHS Information Centre reported that:

“‘Proxy purchase’, that is getting someone else to buy cigarettes on their behalf, is common among 11 to 15 year olds who smoke. 10% of all pupils asked someone to buy them cigarettes from a shop in the last year, including 72% of smokers. Most pupils who ask someone else to buy cigarettes from a shop are successful, at least some of the time; 90% of those who had tried in the last year had been bought cigarettes at least once. The people most likely to buy cigarettes on behalf of 11 to 15 year olds were older friends (69%) or strangers (58%).”³²

The Secretary of State for Health, the Rt Hon Andrew Lansley MP, has previously supported a ban on proxy purchasing. During the second reading of the Health Bill in 2009, he stated:

“...there is an anomaly between the proxy purchasing of tobacco and the proxy purchasing of other products, alcohol in particular. If adults buy alcohol for children, that is a criminal offence, but the same does not apply to the purchase of tobacco. We see absolutely no grounds for such a perverse anomaly; it is important that adults should not give young people alcohol, but it is probably even more important that they do not give them cigarettes. We will press for the ban on proxy purchasing to extend to tobacco.”³³

- (f) **Exploring the use of targeted warnings to address any perceived information deficits.** To the extent that the Government is concerned about any specific information deficits about the health risks of smoking (despite the well-established nature of the public’s awareness of these risks), it can remedy these concerns

³² National Centre for Social Research and the National Foundation for Educational Research. “Smoking, drinking and drug use among young people in England in 2010”, (2011), at 9.

³³ UK House of Commons, Daily Hansard - Debate, 8 June 2009. Column 561. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090608/debtext/90608-0011.htm>.

through focussed warning messages that would provide the appropriate, purportedly “unknown” information to targeted populations.

- (g) **Using existing laws to address claims that particular trade marks or colours used on tobacco packaging mislead consumers.** The Government should not be introducing additional regulation when there is already regulation that can be enforced. Regulation 11 of the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, provides:

“11.— Product descriptions

(1) No person shall supply a tobacco product the packaging of which carries any name, brand name, text, trademark or pictorial or any other representation or sign which suggests that tobacco product is less harmful to health than other tobacco products....”

**** ** ***

The measures outlined above are sensible steps that could be taken to achieve the apparent aims of plain packaging, and do not have the real risks inherent in Plain Packaging. In any event, Government impact assessment guidance requires the consideration of alternative policy options, including a ‘wait and see’ option. The Department of Health has not done this, but rather has presented Plain Packaging as the only option apart from the ‘do nothing’ baseline (see our response to Question 14). By failing to consider alternatives, the Department of Health has not demonstrated that satisfactory outcomes cannot be achieved by alternative measures. Such failure is inconsistent with Government policy to only regulate:

“having demonstrated that satisfactory outcomes cannot be achieved by alternative, self regulatory, or non-regulatory approaches”³⁴

³⁴ Department for Business Innovation and Skills, “Principles of Regulation”, available at <http://www.bis.gov.uk/policies/bre/principles-of-regulation>.

2. QUESTION 2

If standardised tobacco packaging were to be introduced, would you agree with the approach set out in paragraphs 4.6 and 4.7 of the consultation?

For reasons that are elaborated upon in more detail throughout this Response, BAT strongly opposes the introduction of Plain Packaging. Accordingly, we do not agree with the Department of Health's approach to Plain Packaging as set out in paragraph 4.6 of the Consultation. The exception to this proposed approach in relation to "*the course of business solely within the tobacco trade*", as set out in paragraph 4.7 of the Consultation, does not change our view.

It is also premature for the Department of Health to have developed a proposed approach before it receives and fully considers all of the stakeholders' responses, together with the supporting evidence that will be submitted as part of the Consultation. This strategy suggests that the Department of Health may be pre-disposed toward implementing the very proposal upon which it is consulting and for which an impact assessment is being conducted. The Department of Health should not be examining how such a Plain Packaging policy should be implemented before answering the threshold, much more fundamental question of whether such a policy is justified in the first place. This calls into question whether the consultation is, in fact, a genuine one.

3. QUESTION 3

Do you believe that standardised tobacco packaging would contribute to improving public health over and above existing tobacco control measures, by one or more of the following:

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

Putting aside the fact that Plain Packaging is unlawful (see our response to Question 6), it is not possible to assess the contribution of Plain Packaging “*over and above existing measures*” when, for example, the retail display ban is not yet fully implemented and its impact has not been determined. Nevertheless, BAT does not believe that Plain Packaging would contribute to improving public health by ANY of the means outlined above.

This is because:

- First, the evidence relied upon by the Department of Health fails to substantiate a link between Plain Packaging and any of the actual smoking behaviours referred to above. Instead, the studies rely on subjective evaluations of the hypothetical and speculative effect of Plain Packaging on smoking behaviours – a fact explicitly acknowledged by the authors of the PHRC Review upon which the Department of Health relies.
- Second, there is a significant body of evidence already in existence, commissioned by governments and tobacco control groups, which makes it explicitly clear that the behaviours the Department of Health wants to influence by Plain Packaging – i.e., youth initiation, quitting and relapse – are influenced by factors other than packaging.
- Third, it is accepted in the Impact Assessment, and by many commentators that Plain Packaging is likely to: (a) exert downward pressure on cigarette prices by forcing manufacturers to compete on price as the last remaining branding elements are taken away; and (b) further stimulate the already significant levels of illicit trade. In this scenario, there is a very real risk of increased public harm from increased cigarette consumption, including greater levels of consumption of unregulated illicit products in particular.

Following the Department of Health's consultation in 2008, the Government concluded that more evidence was needed to justify pursuing Plain Packaging as a policy option. No meaningful new studies have been undertaken since then and, more importantly, the PHRC Review that has been commissioned by the Department of Health completely ignores all the government funded and other independent studies that specifically examine the causes of the behaviour the Consultation is

seeking to address. Proceeding on the basis of this inadequate analysis would be contrary to the stated policy of the Government that regulation should be based on good quality evidence and a *robust and compelling case*.³⁵

3.1 The studies relied on in the PHRC Review are flawed and irrelevant

When the Department of Health examined Plain Packaging in connection with its Consultation on the Future of Tobacco Control in 2008 it concluded that:

“the research evidence into this [plain packaging] initiative is speculative, relying on asking people what they might do in a certain situation.”³⁶

At that time Gillian Merron, Minister of State for Public Health explained that:

“No studies have been undertaken to show that plain packaging of tobacco would cut smoking uptake among young people or enable those who want to quit to do so. Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need strong and convincing evidence of the benefits to health, as well as its workability, before this could be promoted and accepted at an international level...”³⁷

The need for evidence on the additional public health benefits of Plain Packaging is confirmed in the Government’s current Tobacco Control Plan for England, which states:

“The Government will look at whether the plain packaging of tobacco products could be effective in reducing the number of young people who take up smoking and in supporting adult smokers who want to quit. The Government wants to make it easier for people to make healthy choices but wants to understand whether there is evidence to demonstrate that plain packaging would have an additional public health benefit. We will explore the competition, trade and legal implications, and the likely impact on the illicit tobacco market of options around tobacco packaging.”³⁸

Notwithstanding these clear statements, the studies on Plain Packaging that have been undertaken since the 2008 consultation, and that are relied on in the PHRC Review, contain the same methodological flaws and limitations as the studies considered in the 2008

³⁵ Refer, Department for Business Innovation & Skills, “Reducing Regulation Made Simple”, (December 2010) available at <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/r/10-1155-reducing-regulation-made-simple.pdf>; and Department for Business Innovation & Skills, “Principles of Better Regulation” available at <http://www.bis.gov.uk/policies/bre/principles-of-regulation>.

³⁶ Department of Health. “Consultation on the future of tobacco control”, (May 2008), at 41, available at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085114.

³⁷ UK Special Minister for State, House of Commons, Public Bill Committee Debate, Column 305, 25 June 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s09.htm>.

³⁸ HM Government. “Healthy lives, healthy people: A tobacco control plan for England”, (March 2011), at para 3.6, available at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_124917.

consultation. The evidence base is no more reliable now than it was at the time of the 2008 consultation.

This is confirmed by the PHRC Review, which recognises that there is no direct evidence establishing that Plain Packaging would contribute to improving public health by reducing the uptake of smoking or improving quit rates.

The majority of the PHRC Review instead considers the evidence in relation to whether Plain Packaging would contribute to reducing the appeal of branded cigarette packages relative to unbranded packages; increasing the salience of warnings; and improving perceptions of product harm and strength. This evidence does not demonstrate any impact on smoking behaviours, nor does it establish an information deficit or any misperceptions about the health risks associated with cigarettes (see our response to Question 4 for more detail).

To the limited extent that the PHRC Review addresses the critical issue of whether Plain Packaging would affect smoking behaviour, the PHRC Review only states that:

“the studies in this review show that plain packaging is perceived by both smokers and non-smokers to reduce initiation among non-smokers and cessation-related behaviours among smokers.”³⁹

The perceptions of individuals, which the PHRC Review acknowledges as being mixed,⁴⁰ are not predictive of actual behaviour. Indeed the PHRC Review expressly cautions against the use of this evidence in the manner that the Department of Health is using it, stating that:

“Some caution is required in interpreting these findings, as expressed smoking-related intentions are not always predictive of future smoking behaviour (Ajzen & Madden 1986, Sheeran 2002) and perceptions of the impact of a future policy measure on the behaviour of others are of course subjective.”⁴¹

The PHRC Review also notes numerous limitations of the studies reviewed.⁴² A number of other experts also have reviewed the Plain Packaging literature and similarly concluded that the studies are flawed and unreliable.⁴³

³⁹ PHRC Review at v. (emphasis added)

⁴⁰ *Ibid.* at iv.

⁴¹ *Ibid.* at 87.

⁴² *Ibid.* at 88-89 (e.g., absence of trials and longitudinal research; samples unrepresentative of the general population; unreliability of self-reporting, etc.).

⁴³ See, e.g., Keegan WJ. “Analysis of consumer survey evidence relevant to the UK Department of Health Consultation on the future of tobacco control”, (2 September 2008), available at http://www.jti.com/files/5113/3164/0652/Keegan_analysis_uk_DoH_suppl.pdf; Padilla J, Watson N. “A critical review of the literature on generic packaging for cigarettes”, (2008), available at http://www.plain-packaging.com/downloads/LECG_Literature_Review_on_generic_packaging_2010.pdf; Keegan WJ. “Analysis of consumer survey evidence relevant to the UK Department of Health Consultation on the future of tobacco control”. Supplemental report, (18 June 2009), available at http://www.jti.com/files/5113/3164/0652/Keegan_analysis_uk_DoH_suppl.pdf; De Vinney T. “Analysis of consumer research evidence on the impact of plain packaging for tobacco products”, (30 November 2010), available at <http://www.jti.com/files/3313/3164/0525/Devinney.pdf>; Keegan WJ. “Analysis of consumer survey evidence relevant to DG SANCO’s proposal to increase the size of health warnings on tobacco packaging”, (24 November 2010), available at <http://www.jti.com/files/4413/3164/0545/Keegan.pdf>; Basham P, Luik J. “Erasing intellectual property: ‘Plain packaging’ for consumer products and the implications for

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One such expert, Dr. Jonathan Klick, a Professor of Law and Economics at the University of Pennsylvania and the Erasmus Chair of Empirical Legal Studies at Erasmus University Rotterdam (the Netherlands) in reviewing the quality of the studies relied on in the PHRC Review concluded:

- *“The fundamental shortcoming of the literature is summed up nicely in the Public Health Research Consortium (PHRC) report Plain Tobacco Packaging: A Systematic Review when it states, ‘it has not yet been possible to evaluate the impact of the policy in practice’ (p. v). In fact, most of the studies in this literature examine the subjects’ stated views of plain packaging but observe no actual smoking choices. The two existing studies that observe some behavioural effect present significant problems for the claim that plain packaging will reduce smoking.” (Klick Opinion at 1)*
- *The literature on this subject is flawed and unreliable, “rife with methodological errors and biases that limit the ability of an impartial referee to draw any conclusions about the likely effect of a plain packaging regulation.” (Ibid. at 3)*
- *“The literature suggests that there is no scientific basis upon which to conclude that plain packaging will lead to a reduction in smoking by discouraging young people from taking up smoking, encouraging people to quit smoking, or by discouraging relapse among people who have quit smoking.” (Ibid. at 4)*

Dr. Klick’s opinion (the “Klick Opinion”) is submitted with this Response (see Appendix A).

Given these fundamental limitations, the assertion in the PHRC Review that the consistency of findings across the studies provides confidence about the potential effects of Plain Packaging is unjustified and entirely speculative. A combination of unreliable and flawed studies does not create a reliable evidence base upon which to properly support policy decisions. As noted by Dr. Klick,

“Consistent results from studies that uniformly have the same methodological problems provide zero confidence in any conclusion except, perhaps, that the research designs were flawed in consistent ways.” (Klick Opinion at 4)

In addition, the PHRC Review does not consider at all the well established evidence, including from reports commissioned by the Government and overseas governments, on

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trademark rights”, Democracy Institute, Washington Legal Foundation, (2011), available at <http://www.wlf.org/Upload/legalstudies/monograph/LuikBashamMonographFnl.pdf>; Bloomquist E. “Global tobacco: The plain risk to global tobacco”, Berenberg Bank, (2011) available at <http://www.smoke-free.ca/plain-packaging/documents/2011/Philip%20Morris%20-%20Annex%2012%20-%20Bloomquist,%20Berenberg%20Bank%20-%20The%20Plain%20Risk%20to%20Global%20Tobacco%20-%2021%20March%202011.pdf>; Deloitte. “Tobacco packaging regulation. An international assessment of the intended and unintended impacts”, (2011), available at [http://www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO8GHH3V/\\$FILE/medMD8GHFFW.pdf?openelement](http://www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO8GHH3V/$FILE/medMD8GHFFW.pdf?openelement); Mizerski R. “Plain cigarette packaging as a remedy to reduce smoking”, (2011), available at [http://www.plain-packaging.com/downloads/Richard%20Mizerski%20-%20Plain%20Cigarette%20Packaging%20as%20a%20Remedy%20to%20Reduce%20Smoking%20\(2011\).pdf](http://www.plain-packaging.com/downloads/Richard%20Mizerski%20-%20Plain%20Cigarette%20Packaging%20as%20a%20Remedy%20to%20Reduce%20Smoking%20(2011).pdf); Basham P, Luik J. “The plain truth, does packaging influence smoking”, Democracy Institute, (2012).

what actually drives smoking initiation, cessation and relapse. As outlined below this evidence establishes that packaging is not a relevant factor in driving these behaviours.

The fact that the PHRC Review does not consider all relevant evidence and that it finds support for Plain Packaging notwithstanding the acknowledged limitations of the studies relied on, is not surprising given the well known status of some of the authors as tobacco control proponents and advocates of Plain Packaging.⁴⁴ However, it is concerning that the Department of Health is actually purporting to rely upon the PHRC Review for purposes of making a properly informed decision on the Consultation.

3.2 Plain Packaging would not discourage young people from taking up smoking

It is clear from numerous government funded studies that factors other than packaging are the real drivers of smoking initiation.

These studies have demonstrated that the real drivers of smoking initiation include factors such as parental influences, risk preferences, peer influences, socioeconomic factors, access and price.⁴⁵

Most recently, the May 2012 *Special Eurobarometer 385 Survey of the Attitudes of Europeans Towards Tobacco*,⁴⁶ which was requested by the European Commission, Directorate-General Health and Consumers, reported that the most significant elements “*that made*” UK smokers start smoking were: friends smoking (77%), parents smoking (24%), and affordability (12%).⁴⁷ Even when prompted to consider packaging as a significant element in their decision to start smoking, and notwithstanding that respondents could choose more than one element, 99% of UK respondents did not choose packaging as a relevant factor.⁴⁸

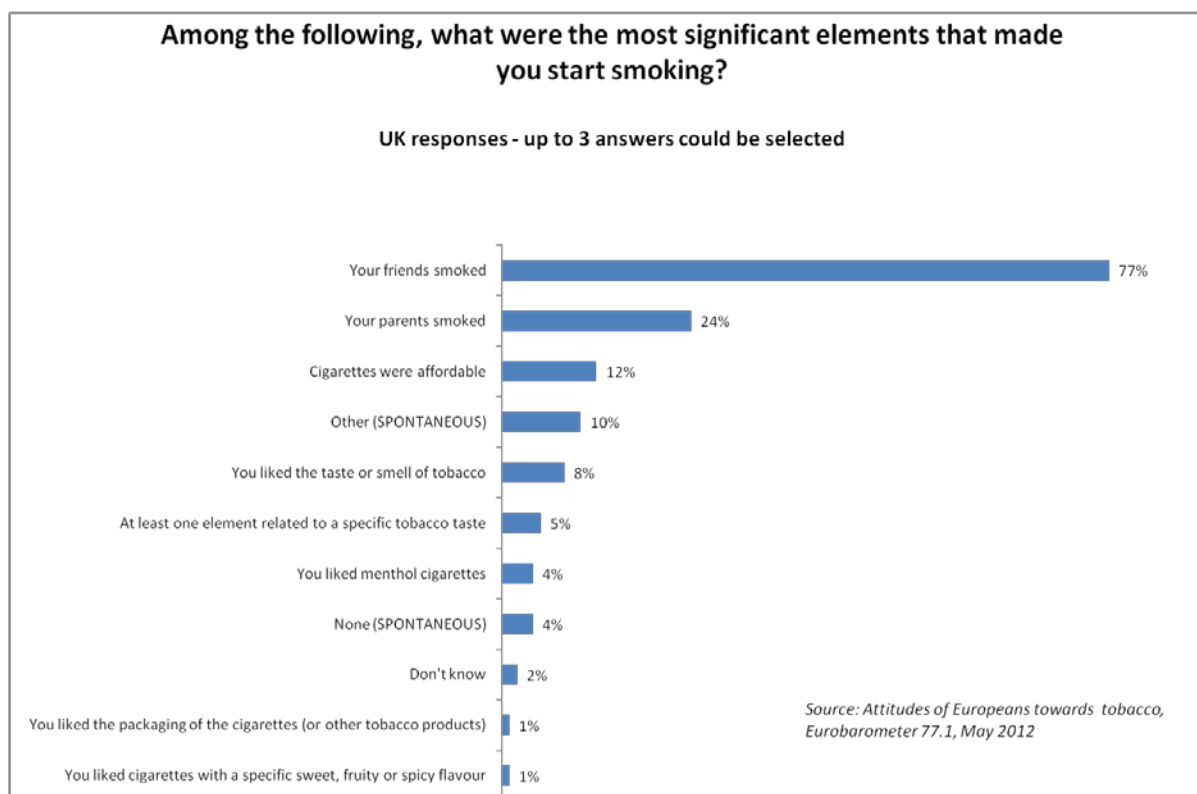
⁴⁴ See, e.g., Moodie C, Hastings G. “Plain Packaging: A Time for Action”, *European Journal of Public Health*, 20(1), 10-11 (2010).

⁴⁵ See, e.g., US Department of Health and Human Services. “Preventing tobacco use among young people: A report of the Surgeon General”. (1994) (summarizing approximately 160 studies on the subject of the psychosocial risk factors associated with underage tobacco use); see also US Department of Health and Human Services. “Preventing tobacco use among youth and young adults: A report of the Surgeon General”. (2012), at Ch. 4 (reinforcing findings of 1994 Surgeon General’s report with added emphasis on individual cognitive processes); Propel Centre for Population Health Impact, University of Waterloo. “Smoking profile for Canada: Youth smoking survey” (2008/2009), at 7, available at http://www.yss.uwaterloo.ca/results/YSS2008-2009_national_smoking_profile.pdf; Bates B, Blenkinsop S, Clemens S, Deverill C, Hills A, Li N, Mackenzie H, Wilson S. “Smoking, drinking and drug use among young people in England in 2006”. Editor: E Fuller, London: National Centre for Social Research, (2007), available at <http://www.ic.nhs.uk/webfiles/publications/smokedrinkdrug06/Smoking%20Drinking%20and%20Drug%20Use%20among%20Young%20People%20in%20England%20in%202006%20%20full%20report.pdf>; Eureka Strategic Research, “Youth tobacco prevention literature review”, (June 2005), available at [http://www.health.gov.au/internet/main/publishing.nsf/Content/578B39761374A043CA2570BF007CE6A4/\\$File/literature.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/578B39761374A043CA2570BF007CE6A4/$File/literature.pdf).

⁴⁶ TNS Opinion & Social. *Special Eurobarometer 385, “Attitudes of Europeans towards tobacco”*, (May 2012), available at http://ec.europa.eu/health/tobacco/docs/eurobaro_attitudes_towards_tobacco_2012_en.pdf.

⁴⁷ *Ibid.* at 70.

⁴⁸ Since respondents could choose multiples elements, there is no way of knowing whether the 1% of UK respondents that chose packaging did so to the exclusion of all other elements or how those respondents ranked it in significance to other elements.



The results of this Eurobarometer survey are consistent with other research, including a recent survey carried out for the Government, “Smoking, drinking and drug use among young people in England in 2010”, which found that there is strong evidence that pupils’ smoking habits are influenced by the smoking behaviour of their families and friends. Virtually all smokers (99%) said they knew at least one person who smoked, compared with 81% of non-smokers. Among pupils who said that no one they lived with smoked, 94% did not smoke, compared with 69% of those who lived with three or more smokers.

Also, in a 2008 paper, James Heckman, a Nobel Prize-winning economist who specialises in research regarding why young people behave as they do, reviewed a vast amount of literature on the causes of youth smoking and concluded that:

“The available evidence in the developing literature on adolescent risky behavior, including smoking, supports a multicausal model for youth smoking, as many factors have been empirically linked to youth smoking in this literature. These factors include price, parental influences, risk preferences, peer influences, and access.”⁴⁹

In fact, even research commissioned by proponents of Plain Packaging has acknowledged that packaging has little to do with youth smoking initiation. For example, in preparing a report for Health Canada, Goldberg, *et al.*⁵⁰ concluded that:

⁴⁹ Heckman J, Flyer F, Loughlin C. “An assessment of causal inference in smoking initiation research and a framework for future research”, *Economic Inquiry*, (2008), 46(1), 37-44, at 39.

⁵⁰ Goldberg M, Liefeld J, Kindra G, Madill-Marshall J, Lefebvre J, Martohardjono N, Vredenburg H. “When packages can’t speak: Possible impacts of plain and generic packaging of tobacco products - Expert panel report for Health Canada”, (March 1995), available at

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*"It is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarette from friends. There is no brand choice - the choice is simply to smoke or not to smoke."*⁵¹

The authors of this report also expressly acknowledge that survey respondents' self-reported intentions cannot be relied on to assess the impact of Plain Packaging on smoking behaviour. They state that:

*"[the] absolute extent of this influence [of plain packaging] cannot be validly determined by research that is dependent on asking consumers questions about what they think or what they might do if all cigarettes were sold in the same plain and generic packages."*⁵²

Similarly the recent Cancer Research UK report, "The Packaging of Tobacco Products", notes that:

*"To some extent the pack appeared peripheral compared with the cigarette in youth smoking, particularly at the initiation/experimentation stage. . . . Some said they never really saw the pack being used it was just the cigarette that was passed around. . . ."*⁵³

None of this evidence is considered in the PHRC Review. Further, the studies relied on to support Plain Packaging do not examine the influence of any of the above mentioned, well recognised, drivers of smoking initiation or address how Plain Packaging would impact on them. Rather the studies only asked people whether they thought that Plain Packaging would reduce smoking initiation. These studies, which the PHRC Review acknowledges as providing mixed outcomes, do not provide evidence of actual smoking behaviours. As Dr. Klick states:

"The link between these impressions and intentions and actual smoking behavior has not been validated. As stated in the PHRC report, 'Without any form of validation (such as validating reported changes in cigarette consumption) [self-reported impressions and intentions] have quite weak predictive validity (p. 89).' Given this, it is not possible to draw reliable conclusions about the effects of plain packaging on smoking in the real world..." (Klick Opinion at 3)

Thus, it is clear that there is no reliable evidence that Plain Packaging would discourage young people from starting smoking. This is so because it is not the cigarette packaging that is driving youth initiation in the first place.

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<http://legacy.library.ucsf.edu/tid/rce50d00/pdf;jsessionid=5121065E400BCA2A7C7D8B158D82549A.tobacco03>.

⁵¹ *Ibid.* at 184

⁵² *Ibid.* at 129.

⁵³ The Centre for Tobacco Control Research Core funded by Cancer Research UK, "The packaging of tobacco products", (March 2012), at 31, available at http://info.cancerresearchuk.org/prod_consump/groups/cr_common/@nre/@new/@pre/documents/generalcontent/cr_086687.pdf.

In fact there is a real risk that Plain Packaging would generate a 'forbidden fruit' effect that would promote youth initiation. While proponents of tobacco control often speculate that Plain Packaging restrictions might help de-normalise cigarette smoking, especially for youth, the opposite effect is possible as adolescents tend to gravitate toward a product that is 'off limits' to them. For example, Sussman, *et al.*, (2010)⁵⁴ found that adolescents who believed that society views smoking as inappropriate for youth were significantly more likely to smoke than those who did not. Plain Packaging could generate this effect especially among youth and young adults who may rebel against such restrictions.

3.3 Plain Packaging would not increase cessation rates or discourage relapse

Numerous government funded and independent studies also show that factors other than packaging are the real drivers of decisions relating to quitting and relapse.

Packaging plays no part in the decision of smokers to quit smoking. As the Government's UK Office of National Statistics survey⁵⁵ shows, the recognised drivers of smoking cessation for UK smokers include concerns about current and future health effects of smoking, the cost of smoking, and pressure from family to quit. This report asked smokers who wanted to quit for their reasons for wanting to stop smoking, and smokers who wanted to quit, but had not succeeded for more than one day, for their reasons for not trying to give up smoking. The reasons given are set out in the tables below. None of the main reasons stated for wanting to quit or for not trying to quit smoking involved packaging.⁵⁶

⁵⁴ Sussman S, Grana R. "Forbidden fruit and the prediction of cigarette smoking" *Substance Use & Misuse*, 45(10), 1683-1693, (2010).

⁵⁵ The UK Office for National Statistics, "Opinions Survey Report No. 40 Smoking-related Behaviour and Attitudes, 2008/09", (2009).

⁵⁶ *Ibid.* Table 3.5 at 20.

Table 3.5 Main reasons for wanting to stop smoking: by sex, 1996-2008/09

Smokers who want to stop smoking

Reasons for wanting to stop smoking	2003	2004	2005	2006	2007 *	2007 **	2008/09 **
All							
Better for health in general	67	68	75	69	70	71	71
Less risk of getting smoking related illness	22	27	34	26	22	22	25
Present health problems	16	15	14	15	19	17	12
At least one health reason	84	88	87	85	86	86	83
Financial reasons	28	26	29	26	28	27	31
Family pressure	15	18	23	17	20	20	16
Harms children	18	16	20	14	16	15	22
Ban on smoking in public places	..	..	..	..	6	7	6
Doctor's advice	6	6	7	5	5	5	6
Pregnancy	1	1	1	2	2	2	2
Other	3	2	3	3	1	1	2
Gave more than one reason	52	55	68	52	59	58	61
<i>Unweighted base</i>						379	620
<i>Weighted base (000s) **</i>						7,554	7,174
<i>Weighted base *</i>	596	589	409	410	356		

Percentages sum to more than 100 as smokers could give more than one answer.

1996-2006 percentages and bases weighted for unequal chance of selection

* weighted for unequal chance of selection

** weighted to population totals

.. code added in 2007

Table 4.12 Main reasons for not trying to give up smoking: 2002-2008/09

Smokers who want to give up but who have not succeeded for more than one day

Reasons for not trying to stop smoking	2002	2003	2004	2005	2006	2007 *	2007 **	2008/09 **
	%	%	%	%	%	%	%	%
Life too stressful/just not a good time	29	36	26	35	33	33	34	29
Lack of commitment to quitting	29	27	31	31	34	33	33	32
I like smoking	15	18	23	21	15	24	24	16
Couldn't cope with the cravings	15	15	8	18	13	10	10	15
Would miss the habit/something to do with my hands	13	11	9	10	10	9	9	14
My friends smoke	6	7	6	4	6	7	6	14
Worried about putting on weight	5	3	5	7	9	4	4	5
My spouse/partner smokes	5	3	5	6	3	7	6	10
Other	16	10	12	6	9	8	8	8
Gave more than one reason	21	21	18	28	26	21	19	24
<i>Unweighted base</i>							140	270
<i>Weighted base (000s) **</i>							2,736	2,995
<i>Weighted base *</i>	300	251	239	162	178	136		

2002-2006 percentages and bases weighted for unequal chance of selection

* weighted for unequal chance of selection

** weighted to population totals

Percentages sum to more than 100 as respondents could give more than one answer.

These reported drivers of cessation and reasons for not making a quit attempt are consistent with other independent research.⁵⁷

Evidence, that again includes the Government's UK Office of National Statistics survey,⁵⁸ establishes that the drivers for smoking relapse include intrapersonal negative states such as frustration, anger, depression and boredom, interpersonal conflicts, and social settings. This survey reported the main reasons for smokers starting smoking again in Table 4.11 of the report. None of the main reasons stated for relapse involved packaging.⁵⁹

Table 4.11 Main reasons for starting smoking again: 2002-2008/09

<i>Smokers who gave up for at least one day in past year</i>								
Reasons for starting smoking again	2002	2003	2004	2005	2006	2007 *	2007 **	2008/09 **
<i>Percentage giving reason for starting smoking again</i>								
Life too stressful/just not a good time	34	38	34	34	42	36	34	38
Missed the habit/something to do with my hands	17	17	16	13	14	14	14	12
I like smoking	16	15	15	15	12	23	24	20
My friends smoke	14	11	14	14	19	15	17	18
Couldn't cope with the cravings	12	14	9	13	12	12	11	12
Put on weight	3	3	3	2	3	6	5	3
My spouse/partner smokes	4	5	5	4	4	4	4	6
Was drinking/ in pub*	–	–	–	4	3	1	1	1
Reason for quitting no longer applied*	–	–	–	4	2	0	0	4
Other	20	18	23	14	10	14	14	9
Gave more than one reason	16	14	16	14	19	18	17	14
Unweighted base							293	430
Weighted base (000s) **							6,175	5,213
Weighted base *	433	421	420	292	280	284		

2002-2006 percentages and bases weighted for unequal chance of selection
 * weighted for unequal chance of selection
 ** weighted to population totals
 Percentages sum to more than 100 as respondents could give more than one answer.
 * These categories were created in '2005' and '2006' when reassigning 'Other' responses, and were not in the original list which interviewers used to code responses.

Again neither the PHRC Review nor the studies relied on to support Plain Packaging consider these drivers of cessation and relapse, or address how Plain Packaging would impact on them. In addition, there are no Plain Packaging studies that address smoking relapse. A number of the studies that address smoking cessation find that Plain Packaging would have no or little impact on existing smokers.⁶⁰ The studies that do find some likely

⁵⁷ See, e.g., Sutton S, Marsh A, Metheson J. "Explaining smokers' decisions to stop: Test of an expectancy-value approach", *Social Behaviour*, 2, 35-49, (1987); Halpern M, Warner K. "Motivations for smoking cessation: A comparison of successful quitters and failures", *Journal of Substance Abuse*, 5, 247-56, (1993); McCaul KD, Hockemeyer JR, Johnson RJ, Zetocha K, Quinlan K, Glasgow RE. "Motivation to quit using cigarettes: A review", *Addictive Behaviours*, 31(1) 42-56, (2006); Caponnetto P, Polosa R. "Common predictors of smoking cessation in clinical practice", *Respiratory Medicine*, 102, 1182-1192, (2008); Pisinger C, Aadahl M, Toft U, Jørgensen T. "Motives to quit smoking and reasons to relapse differ by socioeconomic status", *Preventive Medicine*, 52, 48-52, (2010).

⁵⁸ The UK Office for National Statistics, "Opinions Survey Report No. 40 Smoking-related Behaviour and Attitudes, 2008/09", (2009) available at <http://www.ons.gov.uk/ons/rel/lifestyles/smoking-related-behaviour-and-attitudes/2008-09/smoking-related-behaviour-and-attitudes--2008-09.pdf>.

⁵⁹ *Ibid.* at Table 4.11; see also Curry S, McBride C. "Relapse prevention for smoking cessation: Review and evaluation of concepts and interventions", *Annual Review of Public Health*, 15, 345-66, at 352, (1994); Hawkins J, Hollingworth W, Campbell R. "Long-term smoking relapse: A study using the British Household Panel Survey". *Nicotine and Tobacco Research*, epub, 1-8, (2010).

⁶⁰ PHRC Review at 78.

deterrent effect of Plain Packaging generally rely on respondents' stated impressions and future intentions as well as respondents' subjective views as to how they think other people would react to Plain Packaging. Again, as the PHRC Review acknowledges, these subjective impressions and intentions have weak predictive validity.⁶¹

The evidence establishes that the drivers for quitting smoking and relapse do not involve packaging. Furthermore, there is no credible evidence that Plain Packaging would encourage smoking cessation or discourage relapse.

3.4 Plain Packaging would not reduce people's exposure to smoke from tobacco products

For the reasons set out above, Plain Packaging would not reduce smoking prevalence or consumption. Accordingly, it would not reduce people's exposure to smoke from tobacco products. In fact, there is a real risk that Plain Packaging, by driving down prices and incentivising illicit trade, would increase smoking prevalence and consumption and therefore people's exposure to smoke from tobacco products.

3.5 It is not possible to assess the potential contribution of Plain Packaging "*over and above existing measures*" until the retail display ban is fully implemented

The Consultation makes specific reference to the fact that Plain Packaging would need to have an impact "*over and above existing tobacco control measures*" to be considered. One element of the Government's tobacco control strategy is the retail display ban, which has not yet been fully implemented. The retail display ban regulations came into effect for large stores in England on 6 April 2012, will be implemented on 31 October 2012 in Northern Ireland, 3 December 2012 in Wales and at a future yet-to-be-announced date in Scotland. Small stores will not become subject to the retail display ban regulations in each of the four jurisdictions until 2015. It is impossible to evaluate the effectiveness of the retail display ban as a tobacco control measure until after the regulations have come into effect for all shops across the UK. On this basis, it is not possible to assess the potential contribution of Plain Packaging "*over and above existing measures*" when these measures are not yet fully implemented.

The retail display ban regulations also create an obligation for the Secretary of State to review the effectiveness of the ban at least every five years after its introduction.⁶² Until the retail display ban is fully introduced and its impact on smoking rates can be assessed, any theoretical contribution of Plain Packaging cannot be determined.

** ** *

For all of these reasons, Plain Packaging would not contribute to reducing smoking rates. The evidence that the Government called for at the time of the 2008 consultation still does not exist. The studies on Plain Packaging that have been undertaken since the 2008 consultation contain the same methodological flaws and limitations as the studies considered in the 2008 consultation. There is also a well established body of government funded and independent research that demonstrates that packaging is not associated with smoking initiation, cessation or relapse. Such research has simply been ignored in the Department of Health commissioned PHRC Review.

⁶¹ *Ibid.* at 89.

⁶² Regulation 10 of the Tobacco Advertising and Promotion (Display) (England) (Amendment) Regulations 2010.

4. QUESTION 4

Do you believe that standardised packaging of tobacco products has the potential to:

- o Reduce the appeal of tobacco products to consumers?*
- o Increase the effectiveness of health warnings on the packaging of tobacco products?*
- o Reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking?*
- o Affect the tobacco-related attitudes, beliefs, intentions and behaviours of children and young people?*

BAT does not believe that Plain Packaging would have any of the effects referred to in this question - on the contrary there is a real risk that Plain Packaging would generate a 'forbidden fruit' effect that would increase the appeal of tobacco products to youth.

The fundamental question to be addressed by Government in deciding whether or not to introduce Plain Packaging is the one asked at Question 3 – i.e., would Plain Packaging change smoking behaviours so as to reduce smoking rates. Thus, Question 4 is only relevant if it is considered in conjunction with Question 3. As explained in our response to Question 3, there is no credible evidence that Plain Packaging would have any impact on smoking behaviours.

4.1 Plain Packaging would not reduce the appeal of using tobacco products

There is no evidence that Plain Packaging would have any effect on the appeal of cigarette smoking itself. The studies relied on in the PHRC Review only evaluate the comparative appeal between branded and plain packs, not tobacco products or smoking itself. Asking people to compare branded packs to plain packs is the wrong question. The studies do not address the appeal of cigarette smoking itself if all cigarettes are sold in Plain Packaging. Furthermore, the studies do not relate comparative evaluations between branded and plain packs to smoking behaviours or establish how people would behave if all cigarettes are sold in plain packs and such packaging is not unusual.

As noted in the response to Question 3, there is a real risk that Plain Packaging would generate a 'forbidden fruit' effect that would increase the appeal of tobacco products to youth.

4.2 Plain Packaging would not increase the effectiveness of health warnings on the packaging of tobacco products

Implicit in Question 4 is the proposition that Plain Packaging would make smokers more aware of the risks of smoking or that having previously been aware of these risks, seeing health warnings on plain packs would make them more likely to quit or not start smoking.

The suggestion that Plain Packaging could have any such impact is misguided because:

- There is no information deficit regarding the risks of smoking in the UK;
- Independent studies have demonstrated that additional, more granular

information about the risks of smoking does not influence smoking rates or consumer behaviour; and

- More prominent warnings do not have an impact on smoking behaviours.

Public awareness in the UK about the risks of smoking cigarettes is effectively universal. A number of public opinion polls demonstrate awareness of the hazards of smoking at levels close to 100%. As a statistical matter, estimates in the 90% range represent a practical level of “saturation” with respect to people’s reported awareness of health risks. Indeed the US Surgeon General has stated that it may be:

*“unrealistic to set a goal above 90 percent of smokers for public knowledge.”*⁶³

The Public Health Research Consortium (2010) report for the Department of Health “Evaluating the Impact of Picture Health Warnings on Cigarette Packets”, found that:

- Both pre and post the implementation of the picture health warnings in England in 2008, virtually all survey participants could name at least 1 health effect associated with smoking - 99% pre 1st October 2008 and 97% post 1st October 2008; and
- Over 90% of young people agreed that smoking causes heart disease, mouth or throat cancer and gum/mouth disease. 100% of young people agreed that smoking causes lung cancer.⁶⁴

The NHS Statistics on Smoking: England, 2011, states:

*“When asked about their beliefs about smoking, the majority of pupils reported strong agreement with the negative effects of smoking. Almost all the pupils thought smoking can cause lung cancer (99%), makes your clothes smell (97%), harms unborn babies (97%), can harm non-smokers health (96%) and can cause heart disease (93%).”*⁶⁵

Given the public’s well-established knowledge of the risks of smoking, further attempts to modify consumer behaviour that are premised on the notion that people lack adequate information about smoking are misguided. Independent studies have demonstrated that more information about the risks of smoking does not influence consumer behaviour.⁶⁶ The US Surgeon General addressed this topic in her 1994 report titled “Preventing Tobacco Use

⁶³ U.S. Department of Health and Human Services, “Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General”. DHHS Publication No. (CDC) 89-8411, (1989), at 221.

⁶⁴ Public Health Research Consortium. “Evaluating the Impact of Picture Health Warnings on Cigarette Packets”, National Centre for Social Research, (2010) at 51.

⁶⁵ The NHS Information Centre, Lifestyles Statistics, “Statistics on Smoking: England”, (2011), at 49, available at http://www.ic.nhs.uk/webfiles/publications/003_Health_Lifestyles/Statistics%20on%20Smoking%202011/Statistics_on_Smoking_2011.pdf.

⁶⁶ See e.g. Secker-Walker R, Gnich W, Platt S, Lancaster T. “Community Interventions for reducing smoking among adults”. Cochrane Database Systematic Reviews, Issue 2, CD001745, (2002), at 47; The COMMIT Research Group. “Community Intervention Trial for Smoking Cessation (COMMIT): II. Changes in adult cigarette smoking prevalence”. *American Journal of Public Health*, 85(2), 193-200, (1995), at 198, 199.

Among Young People, A Report of the Surgeon General". There, the US Surgeon General explained her conclusion as follows:

*"In the 1960s and early 1970s, strategies to prevent the onset of cigarette smoking were often based on the premise that adolescents who engaged in smoking behaviour had failed to comprehend the Surgeon General's warnings on the hazards of smoking. The assumption was that these young people had a deficit of information that could be addressed by presenting them with health messages in a manner that caught their attention and provided them with sufficient justification not to smoke....comprehensive reviews published at that time concluded that smoking-prevention programs based on the information deficit approach were not effective."*⁶⁷

In any event, more prominent warnings do not have an impact on smoking behaviours. This was confirmed by the Public Health Research Consortium (2010) report commissioned by the Department of Health which concluded that despite the visibility of the graphic warnings and evidence that the public had received the warnings, there was no fundamental change in risk beliefs or behaviour after the advent of graphic warnings in England. More specifically, the report stated:

*"The range and depth of knowledge about the health risks of smoking did not change after the pictures were introduced."*⁶⁸

Awareness of some conditions featured in the warnings, such as gum/mouth disease, rose, but there was no net effect on behaviour. These results suggest that targeted warnings can address specifically defined information gaps. But the overall impact of the graphic warnings was limited:

*"There were very few smoking-related behavior changes observed after the pictures were introduced."*⁶⁹

Additionally, the warnings had a "negligible" impact on young people.⁷⁰

This is consistent with other research, including a US Food and Drug Administration (FDA) commissioned study in 2010 that measured consumer attitudes, beliefs, perceptions, and intended behaviours related to cigarette smoking in response to proposed graphic warning labels. The study included approximately 18,000 participants and is the largest study of consumer responses to graphic cigarette health warnings ever conducted. The study found that:

*"None of the warning images were significantly associated with quit intentions (for adults and young adults) or the likelihood of smoking 1 year from now (for youth)...."*⁷¹

⁶⁷ US Department of Health and Human Services. "Preventing tobacco use among young people: A report of the Surgeon General". (1994) (summarizing approximately 160 studies on the subject of the psychosocial risk factors associated with underage tobacco use) at 216-217.

⁶⁸ Public Health Research Consortium. "Evaluating the Impact of Picture Health Warnings on Cigarette Packets, Short Report 12", National Centre for Social Research (2010) at 1.

⁶⁹ *Ibid.* at 1.

⁷⁰ *Ibid.* at 4.

It also found that the graphic warnings did not appreciably affect subjects' reported beliefs and intentions about smoking initiation or cessation.⁷² Based on this research, the US FDA Regulatory Impact Assessment estimated that the impact of the graphic warnings on reducing smoking rates was *"in general not statistically distinguishable from zero."*⁷³

The studies relied upon in the PHRC Review do not establish that warnings on plain packs would alter individuals' absolute risk beliefs or smoking behaviours. Indeed, one of the studies relied on suggests that Plain Packaging may actually reduce smokers' attention to warnings. In research funded under the auspices of the UK Clinical Research Collaboration, in 2011, Munafo and others examined the eye movements of 43 subjects as they were exposed to cigarette packs in both branded and Plain Packaging to determine whether Plain Packaging increases the amount of visual attention paid to health warnings. The researchers concluded that daily smokers exhibited more eye movements towards health warnings when the pack was branded than when it was plain, but the opposite was true for non-smokers and non-daily smokers.⁷⁴

Consequently, there is no basis to conclude that Plain Packaging would have any impact on the effectiveness of health warnings.

4.3 Consumers are not misled about the harmful effects of smoking

As outlined above, public awareness in the UK about the risks of smoking cigarettes is effectively universal. Furthermore, branding, trade marks, and packaging do not neutralise consumers' existing awareness of the risks of smoking or prevent consumers from seeing and assimilating the health warnings.

The Public Health Research Consortium (2010) report for the U.K. Department of Health "Evaluating the Impact of Picture Health Warnings on Cigarette Packets", demonstrates that the existing warnings are seen and assimilated by consumers on branded packs. The report states that:

*For adults (aged 18 years and older) "Overall, recall of at least one health warning message was high, 93% of smokers pre 1st October 2008 and 100% post 1st October 2008 could name at least one warning message. Post 1st October 2008, awareness of the picture health warnings was high, only 6% of smokers did not name one of the new warnings messages when asked..."*⁷⁵

(Cont'd from preceding page)

⁷¹ Nonnemaker J, Farrelly M, Kamyab K, Busey A, Mann N. "Experimental Study of Graphic Cigarette Warning Labels: Final Results Report". Prepared for the Center for Tobacco Products, Food and Drug Administration, Contract No. HHSF-223-2009-10135G, (December 2010), at 3-35, para 3.10.4.

⁷² *Ibid.* at 4-4.

⁷³ See Department of Health and Human Services, Food and Drug Administration, 21 CFR Part 1141, Docket No. FDA-2010-N-0568, RIN 0910-AG41. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628, June 22, 2011, at 36776.

⁷⁴ Munafo MR, Roberts N, Bauld L, Leonards U. "Plain packaging increases visual attention to health warnings on cigarette packs in non-smokers and weekly smokers but not daily smokers". *Addiction*, 106(8), 1505-1511, (2011).

⁷⁵ Public Health Research Consortium. "Evaluating the Impact of Picture Health Warnings on Cigarette Packets", National Centre for Social Research, (2010) at 33.

For youth (aged 13-17) “Awareness and recall of the picture health warnings was high. Post 1st October 2008, 85% of young people correctly described one of the health warning message, though for a majority of young people, the message most remembered was the front of packet message ‘Smoking Kills.’”⁷⁶

Accordingly, both with and without graphic health warnings, there is no evidence that the branding neutralised the warnings or impeded consumers’ abilities to assimilate the warnings.

The studies relied upon in the PHRC Review do not establish that any branded cigarette packs are viewed as not risky or that people would smoke less if all cigarettes were sold in the same coloured plain packs. Consequently, there is no basis to conclude that Plain Packaging would impact on people’s risk beliefs or their smoking behaviour.

Furthermore, to the extent that particular trade marks or colours used on tobacco packages are claimed to mislead consumers, the Government can enforce existing laws to prevent their use.⁷⁷

4.4 Plain Packaging would not materially affect the tobacco-related attitudes, beliefs, intentions and, most importantly, behaviours of children and young people

As the PHRC Review shows, there are few studies that discuss in any detail how plain packs affect the tobacco-related attitudes, beliefs, intentions and behaviours of children and young people. Those that do provide little support for Plain Packaging. Furthermore, none of the studies establish any relationship between attitudes, beliefs and intentions, and actual behaviour.

In any event, the PHRC Review also acknowledges that self-reported data on smoking-related intentions and behaviours is unreliable. It states:

*“It is also worth noting that findings regarding smoking-related attitudes, beliefs and behaviour from both the surveys and qualitative studies in the review are reliant upon self-report. Without any form of validation (such as validating reported changes in cigarette consumption) these have quite weak predictive validity.”*⁷⁸

⁷⁶ *Ibid.* at 65.

⁷⁷ Regulation 11 of the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, provides:

“(1) No person shall supply a tobacco product the packaging of which carries any name, brand name, text, trade mark or pictorial or any other representation or sign which suggests that tobacco product is less harmful to health than other tobacco products. ...”

⁷⁸ PHRC Review at 89.

5. QUESTION 5

Do you believe that requiring standardised tobacco packaging would have trade or competition implications?

BAT's view, based on its own detailed understanding of the UK market for tobacco products and the impact of past regulation on the dynamics of that market, is that Plain Packaging would have significant implications for competition and trade and, in particular would:

- drive down prices;
- exacerbate the illicit market in tobacco products;
- further restrict market access; and
- negatively impact international trade.

Together these impacts would not only facilitate uncontrolled youth access to tobacco products, but would also increase consumption contrary to the stated objective of the proposal.

These are all points which the Impact Assessment identifies as risks although the fact that they have neither been fully appreciated nor properly quantified highlights the need identified by the Secretary of State for Health, the Rt Hon Andrew Lansley MP, for additional evidence and research to be carried out in this area before any decision is made to proceed with Plain Packaging. There are serious risks of a disproportionate and unlawful (see our response to Question 6) decision if these issues are not properly understood and assessed. As the Secretary of State indicated:

*"We will, as well, explore the competition, trade and legal implications, and the likely impact on the illicit tobacco market of options around tobacco packaging. While similar measures are currently being considered actively by a number of Governments around the world, we must be sure about the impacts of policy options in the legal and trading circumstances of tobacco control in this country. Only after this work, and gathering views and evidence from public consultation, will we be in a position to know whether, or how, to proceed."*⁷⁹ (emphasis added)

5.1 The overall impact of Plain Packaging on current market dynamics

BAT expects that the introduction of Plain Packaging would have the following consequences in the UK market:

- (a) in the short term there would be little immediate change in consumer behaviour, particularly in the premium brand sector, due to residual brand loyalty;

⁷⁹ Secretary of State for Health, the Rt. Hon. Andrew Lansley MP, written Ministerial statement to House of Commons (9 March 2011).

- (b) new brand entry would, however, immediately become and thereafter remain even more difficult due to the inability of manufacturers to differentiate their products from those already on the market;
- (c) residual brand loyalty would decline over time, meaning that adult smokers would become increasingly reliant on price as the basis for product choice;
- (d) the consumer focus on price would increase the levels of down trading to lower-priced products (across all market segments, including the illicit market);
- (e) price competition would inevitably increase, leading to price falls across all segments of the legal market, with the greatest price falls in the premium sector, where branding is a key element of differentiation;
- (f) lower prices would lead to increased tobacco consumption;
- (g) the inability to differentiate would make it much more difficult for new entrants to enter the legal market, but would have a disproportionate impact on small manufacturers;
- (h) there would be an inevitable increase in illicit and cross-border trade in tobacco products arising from the focus on price and the reduction in brand equity in the legal sector; and
- (i) an increase in tobacco duty as a response to concerns over increased demand would merely exacerbate down trading and push more people into the illicit market.

5.2 Prices would fall

Unlike many other markets, competition in the UK tobacco market is already constrained by significant regulation, including the ban on advertising, bans on domestic and international event sponsorship, brand sharing and 'sampling', the ban on cigarette sales from vending machines, and the retail display ban (which has already been introduced into large retail outlets in England, and will come into effect for small retailers from April 2015). These regulations have significantly limited the range of competitive levers available to tobacco manufacturers. Plain Packaging would represent a quantum leap in terms of further restrictions on the ability of manufacturers to compete by way of product differentiation and would also undermine tobacco manufacturers brand led business models in the UK, by moving the market towards an essentially lower priced, low-margin commodity market. This would result in less investment and significant losses for all participants in the tobacco industry.

The significant reduction in product differentiation resulting from Plain Packaging is likely to exacerbate the present trend of down trading, as smokers become less loyal to their brands and increasingly focussed on price.

For example many smokers who today are prepared to pay £7.80 or more for a premium priced product because of what it stands for in terms of its differentiated positioning may be unwilling to pay premium prices when all brands are in plain packs. Consequently they are likely to down trade to e.g. the mid-price range or even the low price range, where it would be possible to buy tobacco products that appear exactly the same for prices as low as £6.35 or £5.75 respectively. In this scenario manufacturers who are losing market share would have little choice but to lower their prices with the consequent knock-on effect across all price segments. Additionally, consumers' discernible purchasing decisions would become

confused, because all tobacco products would look the same, thereby eliminating the benefit of brands in facilitating consumer choice and market competition.

While Plain Packaging and the resultant decline in the ability of manufacturers to differentiate between brands is likely to impact on different segments of the market in different ways, and possibly at different times, price competition would inevitably increase, leading to price falls across all segments of the legal market. Price falls are likely to happen earlier in the lower price segments, due to the high price sensitivity of smokers purchasing products in these segments. However, because of the already extremely tight margins within these segments these falls are likely to be relatively small. Impact on the premium and mid-price segments, where smokers are more price insensitive, and the price itself has a premium-signalling effect, is likely to be slower, but due to the existing premium placed on those products, in respect of which branding is a key element, prices would fall much further. Over time, therefore, where consumers are no longer able to differentiate between products in the absence of branding, prices across the market would inevitably fall and the market would compress.

The increase in price competition, leading to lower prices, would have significant adverse consequences in terms of increased consumption – particularly for youth and poorer socio-economic groups that are more price sensitive.

This increase in price competition and consequential fall in prices is universally recognised as one of the fundamental implications of Plain Packaging, including in the Impact Assessment and the economic reports to which it refers, namely the three reports authored by Europe Economics⁸⁰, Padilla J⁸¹, and Reed H⁸², each of which has attempted to assess the economic impact of Plain Packaging measures. Although these reports differ in a number of respects (and as the Reed report points out, one should be *“cautious about placing too much reliance on any one model”*), they are unanimous in concluding that, by further restricting product differentiation, Plain Packaging would lead to increased price competition and a downward trend in prices. Each of the reports also makes the point that a likely consequence of a reduction in cigarette prices after the introduction of Plain Packaging would be a corresponding increase in demand.

BAT strongly disagrees with the suggestion in the Impact Assessment that the price impact of Plain Packaging would be relatively short-lived, and that in the long-term prices *“might be higher”*. On the contrary, given that the ability to differentiate between brands would continue to decline, increasing the importance of price as a means for manufacturers to compete in the legal market, price competition, which is already a key feature of the market in the lower priced segments, would become an important element in all price segments. Significantly, the continued existence of the lower-priced illicit market would also serve to drive price competition in all segments of the legal market.

While it might be suggested that these consequences can be overcome and offset by tax increases, this oversimplifies market realities. Tax increases would most likely push the entire market upward and exacerbate existing price differentials between the legal and illicit

⁸⁰ Europe Economics. “Economic Analysis of a Display ban and/or a plain packs requirement in the UK”. (2008) (commissioned by Japan Tobacco).

⁸¹ Padilla J. “The Impact of plain packaging of cigarettes in Australia: A simulation exercise”. Brussels: LECG Consulting, (2010) (commissioned by Philip Morris).

⁸² Reed H. “Analysis and review of J. Padilla ‘The Impact of Plain Packaging of Cigarettes in the UK: A simulation exercise’”. Colchester: Landman Economics (2011) (commissioned by ASH).

market, at a time when the incentive to pay premiums for products is diminishing. Consequently, any such tax-focussed response would only exacerbate down trading and push more people into the illicit market.

5.3 The illicit market would expand

The illicit market would, however, benefit from Plain Packaging irrespective of any increase in tax. This impact on the illicit market is dealt with in detail in our response to Question 9. However, the increased focus on price, the attraction of branded illicit products and the fact that Plain Packaging would be easier and cheaper to copy and harder to detect is likely to lead to a significant increase in the size of the illicit market.

The resultant expansion of the illicit market would be a significant factor in maintaining price competition and lower prices in both the legal and illicit markets, as well as in impeding effective market entry in the legal market, as illicit traders will always be able to sell at significantly lower prices than legal retailers.

5.4 Plain Packaging would impede market entry

Besides its impact on prices, Plain Packaging would significantly reduce opportunities for market entry in several ways.

First there would be little, if any, prospect of entering the market with a branded product as there would be very limited means to indicate differences in the quality and origin (or even to convey the brand name) of new products to customers who do not know those products.

The incentive for brand innovation would also be significantly reduced in circumstances where manufacturers would be unable to inform adult smokers of the nature of those innovations.

Consequently, with little prospect of establishing a brand name through innovation, new entrants, as well as those manufacturers of existing brands with relatively small market shares (such as BAT), would be placed at a considerable disadvantage relative to manufacturers of existing higher-selling brands. Small or new entrant manufacturers would not, of course, enjoy the considerable economies of scale (in both manufacture and distribution) enjoyed by the larger existing manufacturers, and would also have little opportunity or incentive, given the restrictions on brand communication, to enter (or maintain a presence in) a market which would, over time, move towards a lower priced, low-margin commodity market.

However, as explained above, any suggestion that this would ultimately result in reduced price competition and potentially higher prices is misconceived and ignores, in particular, the considerable impact of the presence of the significantly lower priced illicit market. This will continue to drive price competition.

5.5 International trade and investment implications

In addition to the matters discussed above, and quite apart from the significant impact on the UK market, plain packaging would have significant implications for international trade and on the UK's existing and potential trading partners. This is an issue that Health Minister, the Rt. Hon. Andrew Lansley MP, was clearly concerned about given his public comments at the outset of this consultation:

"We will, as well, explore the competition, trade and legal implications, and the likely impact on the illicit tobacco market of options around

tobacco packaging. While similar measures are currently being considered actively by a number of Governments around the world, we must be sure about the impacts of policy options in the legal and trading circumstances of tobacco control in this country. Only after this work, and gathering views and evidence from public consultation, will we be in a position to know whether, or how, to proceed.”⁸³

One can think of few greater barriers to market entry than to require traders to divest themselves of valuable intellectual property rights as a precondition to trading in this market. Plain packaging sends a very powerful negative message to international traders and investors. The implications are particularly broad, given the very real threat of its extension to other industries such as alcohol and fast food.

Indeed, the Department of Health has failed to appreciate the international trade implications of pursuing such extreme measures that are in conflict with the principles of protection of IP rights and foreign investor protection.⁸⁴ The Impact Assessment makes the Department of Health’s disregard for foreign investors very clear when it explicitly excludes from its economic impact assessment of Plain Packaging any economic impact on foreign investors.⁸⁵ This is unprecedented in Impact Assessment practice.⁸⁶

IP is an important part of investment policy and Plain Packaging signals to international traders and investors that the UK is not a place where intellectual property rights are protected to the highest degree. Voices from British business clearly share these concerns. For example, a letter sent by a group of concerned packaging manufacturers to Mark Prisk MP (Minister of State for Business and Enterprise 2 May 2012) states:

“The adoption of plain packaging would send a message to our investors and to other companies and organisations that rely or place value on brands and trademarks that the Government cannot be relied upon to protect intellectual property rights and the UK is a relatively hostile environment for doing business.”⁸⁷

Andrew Wilson, director of policy at the ICC in the UK stated:

“It remains unclear as to whether plain packaging is compatible with a number of the UK’s international trade commitments, including important WTO (World Trade Organisation) intellectual property agreements. With protectionism on the rise, this is not the time for the UK to be testing the limits of international trade law. What might be viewed as a justifiable measure in narrow terms could set a precedent which would be hugely damaging to global trade.”⁸⁸

⁸³ Secretary of State for Health, the Rt. Hon. Andrew Lansley MP, written Ministerial statement to House of Commons (9 March 2011).

⁸⁴ See response to Question 6 regarding the international legal implications of Plain Packaging.

⁸⁵ Impact Assessment at 20.

⁸⁶ See Appendix B, Gibson Opinion p. 21-23.

⁸⁷ Letter from API Group plc, Weidenhammer Packaging Group, Chesapeake Branded Packaging, Parkside Flexibles and Amcor Tobacco Packaging to Mark Prisk M.P., dated 2 May 2012, at 2.

⁸⁸ Health Secretary, the Rt. Hon. Andrew Lansley MP, keeping 'open mind' on cigarette packaging, The Independent, (6 April 2012).

The signal to international traders is that Britain is no longer “*open for business*”, a signal which runs directly contrary to the objectives of the UK Trade & Investment (UKTI) (objectives BAT would fully support).⁸⁹ It is no surprise that more than 15 countries⁹⁰ recently publicly voiced their opposition to similar Plain Packaging measures in Australia in TBT Committee and the TRIPS Council meetings.⁹¹

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A number of these impacts are, at least in part, recognised in the Impact Assessment. However, the Impact Assessment's view of the likely impact on competition generally, and on price in particular, fails to appreciate the complex dynamics of the tobacco products market and, in particular, the impact and effect of the substantial illicit tobacco market. The increased price competition and expansion of the illicit market would have significant negative impacts not only in terms of reduced tax take, but also in terms of uncontrolled youth access to cheaper unregulated products and increased consumption of tobacco products generally. The international trade and investment implications are similarly serious requiring traders to divest themselves of valuable property rights in order to trade in the UK market.

⁸⁹ <http://www.ukti.gov.uk/uktihome/aboutukti/aimsobjectives/corporatestrategy.html>.

⁹⁰ Chile, China, Cuba, Dominican Republic, El Salvador, Honduras, Hong Kong, Indonesia, Jordan, Mexico, Nicaragua, Nigeria, Philippines, Russian Federation, Switzerland, Turkey, Ukraine, Zambia and Zimbabwe.

⁹¹ See fuller discussion of this point in our response to Question 6.

6. QUESTION 6

Do you believe that requiring standardised tobacco packaging would have legal implications?

Plain packaging is unlawful. The Government cannot introduce Plain Packaging merely because lawful products are controversial. Plain Packaging would violate fundamental rights, as well as create market distortions and barriers to trade in breach of both European and international law.

Prohibiting a legal industry from enjoying its intellectual property rights in respect of lawful products would create a “pariah class” of goods. If such discrimination were permitted by reference to the goods themselves, it would not logically be limited to tobacco products: alcohol and food are just two examples of industries whose IP rights are already coming under threat in the same way.

Plain Packaging constitutes, in substance, the wholesale expropriation of the most valuable assets owned by a fast moving consumer goods industry - its intellectual property. It also entails to all intents the complete suppression of manufacturers’ and consumers’ fundamental rights to communicate. In respect of Plain Packaging, these rights are intertwined: the intellectual property being expropriated is itself a means of communication to differentiate brands for consumers, in order to compete. Plain Packaging is also likely to violate the protections afforded to international trade under WTO agreements and to foreign investors under the myriad bilateral investment treaties in force with countries around the world.

Given the lack of any credible evidence demonstrating the effectiveness of Plain Packaging, it is hard to see how such a measure can be justified, proportionate or necessary to achieve the public health goals of this Government.

In any event, any such expropriation/destruction of trade marks and other intellectual property must, even if it could be justified (which it cannot), be accompanied by compensation, which would in these circumstances be considerable.

6.1 Summary of key legal obstacles

As identified above, the introduction of Plain Packaging would have serious and significant legal implications. The Government's power in this area is constrained not only by the general principles of public law, but also the law of the European Union (the **EU**) and its obligations under the European Convention on Human Rights (**ECHR**), as well as other international treaties. Even if such a measure were justified (which, in the absence of credible evidence that it would achieve its stated objectives, it is not), it would require the payment of substantial compensation by the Government in respect of the resultant expropriation of tobacco manufacturers' very valuable intellectual property.

It is clear that the primary legal implications of the introduction of Plain Packaging arise from the inevitable interference with Intellectual Property Rights (**IPRs or IP**). It is indisputable that IPRs are “*the cornerstone of economic activity*” and constitute the very essence of commercial communication by which manufacturers differentiate their products in order to compete. Such rights are protected within the UK and the EU by:

- (a) the harmonised international and European system of trade mark protection, as set out in the WTO Agreement on Trade-Related Aspects of Intellectual Property

(TRIPS), and the Paris Convention for the Protection of Industrial Property (the **Paris Convention**), Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (the **TMD**) and Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (the **CTMR**); which, prohibit the imposition of restrictions on the registration and use of trade marks based on the nature of the goods;

- (b) the harmonised European and international system of protection for other IPRs, including, *inter alia*, patents and design rights;
- (c) the right to property protected by the ECHR and the EU Charter on Fundamental Rights (the **EU Charter**), which prohibits the deprivation of property without the payment of full compensation, which in this case would be very substantial;
- (d) the right to freedom of communication within the ECHR and EU Charter, which protects the right to impart and receive information; and
- (e) the requirement of free movement of goods within the EU, as enshrined in the Treaty on the functioning of the European Union (**TFEU**), as well as internationally, as protected by the WTO General agreement on Tariffs and Trade (**GATT**) and the WTO Agreement on Technical Barriers to Trade (**TBT**).

The introduction of Plain Packaging in contravention of such protections would undermine the very basis upon which IPRs are created and protected internationally, with implications far beyond the tobacco sector.

6.2 The harmonised regime of trade mark protection

As already noted, IPRs are “a *cornerstone of economic activity*”,⁹² hence both their significant value to their owners and the wider economy and the need for them effectively to be protected at both the domestic and international levels.

Protection of trade marks has been harmonised at both an international level, by TRIPS and the Paris Convention, and at an EU level, by the TMD and CTMR. Moreover, it is well-established that TRIPS forms an integral part of the legal order of the EU, and EU legislation must, so far as possible, be interpreted in a manner that is consistent with TRIPS, particularly when the legislation is intended to give effect to it, as is the case for the TMD and CTMR.⁹³

The UK cannot therefore introduce measures that are inconsistent with that harmonised regime of trade mark rights across the EU.⁹⁴ In particular, this regime seeks to ensure the consistent protection and treatment of trade marks throughout the EU, irrespective, *inter alia* of the nature of the goods to which those trade marks are to be applied. For example, Article 1(2) of the CTMR provides that:

“A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community: it shall not be registered,

⁹² Gowers Review of Intellectual Property (December 2006).

⁹³ For a recent exposition of these principles see Case C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso [2012] ECR I-0000.

⁹⁴ See, e.g., Recital 8 to the TMD, Recital 4 and Article 1(2) of the CTMR, Article 15(4) of TRIPS and Article 7 of the Paris Convention.

*transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, **nor shall its use be prohibited, save in respect of the whole Community.** This principle shall apply unless otherwise provided in this Regulation.” (emphasis added)*

The purpose of this Article is emphasised in Recital 4 to the CTMR:

“The barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States cannot be removed by approximation of laws. In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trade marks should be created which are governed by a uniform Community law directly applicable in all Member States.”

Plain Packaging would undermine this principle, which effectively constitutes the fundamental essence of the harmonised regime, by establishing differential protection and treatment in the UK for trade marks applied to tobacco products, both as against other products, and against the protection and treatment accorded those trade marks in other Member States and in the EU as a whole.

In addition, Plain Packaging would be liable to alter the scope and effect of the protection accorded to trade marks pursuant to specific aspects of the harmonised regime. For example, Plain Packaging would have the inevitable effect of precluding the continued registration (in the UK but not in other Member States) of trade marks in respect of tobacco products other than simple word marks, because a prohibition on their effective use would make such marks unregistrable (and existing marks liable to revocation or invalidity).

Equally, Plain Packaging would violate the UK's international treaty obligations under several key provisions of TRIPS.

First, Article 20 of TRIPS requires that the use of trade marks 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”*. Plain Packaging violates this provision because it imposes *“special requirements”* that directly and specifically concern the trade mark when used on the product and its packaging. WTO Members cannot mandate the use of trade marks in a *“special form”* and require use in such a limited way that it is detrimental to the trade mark's capability to distinguish the goods or services from those of other undertakings. Article 20 of TRIPS confirms that the use requirements listed in the second part of the sentence are examples of *“unjustifiable encumbrances”*. This means that under TRIPS, Plain Packaging cannot be justified under any circumstances.

Second, Plain Packaging also violates Articles 15 and 16 of TRIPS because it violates the UK's obligation to make all distinguishing signs capable of constituting a trade mark and undermines the right of registered trade mark owners effectively to prevent others from using similar signs that are likely to cause confusion. Article 15.1 confirms that *“[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trade mark”*. The ordinary meaning of a “trade mark” is that it is a sign used on products to distinguish products. Plain Packaging would prevent certain distinguishing signs from being capable of constituting a “trade mark” on tobacco products legally sold in the market. Moreover, Article 15.4 makes it very clear that registered trade mark protection is to apply irrespective of the nature of the product. Plain Packaging would, therefore, violate the UK's obligation under

Article 15.1 and would not provide the same rights to tobacco-related trade marks as are granted to other trade marks, in violation of Article 15.4 of TRIPS.

Article 16.1 of TRIPS provides for the right to prevent others from using signs similar to trade marked signs when such use is likely to cause confusion. Measures that prevent the trade mark from being used on the product or its packaging undermine the ability of registered trade mark owners to maintain the distinctiveness and associations between the trade mark and the product that are required to exercise this right effectively and establish “confusion” in any infringement proceeding. Accordingly, Plain Packaging would violate the UK’s obligations to preserve the rights of registered trade mark owners under Article 16.1 of TRIPS.

Third, Plain Packaging requirements regarding the use of trade marks violate provisions of the Paris Convention that are incorporated into TRIPS through Article 2.1. In particular, Article 6quinquies of the Paris Convention requires Members to ensure that “[e]very *trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union*” (emphasis added). This provision requires Members to respect and “protect” the form of the trade mark “as is”, meaning as filed in any other country that is a party to the Paris Convention. Plain Packaging requires the use of trade marks in a form that is clearly not the same form that was lawfully registered in registrants’ countries of origin.

In addition, Article 10bis of the Paris Convention, as incorporated into TRIPS by Article 2.1, establishes that WTO Members have an obligation to provide effective protection against unfair competition, such as against “*all acts of such nature as to create confusion by any means whatever*” (emphasis added). Plain Packaging would create confusion among trade marked products. In fact, the very objective of Plain Packaging is to remove the very means that allow consumers to distinguish among tobacco products. Plain Packaging thus requires the kind of confusion and passing-off that Article 10bis requires the UK to prohibit.

Finally, TRIPS does not provide for a general health exception. Article 8.1 of TRIPS permits measures necessary to protect health “*provided that such measures are consistent with the provisions of this Agreement*”.

Accordingly, the introduction of Plain Packaging would breach the UK’s obligations under EU and international law in respect of the protection of trade marks, which breaches would render the measure unlawful and liable to be struck down.

6.3 The protection of other IPRs

Plain Packaging would not, however, only undermine the effective protection of trade mark rights, but would also undermine the effective protection of other IPRs, including copyright, patents, design rights and trade secrets, by restricting the shape, size and configuration of the pack and the materials from which it was made. Such rights are inherent not only in the branding applied to the packaging itself, but also in the pack shape, as well as the machinery processes, equipment and construction techniques that are used to manufacture the packaging.

These rights are protected by not only TRIPS and the Paris Convention, but also numerous other international treaties and EU legislation, including (*inter alia*):

- (a) the Berne Convention for the Protection of Literary and Artistic Works (24 July 1971);
- (b) the WIPO Copyright Treaty (20 December 1996);

- (c) Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights;
- (d) the Hague Agreement Concerning the International Registration of Industrial Designs;
- (e) Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs;
- (f) Commission Regulation 2445/2002/EC implementing Council Regulation 6/2002/EC on Community Designs;
- (g) Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs;
- (h) The WIPO Patent Co-operation Treaty (19 June 1970, as amended);
- (i) Convention on the Grant of European Patents (Munich, 5 October 1973 as revised) ('European Patent Convention');
- (j) Regulations under the Patent Co-operation Treaty (19 June 1970, as amended); and
- (k) Patent Law Treaty (1 June 2000).

6.4 The rights to property and commercial communication

The very purpose of the protection of trade marks as personal property is to ensure accurate communication with consumers regarding the origin and quality of products. Consequently, the interferences in both the rights to property and the right to impart and receive information resulting from Plain Packaging are fundamentally intertwined and go to the very essence of both rights.

The right to property is protected by both Article 1 of Protocol 1 (**A1P1**) to the ECHR and Article 17 of the EU Charter. Similarly, the right to freedom of communication is protected by Article 10 of the ECHR, as well as Article 11 of the EU Charter. The scope of the rights is similar across both the ECHR and the EU Charter.

As discussed above, Plain Packaging would fundamentally undermine the basis of international and EU trade mark protection, by rendering trade marks for tobacco marks, unregistrable, revocable or invalid. As such, Plain Packaging measures would amount to a deprivation of manufacturers' valuable property rights in those trade marks, as well as in copyright, patents and designs incorporated in the packaging, together with the goodwill arising in the resulting brand.⁹⁵ Such a deprivation would be unlawful unless:

- justified in the public interest - which it cannot be in this case where there is no credible evidence that Plain Packaging would achieve its stated objectives, as explained elsewhere in this Response;
- introduced in accordance with law - which cannot be the case for the reasons described above in respect of the harmonised regime for trade mark protection; and

⁹⁵ That IPRs constitute property within the scope of A1P1 has been confirmed by the European Court of Human Rights, and indeed is expressly recognised in Article 17 of the EU Charter.

- proportionate - which would (at the very least) require the payment of compensation to those who have been deprived.

Given the commercial value of manufacturers' trade marks (and related rights), the compensation due in those circumstances would clearly be very substantial indeed.

The deprivation of property resultant from Plain Packaging also constitutes an interference with the fundamental right of manufacturers to communicate with consumers in relation to the origin and quality of their respective products and the right of those consumers to receive such communications in order to differentiate between products.⁹⁶

The interference resulting from Plain Packaging goes to the very essence of this fundamental right, meaning that the requisite thresholds for justification and proportionality are at their highest. In this case, the proportionality of the interference must be judged against the background of the existing comprehensive ban on tobacco advertising and promotion as well as, the recently introduced ban on retail displays. Packs, and the marks used on them, are to all practical purposes the only means by which manufacturers can differentiate their products from those of their competitors. It is clear that a measure, the efficacy of which is questionable but that would extinguish the last vestiges of such communication in relation to legally available products, while resulting in adverse consequences in respect of pricing, tax revenue, the illicit market and public health, cannot be justified, nor proportionate.

6.5 Trade implications within the EU and internationally

(a) EU Law

A harmonised system of trade mark protection is crucial to the effective functioning of the EU internal market, as is expressly recognised in the TMD and CTMR. The introduction of Plain Packaging in the UK would, both by imposing additional restrictions on tobacco products in the UK and interfering with the ability of manufacturers to communicate with consumers in order to differentiate their products, unlawfully restrict the free movement of goods and the ability of manufacturers from other member states to enter the UK market. As such, any measures of this type would violate EU law (specifically Article 34 TFEU).

Such a restriction on the free movement of tobacco products cannot be justified in accordance with Article 36 TFEU. Although it is generally accepted that the high level health objectives set out by the Department of Health are valid and appropriate, as explained elsewhere in this Response, there is no credible evidence that those objectives would be achieved by Plain Packaging. As also explained elsewhere in this Response, Plain Packaging would result in a number of unintended adverse consequences, not least an expansion of the illicit market and more price-based competition, which together would result in an overall increase in the consumption of tobacco products. In these circumstances, there can be no question that Plain Packaging would constitute an unjustified and disproportionate interference in the free movement of goods.

⁹⁶ Those rights are protected by Article 10 of the ECHR and Article 11 of the EU Charter, which recognises free speech (including commercial free speech) as a fundamental right.

(b) WTO Technical Barriers to Trade Agreement

A Plain Packaging requirement would also constitute an unjustified barrier to international trade in contravention of the UK's international obligations under Article III(4) of both the GATT and Articles 2.1 and 2.2 of the TBT Agreement.

The TBT Agreement, in particular, prohibits technical regulations, such as packaging and labelling requirements, from constituting unnecessary obstacles to the international trade in goods. Technical regulations extend to product characteristics, including packaging, marking or labelling requirements and therefore Plain Packaging would clearly fall within the scope of the TBT Agreement. For the reasons already explained, Plain Packaging would also constitute an unnecessary obstacle to international trade and would therefore be in contravention of that agreement.

Accordingly, it is unsurprising that more than 15 countries⁹⁷ have already publicly voiced their opposition to Plain Packaging measures at the TBT Committee and the TRIPS Council meetings. Leading trade associations around the world⁹⁸ have also expressed their serious concern over the incompatibility of Plain Packaging measures with obligations under the WTO Agreements, including TRIPS and the TBT. Furthermore, Ukraine, Honduras and the Dominican Republic have taken the first steps in the WTO dispute resolution process by submitting formal requests for consultation to Australia on this issue. There is no doubt that Plain Packaging constitutes a technical barrier to trade, and it is now part of a live international debate.

6.6 Bilateral Investment Treaties

In addition to claims by states under the WTO, the UK Government risks facing numerous claims from foreign investors under bilateral investment treaties (**BITs**).⁹⁹ The UK has more than 100 BITs currently in force with countries around the world.¹⁰⁰ Many of these countries host companies with significant commercial interests in the tobacco industry¹⁰¹ in the UK as well as other sectors that may in the future be the subject of Plain Packaging or similar requirements.

⁹⁷ Chile, China, Cuba, Dominican Republic, El Salvador, Honduras, Hong Kong, Indonesia, Jordan, Mexico, Nicaragua, Nigeria, Philippines, Russian Federation, Switzerland, Turkey, Ukraine, Zambia and Zimbabwe.

⁹⁸ International Chamber of Commerce, Business Europe, US Chamber of Commerce, Federation of the Chamber of Commerce of Quebec, Federation of the Chilean Industry, Brazilian Association of Intellectual Property, East African Business Council, National Manufacture Association- Peru, The Kenyan Association of Manufacturers, US coal giant Peabody Energy, China's big mining investors CITIC Pacific Mining, mining identity Owen Hegarty, the Montreal Economic Institute, Marques, the Association of European Trademark Owners, Amcor, Economie Suisse, the TransAtlantic Business Dialogue, The Emergency Committee for American Trade, the US-ASEAN Business Council and the TransAtlantic Business Dialogue, American Legislative Exchange Council.

⁹⁹ Philip Morris International has filed a claim against Australia under the 1993 Australia-Hong Kong BIT in respect of Australia's Plain Packaging measures. The notice of claim dated 22 June 2011 is available from the Australian Department of Foreign Affairs and Trade at <http://www.dfat.gov.au/foi/downloads/dfat-foi-11-20550.pdf>.

¹⁰⁰ BITs are entered into between sovereign nations establishing the terms and conditions for investment by nationals and companies of one country in another country. They grant protected investors direct recourse to international arbitration against the host country when investments have not been protected.

¹⁰¹ Cuba, the Dominican Republic, Ecuador, Honduras, the Republic of Korea, China, Brazil, Mexico and Indonesia.

Invariably, intellectual property is specifically included in the definition of investments protected by such treaties and Plain Packaging would almost inevitably breach several of the usual protections afforded by BITs including those prohibiting unlawful expropriation and discrimination, as well as those requiring fair and equitable treatment and full protection and security.

A number of foreign companies that are covered by UK BIT protections have UK registered trade marks for many of their tobacco brands. For example a number of Korean and Chinese tobacco companies own UK registered trade marks, whose commercial utilisation is likely to be impeded by Plain Packaging.¹⁰² The introduction of Plain Packaging could expose the UK to BIT claims from such companies seeking to protect their investment.

Additionally, if Plain Packaging were to apply to a broader range of tobacco products, the UK could for example be subject to claims from cigar and kretec manufacturers in BIT-protected countries.¹⁰³ Looking to the future, if Plain Packaging were to extend to other sectors, such as the alcohol industry, again the Government could be subject to further BIT claims from interested companies in BIT protected countries.

** ** *

In these circumstances, it is readily apparent that the legal implications of Plain Packaging are serious and significant. In particular, it is quite clear that, in light of the harmonised regime for trade mark protection as well as the extensive international treaties and EU legislation to protect all IPR, the UK is not in a position to 'go it alone' by introducing Plain Packaging. Moreover, even if it were not constrained in this manner, Plain Packaging would unjustifiably interfere with the fundamental rights to property and freedom of communication, as well as the free movement of goods within the EU and internationally.

Against this background, it is of substantial concern that the Government has failed to consider such legal issues prior to engaging in the Consultation, or to the extent it has considered such issues, that its position is not set out in the Consultation.

¹⁰² KT & G Corporation owns a number of trade marks for its "PINE"(TM number 2338470) and "BOHEM" brands (TM number 2545402). China Tobacco Guangdong Industrial Co Limited owns a number of UK and Community registered trade marks for its "SHUANGXI" (or "DOUBLE HAPPINESS") brand which it exports worldwide. Other Chinese tobacco manufacturers who own UK or Community registered trade marks include, for example, China Tobacco Hunan Industrial Co. Ltd (TM number 2583227 for its "FURONGWANG" brand, 2402442 for its "NISE" brand, among others), and Hongta Tobacco (Group) Co., Ltd. (TM numbers 2351420, E5251293, and M652333 for its "HONGTASHAN" brand, 2494507 and 2494508 for its "HTS" brand, and 2531704 for its "ASHIMA" brand).

¹⁰³ Indonesian tobacco companies also own UK registered trade marks, for example, N.V. Sumatra Tobacco Trading Company has a number of UK registered trade marks, for its "GOLD COIN" brand (TM number 2266162) and "JET" brand (TM number 1453053, among others).

7. QUESTION 7

Do you believe that requiring standardised tobacco packaging would have costs or benefits for manufacturers, including tobacco and packaging manufacturers?

Plain Packaging would severely impact on the extremely valuable intellectual property rights, including trade marks, manufacturing patents and registered designs belonging not only to tobacco manufacturers, but also machine and packaging manufacturers engaged by the industry. Many of these rights have been ignored by the Department of Health in its Impact Assessment, and others have been grossly undervalued.

Plain Packaging would impose other significant costs on all the participants in the tobacco industry, including both large companies and small and medium sized enterprises (SMEs). The downward pressure on prices caused by Plain Packaging would mean less investment in all manufacturing processes. The removal of the various branding elements would also mean that the work required to produce these branding elements would be lost. This would lead to job losses as well as significant reductions in income and investment activity for a large number of businesses engaged by the tobacco industry.

7.1 Plain Packaging would expropriate valuable intellectual property

Plain Packaging would cause a wholesale change to the operating model of tobacco manufacturers in the UK. It would transform the fundamental nature of their current business by transforming it from one that is brand-led towards one that essentially produces a commodity product. The result would be that decades of significant investment in brands and innovation would be lost. In particular, this transformation would dramatically impact trade marks and related design rights in product packaging, as well as other intellectual property rights such as manufacturing patents.

BAT sells products in the UK under a wide range of intellectual property rights, including trade marks (consisting of word marks, device marks and marks that are a combination of both device and word marks), as well as extensive design rights. The combined use of these marks represents BAT's brands, which have been developed over significant periods of time, and have been the subject of substantial investment. They are vital in communicating to consumers essential information relating, for example, to a particular product's origin and qualities as well as the reliability of that information.

Plain Packaging would effectively expropriate this extremely valuable property, by preventing the use of all marks, with the exception of simple word marks, which would be required to be presented in a standardised font. The loss of value in such marks calculated in the Impact Assessment is risible, as is clear from the numerous obvious flaws in the Department of Health's approach identified by Mr Stephen Gibson (Appendix B, at 5.3.1).

While it is accepted that brand valuation is a complex area, and a full analysis is beyond the scope of this Response, there can be little doubt that the loss of value to brands in the UK market would be substantial. The Department of Health's suggestion therefore that the loss to manufacturers in terms of brands would only be £25 million is derisory and deficient. Any cost benefit analysis proceeding upon the footing that this is the relevant input (or the relevant order of magnitude of the input) would be flawed from the outset.

However, not only has the Department of Health failed to appreciate the central value of tobacco manufacturers' trade marks and branding, but it has ignored other forms of intellectual property.

Such intellectual property rights, which belong not only to tobacco manufacturers, but also machine and packaging manufacturers engaged by the industry, include patents classified as "construction", "manufacturing process" and "manufacturing equipment", and related registered designs used in making innovative products and packaging.

To put this in context, the number of affected patents and registered designs utilised by BAT (a relatively small player in the UK market) would be in the order of 160 granted patents/patent applications and 150 registered designs with the vast corresponding financial investment already made in drafting, filing, prosecuting, maintaining, enforcing and defending these rights. Such rights would be entirely undermined and effectively expropriated by Plain Packaging with the underlying value in these rights rendered negligible. As is the case for trade marks, the expropriation of IP in this way would lead to significant compensation being required. The calculation of any compensation would necessarily be very complex and would undoubtedly be significant.

As a direct outcome of Plain Packaging, BAT and the various machine and packaging manufacturers would be severely affected through their inability to fully utilise an entire complement of valuable property rights. Investment in IP has been actively encouraged by the Government over many decades. Plain Packaging would be at odds with international trade and would constitute an assault on the way international trade has been conducted for many centuries and as a consequence diminish the reputation of the UK as a jurisdiction which considers and fully supports IP as a valuable business asset.

The UK Intellectual Property Office (UKIPO) describes IP as *"one of the most valuable business assets" which "increase[s]competitiveness and contributes to.... business success"* and that *"a granted patent becomes property, like any other property [which] can be bought, sold or licenced out"* and although *"IP assets cannot be seen or touched and it is sometimes difficult to appreciate their true value"* these rights are nevertheless critical for business development and are therefore of enormous worth. To this end, the UKIPO specifically encourages established companies and new entrepreneurs to build a successful business through the use of IP which *"is a large, but necessary commitment"*.¹⁰⁴

It is of significant concern that the Department of Health has failed to understand the implications of Plain Packaging in this area and the considerable financial impact it will have.

7.2 Other impacts of Plain Packaging on industry participants

Plain Packaging would also seriously affect all the economic participants in the tobacco industry in both the UK as well as the EU in a number of other ways. With a combined industry Gross Value Added¹⁰⁵ of £2.1 billion, the tobacco sector, in the UK, directly employs over 5,500 people and indirectly supports a further 65,000 jobs in the associated supply chain. Jobs in design and branding as well as those in manufacturing and printing are all at

¹⁰⁴ UK Intellectual Property Office, "Intellectual Property Explained" available at <http://www.ipo.gov.uk/myip.pdf>.

¹⁰⁵ The difference between the value of goods and services produced and the cost of raw materials and other inputs which are used in production.

risk as a result of this proposal and the resulting business failures could decimate employment in some communities.¹⁰⁶ These include:

- Cigarette factories;
- Carton and packaging industry;
- Component suppliers (such as filter, paper, dyes, ingredients, etc.);
- Creative packaging designers and developers; and
- EU machinery manufacturers (who design and manufacture machinery used to manufacture tobacco products).

The downward pressure on prices caused by Plain Packaging would drive profit out of the legitimate tobacco industry in the UK. Less profit will mean less investment in all manufacturing processes. The most significant losses will be borne by the following:

(a) Tobacco manufacturers

There would be significant transition and compliance costs for tobacco manufacturers, who would face significant complexity in the process of preparing to comply with new Plain Packaging requirements.

Moreover, with manufacturers unable to compete on the basis of brands and ultimately competing on price alone, jobs in the UK would be placed in jeopardy. Plain Packaging would drive significant rationalisation in operations - as would be expected where an industry moves from a diversified product portfolio to one standardised package commodity. Skilled workers who are currently managing varied manufacturing processes would no longer be required as manufacturing could become more automated and simplified.

(b) Packaging manufacturers

Cigarette packaging incorporates a number of enhanced design features such as embossing, debossing, hot foil stamping and UV varnishing, in a sophisticated multiple step production process.

The removal of branding from tobacco product packaging would adversely impact on businesses in this supply chain, many of which have invested heavily to meet the needs of the tobacco industry, including the regulatory requirements directed by Government. In addition to the approximately €200 million financial investment within the EU, in recent years, manufacturers have put considerable resource towards the development of a skilled workforce, innovation and a high level of manufacturing competence. Large-scale investments of this nature are generally made on the basis of regulatory certainty and anticipated financial returns. The introduction of Plain Packaging would negate the benefits of the investment that has been made. The result is that as much as 30 to 50 percent of the machinery (of packaging manufacturers) would become redundant.¹⁰⁷

In addition, Plain Packaging would mean less complexity in the process – which would lead to less printing stations and machines. A change of this scale would create significant spare

¹⁰⁶ Open Letter to Secretary of State, the Rt. Hon. Andrew Lansley MP, signed by 51 MPs (29 June 2012).

¹⁰⁷ See www.ecma.org - European Carton Makers Association (ECMA) submission re EU TPD Review.

capacity in the carton manufacturing industry as a whole. The industry would consolidate and *“well paid, skilled manufacturing jobs within the print and packaging sector will be under threat.”*¹⁰⁸

As the Chief Executive of one printing and specialised laminating company has observed:

*“In these difficult economic times, I thought Government policy was to help small and medium sized enterprises, especially those involved in the manufacturing sector, and reduce red tape. Instead, a new tide of regulation directly threatens our business and many others like us. And it's not just the printers that will be hit but also suppliers such as ink manufacturers as well as design & creative agencies, the advertising & promotion sector and the brand owners themselves.”*¹⁰⁹

¹⁰⁸ Letter from API Group plc, Weidenhammer Packaging Group, Chesapeake Branded Packaging, Parkside Flexibles and Amcor Tobacco Packaging to Mark Prisk M.P., dated 2 May 2012, at 2.

¹⁰⁹ Lawrence Dall, Chairman & Chief Executive, Parkside Flexibles Plain Packaging, Press Release (14 June 2012) <http://www.printweek.com/news/1137338/manufacturers-join-forces-lobby-plain-packaging-proposal/>.

8. QUESTION 8

Do you believe that requiring standardised packaging would have costs or benefits for retailers?

Plain Packaging is fraught with adverse unintended consequences for retailers and in particular small retail businesses across the UK.

Specifically these include:

- **a loss of legitimate sales to the illicit trade;**
- **severe interruption of efficient day-to-day operations;**
- **increased security concerns;**
- **the potential for consumers to favour patronising larger stores over smaller shops (known as “channel shift”);**
- **pressure on retailers’ margins; and**
- **the burdens of complying with over-regulation.**

In short, the introduction of Plain Packaging would put at risk numerous small businesses that are key to economic growth at a time when there is considerable economic uncertainty.

8.1 A loss of legitimate sales to the illicit trade

As detailed in our responses to Questions 9 and 10, Plain Packaging would more easily facilitate counterfeiting and smuggling and thereby the distribution of products through unregulated, untaxed criminal networks.

As a result it would be much harder for honest retailers to compete in the UK market, thus impacting the volume of legal tobacco sold and the commercial viability of small businesses across the country.

HM Revenue & Customs acknowledge that:

“The availability of cheap, illegal tobacco within communities harms honest retailers who sell tobacco products legally. Businesses not only lose direct sales of tobacco but also sales of other products by customers who stop coming into their shop.”¹¹⁰

The National Federation of Retail Newsagents (NFRN), which has a membership of over 16,500 independent news and convenience retailers, has said:

“We are very concerned, for instance, that this proposal could become a gift to the counterfeiter. Counterfeit cigarettes are already a huge and

¹¹⁰ HM Revenue and Customs, “Tackling tobacco smuggling”, available at <http://www.hmrc.gov.uk/news/tackling-tobacco.htm> (website accessed in June 2012).

growing problem and anything that makes it easier will certainly see an escalation of the volumes of counterfeit cigarettes in distribution and be counter-productive to the aims of this proposal.”¹¹¹

A press release from the Association of Convenience Stores, representing more than 33,500 local shops, reads:

“We also fear that consumers that are used to buying certain brands will react against plain packs and seek them out from the illegal trade. The result would be more consumers placed at the mercy of unscrupulous criminals that run the black market and further loss of trade for legitimate retailers.”¹¹²

8.2 A detrimental impact on the efficiency of day-to-day operations

If retailers are forced to handle large quantities of cigarettes in more uniform and homogenous packages, there would be a slow-down in service, both in terms of customer purchases (with the related effect of increased transaction times, increased product selection errors, and increased customer frustration), as well as more time needed to receive and manage stock. Indeed, speedy customer transactions would be even more challenging once the retail display ban is fully implemented in the UK. Additionally, retailers would need to train employees to deal with plain packages, resulting in higher costs for this training and other labour costs.

The Federation of Wholesale Distributors, which represents members of the wholesale distribution sector in the UK, has observed:

“Introducing standardised packaging for tobacco products in a wholesale or cash and carry environment makes absolutely no sense. Since the introduction earlier this month of new display rules, tobacco products can only be viewed by tobacco traders...Removing clear identification of manufacturer, brand and price in the distribution chain cannot possibly affect the public’s attitude to smoking, but it will create operational difficulties, confusion and delay for both wholesale depot staff and their customers. FWD believes it is not the Government’s intention to impose a burden on business which will not contribute towards the intended outcome of this proposal.”¹¹³

The Impact Assessment refers to the simulation study undertaken by Carter *et al.*, which suggests that Plain Packaging would modestly decrease transaction times and selection errors.¹¹⁴ As the Impact Assessment notes, this study is not directly applicable to a typical retailer and caution is needed in applying its findings to the real-world environment. The

¹¹¹ Talking Retail, “Independent newsagents fear boost to illicit trade from plain tobacco packaging”, (16 April 2012).

¹¹² Association of Convenience Stores. “Hands off our packs: Stores fear plain packaging will be major burden”. (16 April 2012), available at <http://www.handsoffourpacks.com/newsroom/stores-fear-plain-packaging-will-major-burden/>.

¹¹³ Talking Retail, “Standardised tobacco packaging in wholesale ‘will not achieve government’s aims’ says FWD”, (17 April 2012).

¹¹⁴ Carter O B J, Mills B W, Phan T, Bremner JR. “Measuring the effect of cigarette plain packaging on transaction times and selection errors in a simulation experiment”. *Tobacco Control* (2011), doi:10.1136/tobaccocontrol-2011-05008.

study was not conducted in a real retail environment - it was conducted on a table “at approximately waist height”, using participants picked from a university campus. Accordingly, there were no other distractions such as other customers lining up, customers frustrated by waiting and other customers in the store and/or outside filling up cars with petrol. There were no other products on display, no issues in terms of buying multiple products and no need to complete a financial transaction. The sample size was small and unrepresentative, including the exclusion of people who were not fluent in English - the very people who are likely to rely on branding to differentiate products. Also, the packs used did not include health warnings and used a larger font size, such that it was acknowledged that the packs were “likely to have been easier to read than their real life counterparts”.¹¹⁵

8.3 Increased security concerns

Employees attempting to distinguish among the similar packages while making a sale (likely with their backs to the customer) would be less vigilant in regard to the store premises, which in turn would increase the potential for shoplifting.

8.4 Disproportionate impact on small businesses

As a result of the increase in service time, it is likely that customers would start to patronise larger stores (e.g., supermarkets) rather than smaller shops due to the inconvenience of shopping at the latter. This in turn would lead to reduced overall sales at these smaller retail shops as customers regularly purchase other products at convenience stores while buying tobacco products.

The Tobacco Retailers Alliance UK, a coalition of 26,000 independent shopkeepers who sell tobacco products, has warned its members that:

“...banning cigarette branding would directly threaten small shops. For many of you, tobacco sales make up around a third of turnover, sometimes more. . . . During the busy times, such as the morning rush, there is a real risk that customers who have to wait will go to supermarkets and larger shops, which have more staff and therefore shorter transaction times.”¹¹⁶

The Impact Assessment acknowledges that any additional costs of selling tobacco would be more burdensome on smaller shops.¹¹⁷ However, contrary to the Government’s regulatory principles¹¹⁸ there is no assessment of this impact.

8.5 Pressure on profit margins

As Plain Packaging would cause price to become the primary basis for competition, price competition among brands would put downward pressure on retailers’ profit margins (see our response to Question 5).

¹¹⁵ *Ibid.* at 5.

¹¹⁶ Tobacco Retailers Alliance. Newsletter, (November 2011), available at <http://www.tobaccoretailersalliance.org.uk/images/pdf/tra%20Nov%202011.pdf>.

¹¹⁷ Impact Assessment at 14.

¹¹⁸ Department for Business Innovation & Skills, “Principles of Regulation”, available at <http://www.bis.gov.uk/policies/bre/principles-of-regulation>.

8.6 Burdensome over-regulation

The retail display ban has yet to be fully implemented, but retailers are already bearing the significant costs of compliance with these display regulations. The Plain Packaging proposal seems superfluous in circumstances where the retail display ban is being implemented, and would require the retailers to implement different changes and spend even more on training and security to comply with yet another type of regulation.

The British Retail Consortium, the lead retailer trade association representing retailers from large multiples to independents (with members representing 80% of retail trade in the UK by turnover), has said:

*"So much for joined up government and minimising burdens on business. Having just forced large retailers to spend almost £16 million refitting stores to hide tobacco products the Government is now confirming it's considering legislation on packaging. That's crazy and completely against the Government's own better regulation principles. If a decision is taken to go ahead with plain packaging, concealing products from view in shops becomes irrelevant... Retailers are working closely with the Government to help people stop smoking, alongside all their other work on public health and obesity but, after only one week it's telling us the costly display ban it's just imposed on retailers is about to become obsolete."*¹¹⁹

The Scottish Grocers' Federation, which has around 2000 convenience stores in its membership, commented:

*"Given that both London and Edinburgh have passed legislation which bans the display of tobacco products in our stores, and at significant cost to the retailer, a proposal for plain packaging is an absurd example of over regulation."*¹²⁰

The concerns publicly expressed by retailers confirm that they indeed would be significantly impacted by, and strongly oppose, Plain Packaging.

¹¹⁹ British Retail Consortium, "Government approach to tobacco regulation 'crazy'" (13 April 2012).

¹²⁰ Talking Retail, "Independent newsagents fear boost to illicit trade from plain tobacco packaging" (16 April 2012).

9. QUESTION 9

Do you believe that requiring standardised tobacco packaging would increase the supply of, or demand for, illicit tobacco or non-duty-paid tobacco in the UK?

BAT believes that Plain Packaging would exacerbate an already significant illicit trade problem in the following ways:

- **Given the effects that Plain Packaging would have on cigarette brands and down trading, price would become the key driver in any consumer purchasing decision. In this scenario the person able to sell the cheapest product (i.e. the illicit trader) would have a significant competitive advantage.**
- **The business opportunity for counterfeiters would also grow significantly as the mandated removal of difficult to copy features such as complex pack design and sophisticated print techniques would facilitate counterfeit production and would make it harder for both retailers and consumers to spot fake products.**
- **The market in branded products from outside the UK would grow in response to demand from those consumers who would rather continue using the branded product they are used to. This is likely to be sourced either through illegal supply from mainland Europe and other countries where the use of trade marks are legitimately protected, or by suppliers of illicit white or counterfeit branded product.**

Not only would this increase in illicit trade severely undermine the stated aims behind plain packaging – i.e., the proliferation of cheap illegal products would stimulate demand for tobacco products rather than reduce it – but, it would also have a significant impact on Government revenues and society in general through increased criminal activity, and would further undermine public health by:

- **increasing youth access to tobacco products; and**
- **exposing consumers to unregulated products with no controls on hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.**

9.1 The nature of the illicit trade in cigarettes in the UK

The illicit trade in tobacco in the UK remains a significant problem, as recently acknowledged by the Government.

Launching an updated strategy to tackle tobacco smuggling in 2011, Ministers Damien Green and Justine Greening said:

“The Government believes that smuggling must be tackled head on. Tobacco fraud costs taxpayers over £2 billion a year, depriving the

general public of revenue to fund vital public services that support us all.”¹²¹

The most recent estimates published by HMRC indicate that illicit tobacco cost the UK up to £3.1 billion in lost revenue in the 2009/10 year. The estimate of the non-UK duty paid market share for cigarettes for 2009/10 is up to 16% and for Hand Rolled Tobacco is up to 50%.¹²² The latest results from the tobacco industry commissioned empty pack collection survey show non-UK duty paid cigarettes at 14.9% of the market.

Peter Sheridan, a former Assistant Chief Constable of Northern Ireland, with over 30 years of experience policing organised crime, recently stated in an article published in the Daily Mail newspaper:

“...right now in Northern Ireland one in every five packs of cigarettes is illegally sourced, and this money goes into the pockets of organised crime. It may sound far-fetched, but that is the truth. Put simply, my fear is that introducing plain packaging for cigarettes will make life easier for criminals, while those policing our streets will have a much tougher time: instead of having 200 different designs of packs to copy there would be just one...”¹²³

The main reason why demand for illicit tobacco stays so high is the fact that its price is at a substantial discount to legal, UK-taxed products. Successive UK Governments have consistently increased tobacco duties, the latest rise of 5% above inflation in the March 2012 Budget adding 37p to the price of a packet of premium cigarettes.¹²⁴ The consequence has been to make UK cigarette prices the highest in the EU and therefore a “*prime destination for smuggled and counterfeit tobacco*”.¹²⁵

Currently the UK illicit tobacco market comprises three distinct categories:

- **Illicit Whites** - these are branded cigarettes manufactured in countries outside the UK for the purpose of smuggling into higher tax markets, particularly the UK. Illicit Whites sell for about half the price of legal cigarettes in the UK market and are often sold in ‘look a like’ packaging that is very similar to that of better known brands in the UK. For example, JIN LING looks very similar to CAMEL and RAQUEL looks very similar to MARLBORO. The Illicit White market has grown substantially in the UK since 2009.

¹²¹ HM Revenue & Customs. “Tackling tobacco smuggling—building on our success. A renewed strategy for HM Revenue & Customs and the UK Border Agency”, (April 2011), at 1.

¹²² HM Revenue & Customs, “Measuring Tax gaps”, (21 September 2011), at 25-26, available at <http://www.hmrc.gov.uk/stats/mtg-2011.pdf>; The problem is growing in scale and adversely impacts the revenues and budgets of every EU member state, costing Member States €10 billion annually in lost revenue. European Commission Press Release: European Commission and British American Tobacco sign agreement to combat illicit trade in tobacco, Ref: IP/10/951, 15 July 2010.

¹²³ Sheridan, P. “Plans for plain packaging of cigarettes are a charter for organised crime and a danger to our children” *Mail Online*, (22 June 2012). Available at: <http://www.dailymail.co.uk/debate/article-2163227/Plans-plain-packaging-cigarettes-charter-organised-crime-danger-children.html?ito=feeds-newsxml>.

¹²⁴ Impact Assessment at 19, para. 75. UK consumers have also become more and more price sensitive, as illustrated by the Impact Assessment which shows that the share of premium brands in the UK fell from 34.9% to 24.6% between 2001 and 2009 - Impact Assessment at 16, Figure 3.

¹²⁵ Tobacco Retailer Alliance. “Retailers against smuggling”, available at: http://www.tralliance.org.uk/index.php?option=com_content&view=article&id=29&Itemid=24.

- **Counterfeits** - these branded cigarettes infringe the intellectual property rights of the trade mark owners. According to the Tobacco Manufacturers' Association, counterfeits account for 13% of the illicit market, having grown from 1% in 2004.¹²⁶
- **Illicit cross border trade** - the illegal import of tobacco products purchased in lower tax countries. Intra-EU sales are legal if brought into the UK for personal consumption. However, due to the price differential between UK and cross border products, there is a significant incentive for criminal gangs and individuals to bring non-UK duty paid product into the UK for illegal commercial resale.

9.2 Plain Packaging would exacerbate the illicit trade problem

Plain Packaging would drive growth in all of the segments of the illicit market. Due to the particularities of each segment, Plain Packaging would drive this outcome in different ways.

(a) Illicit Whites and Plain Packaging

(i) Price and brand equity

Although certain of today's consumers are driven by price, it is clear from the significant premium and sub-premium segments in the highly priced UK cigarette market that a large proportion of today's consumers are also prepared to pay a premium for the perceived quality and value attributes created by branding. Removing the incentive to pay premiums for products that no longer look or feel premium would drive prices down across all cigarette market segments, conferring a competitive advantage to those able to supply the lowest cost product – i.e. the illicit trader. As Morgan Stanley's recent research note on tobacco and illicit trade points out:

*"...to the extent that brand equity is degraded over time, it could result in lower tobacco prices than would otherwise have been the case (presumably resulting in higher tobacco consumption), and a potential substantial increase in illicit volumes."*¹²⁷

Similarly, a recent report by Transcrime (the Joint Research Centre on Transnational Crime of the Università Cattolica del Sacro Cuore of Milan and the University of Trento) states:

*"Just as an increasing number of consumers have downgraded among legitimate brands, so there is the risk that, with the introduction of plain packaging, the switch to cheaper illicit tobacco will be facilitated."*¹²⁸

¹²⁶ Fenton, B. QGM, Security Liaison Manager, Tobacco Manufacturers' Association, "Sizing the non-duty paid market" (2011). Available at: <http://web1.wisetigerhosting.co.uk/~thetma/wp-content/uploads/2011/03/TMA2.pdf>.

¹²⁷ "Tobacco – Legitimate Manufacturers or Illicit Trade? A Stark Choice, Morgan Stanley Research, July 2, 2012.

¹²⁸ Transcrime -- Joint Research Centre on Transnational crime. "Plain packaging and illicit trade in the UK". (May 2012), at 22, available at <http://transcrime.cs.unitn.it/tc/1069.php>.

(ii) **Denormalisation of legitimate tobacco**

While Plain Packaging is seen by anti tobacco lobbyists as a way of seeking to further denormalise tobacco use, it may in fact provoke some consumers, who would have never before considered illicit tobacco to consider alternatives such as smuggled Illicit Whites.

Evidence shows that denormalising legitimate tobacco use is a driver of the illicit market. According to the Ontario Tobacco Research Unit:

“Tobacco control measures such as advertising bans, public awareness campaigns, and point-of-sale display bans have had the cumulative effects of denormalising traditional cigarette brands, stripping them of the social significance they once had. As big tobacco company brands have been denormalised, there has been growth in demand for ‘no-name’ [illicit] cigarettes and discount brands.”¹²⁹

(b) **Counterfeit and Plain Packaging**

(i) **Easier to Manufacture**

As noted above, Plain Packaging is likely to increase levels of counterfeit by making the manufacture of counterfeit plain packs much easier and cheaper.

First, it is much simpler to manufacture fake packs that no longer come in numerous and varied shapes and sizes or feature complex design features, such as bevelled edges or rounded corners. Plain Packaging would mean that much simpler technology and machinery to make the new packs would be required.

Second, it would also be simpler to print plain packs, without embossing, metallic finishes and difficult “gravure” print technology.

Some commentators have suggested that the requirement to reproduce the pictorial health warnings would still make counterfeiting difficult and costly. However, compared to the print and design features referred to above, the reproduction of graphic health warnings is relatively straightforward for most counterfeiters.

As the Transcrime Report points out:

“Experts from the carton-making industry recently declared that ‘pictorial health warnings pose no real barrier to counterfeiters: they can be produced (and reproduced) using low-cost printing techniques from equipment readily available in the market and four basic printing colours.”¹³⁰

The International Chamber of Commerce's Business Action to Stop Counterfeiting and Piracy (BASCAP) Director, Jeffrey Hardy, has warned that Plain Packaging would increase counterfeiting and smuggling:

¹²⁹ Sweeting J, Johnson T, Schwartz R. “Anti-contraband policy measures: evidence for better practice - summary report”. Toronto, ON: The Ontario Tobacco Research Unit, Special Report Series. (June 2009), at 41, available at http://www.otru.org/pdf/special/special_anti_contraband_measures_summary.pdf.

¹³⁰ Transcrime -- Joint Research Centre on Transnational crime. “Plain packaging and illicit trade in the UK”. (May 2012), at 20, available at <http://transcrime.cs.unitn.it/tc/1069.php>.

“Once brands are removed and all packaging is made to look the same, it is easy to imagine how much simpler it will be to counterfeit a pack of cigarettes. It will reduce brand owners’ ability to take action against counterfeiting and will increase the burden on already overstretched public agencies as they try to keep illicit products away from consumers.”¹³¹

(ii) Counterfeit plain packs - more difficult to detect

By facilitating the counterfeiters’ ability to make fake products that are virtually identical to the genuine ones, it would inevitably make it much harder for both retailers and consumers to identify what is fake and what is not. As retailers and consumers are increasingly misled in relation to fake products, the intelligence information that enforcement authorities receive from the public in relation to illicit product would also diminish.

In light of the considerations described above, it grossly oversimplifies the issue to contend (as do some tobacco control advocates) that counterfeit Plain Packaging would not be any more difficult to detect because packs are still required to have covert security markings. Consumers are plainly not aware of the existence and relevance of covert markings like the use of ink that can only be detected by someone with the relevant sophisticated identification equipment (which is generally only supplied to Customs and Tax officials and is not available to retailers and consumers).

Fakes of branded cross border products would also be harder to detect as consumers would no longer be able to compare them to branded legal products.

Ruth Orchard, Director General of the Anti-Counterfeiting Group (ACG), a trade association that represents over 170 organisations globally and a recognised leading authority on the worldwide trade in fakes, has said:

“Plain packaging will be welcomed by counterfeiters. It will make their job much simpler and make it harder for consumers to spot fakes. It creates a trading environment where all packaging will look essentially the same and where the standard designs will be easy to replicate illegally. Such effects need to be integrated into Government thinking.”¹³²

John Noble, Director of the British Brands Group, has also stated:

“Plain packaging will certainly encourage counterfeiting. Firstly, the fewer designs means that it will be much easier for counterfeiters to produce fakes. More significantly, perhaps, consumers will find it much harder to distinguish between a genuine and a fake product. Fakes undermine Governments’ tobacco policies not just because of the lack of quality control but because they tend to circumvent the legitimate supply chain,

¹³¹ BASCAP, “Plain packaging law creates dangerous precedent”, statement of Director Jeffrey Hardy, (27 October 2011), available at http://bascap.iccccs.org/index.php?option=com_flexicontent&view=items&cid=1:bascap-blog&id=52:plain-packaging-law-creates-dangerous-precedent&Itemid=1.

¹³² PR Newswire. “Standardised ‘Plain’ Packaging - A Leap in the Dark”, available at <http://www.prnewswire.co.uk/news-releases/standardised-plain-packaging---a-leap-in-the-dark-147572055.html>.

allowing children much easier access to age-regulated tobacco products.”¹³³

(c) **Illegal cross border trade and Plain Packaging**

Today the illegal cross border trade is driven by UK consumers' desire for cheaper product and the ability of illicit traders to supply it from mainland Europe. In a Plain Packaging world, those same traders would have an additional opportunity to supply branded product from the EU to those who prefer products recognisable by their current branded format. Indeed, Plain Packaging would create a significant competitive advantage in favour of overseas branded products, as they would be perceived as better quality than UK products which would lack the origin, quality and value attributes created by branding.

This is a point forcefully made by Erik Bloomquist, Berenberg Bank, in March 2011:

“... it is possible that in a plain package environment, the only ‘branded’ product would be either illicit whites (such as Jin Ling) or grey market product brought in from non-plain-package jurisdictions. This increase in the illicit market would then accentuate not only our expectation of PP’s failure to reduce initiation or consumption in the overall market, but also its unintended negative impact on the tobacco tax base, eroding control by public health of tobacco generally and likely increasing youth access.”¹³⁴

9.3 Negative consequences

Illicit trade has a number of extremely negative consequences both in relation to tobacco control aims and for society in general.

(a) **Youth smoking**

An increase in the availability of cheaper illicit product would increase youth smoking rates. HMRC acknowledges that:

“Illicit trading also makes tobacco more accessible to children and young people.”¹³⁵

The Illicit Tobacco North of England Study 2011, by the UK Centre for Tobacco Control Studies, found that 14 and 16 year olds are twice as likely to buy illicit tobacco as adults, and almost 9 out of 10 people agree that children and young people are at risk because they can buy easily and cheaply from unscrupulous dealers.¹³⁶

¹³³ Hands Off Our Packs. “John Noble: Beware ‘full implication’ of plain packs”, (16 May 2012), available at <http://www.handsoffourpacks.com/blog/john-noble-beware-full-implications-of-plain-packaging/>.

¹³⁴ Bloomquist E. “Global tobacco, the plain risk to global tobacco”, Berenberg Bank, (21 March 2011), at 17, available at <http://www.smoke-free.ca/plain-packaging/documents/2011/Philip%20Morris%20-%20Annex%2012%20-%20Bloomquist,%20Berenberg%20Bank%20-%20The%20Plain%20Risk%20to%20Global%20Tobacco%20-%2021%20March%202011.pdf>.

¹³⁵ HM Revenue & Customs. “Tackling tobacco smuggling—building on our success. A renewed strategy for HM Revenue & Customs and the UK Border Agency”, (April 2011), available at <http://www.hmrc.gov.uk/news/tackling-tobacco.htm>.

¹³⁶ UK Centre for Tobacco Control Studies, “Illicit Tobacco: North of England” (2011).

(b) Unregulated products

Illicit tobacco exposes consumers to unregulated products with no controls on the hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

Europol, the main European law enforcement agency, which is engaged in combating illicit tobacco trade has stated:

*"To increase profits, illegal tobacco is produced with cheap materials, and with little regard for health and quality controls. These cigarettes are sold to smokers, instead of genuine products which have to meet certain standards. Seized counterfeit cigarettes have been found to contain mites, insect eggs, fungi and even human faeces."*¹³⁷

(c) Organised crime

The illicit tobacco trade is generally run by organised crime which uses profits from illicit tobacco for expanding other illegal activities such as drugs, human trafficking, etc.

John Whiting, Assistant Director of Criminal Investigations at HMRC has stated:

*"Tobacco smuggling is organised crime on a global scale, with huge profits ploughed straight back into the criminal underworld, feeding activities such as drug dealing, people smuggling and fraud. Purchasing cheap cigarettes without the duty paid on them means trading with criminals and under-mining honest businesses. Organised criminal gangs will deal in any commodity: alcohol, tobacco, rebated oils, drugs, stolen goods, illegal immigrants and human trafficking – whatever makes them money and allows them to launder their criminal profits. Many people who buy a few cans of lager or dodgy cigarettes do not realise the scale of criminality behind the sellers they are dealing with."*¹³⁸

This concern is also shared by former Assistant Chief Constable of Northern Ireland, Peter Sheridan, who states:

*"Many people have said smokers are naturally drawn to branded cigarettes, which is why logos should be banned. But plain packaging will create a bizarre situation - where branded cigarettes are the tobacco products of choice on the black market. If we hand the control of branded goods to criminal gangs, we could actually be aiding them in their illegal trade."*¹³⁹

¹³⁷ Europol, "Europol Review, General Report on Europol Activities" (2011) at 19. Available at: <https://www.europol.europa.eu/content/publication/europol-review-2010-1441>.

¹³⁸ Quoted in Herald Scotland, (9 August 2011), "One in 10 cigarettes being bought illegally", available at <http://www.heraldsotland.com/mobile/news/health/one-in-10-cigarettes-being-bought-illegally-says-study.14671502>.

¹³⁹ Sheridan, P. "Plans for plain packaging of cigarettes are a charter for organised crime and a danger to our children" *Mail Online*, (22 June 2012). Available at: <http://www.dailymail.co.uk/debate/article-2163227/Plans-plain-packaging-cigarettes-charter-organised-crime-danger-children.html?ito=feeds-newsxml>.

A letter by Michael Waller, a former Detective Superintendent, M. McAdam, a former Detective Chief Superintendent, and 24 former senior police officers and customs officers , that was published in the Times Newspaper on 28 June 2012, states:

"Sir, Plain packaging risks fuelling tobacco smuggling. We are concerned at the possibility of the Government introducing standardised packaging of tobacco products. We do not wish to get involved in the public health debate. However, our concern is very much on the impact that it could have on crime and in particular on serious organised criminals who are the target of the major law enforcement agencies.

Tobacco products are relatively small, high-value items and are smuggled in extremely large quantities, depriving the Treasury of billions of pounds in tax revenues. Those who smuggle tobacco products are often involved in other forms of serious criminality. The introduction of standardised packaging would make it even easier for criminals to copy and sell these products to the unsuspecting public, including children. This would place further pressure on already stretched law enforcement agencies and at a time when the Government needs to secure much needed tax revenues.

*Irrespective of your views on smoking, measures that appear to benefit the criminal community must be given serious consideration before being taken any further."*¹⁴⁰

(d) Tax revenue

The most recent estimates published by HMRC indicate that illicit tobacco cost the UK up to £3.1 billion in lost revenue in the 2009/10 year. The estimate of the non-UK duty paid market share for cigarettes for 2009/10 is up to 16% and for Hand Rolled Tobacco is up to 50%.¹⁴¹ The latest results from the tobacco industry-commissioned empty pack collection survey show non-UK duty paid cigarettes at 14.9% of the market. Any increase in the size of the illicit market will only exacerbate the already substantial loss to the Exchequer resulting from illegal sales.

9.4 Lack of evidence

The risk that Plain Packaging would increase illicit trade of tobacco is one of the express concerns of the Department of Health in the present consultation.¹⁴² Indeed, a Health Minister recently stated:

¹⁴⁰ Waller, M. *et al.*, "Standardised packaging would make it even easier for criminals to copy and sell tobacco products to the unsuspecting public" The Times, (28 June 2012).

¹⁴¹ HM Revenue & Customs, "Measuring Tax gaps", (21 September 2011), at 25-26, available at <http://www.hmrc.gov.uk/stats/mtg-2011.pdf>; The problem is growing in scale and adversely impacts the revenues and budgets of every EU member state, costing Member States €10 billion annually in lost revenue. European Commission Press Release: "European Commission and British American Tobacco sign agreement to combat illicit trade in tobacco", Ref: IP/10/951, (15 July 2010).

¹⁴² Impact Assessment at 3 ("Any risk that standardised packaging could increase illicit trade of tobacco will be explored through consultation as there is insufficient evidence on which to include analysis in this IA"); at para.45 ("The main uncertainties associated with the policy explored herein (beyond the impact upon smoking behaviour itself) relate to impacts upon price and the illicit tobacco trade.")

*"In coming to a view on the impact of standardised packaging, the availability of illicit tobacco will obviously be important, but we do want to see good, hard evidence on this."*¹⁴³

The Impact Assessment concludes that:

*"any adverse impact of standardised packaging (increase) in the non duty paid segment of the market could involve significant costs",*¹⁴⁴

However, the Department of Health has not attempted to quantify these risks or costs but rather has just stated:

*"It is hard to predict the potential on the complex and dynamic nature of the illicit trade in contraband and counterfeit tobacco."*¹⁴⁵

In light of the very widely held views as to the significant risk Plain Packaging poses in this context, it is vital that the Government addresses these concerns before pursuing this policy option.

¹⁴³ Milton, Anne. Parliamentary Under-Secretary of State for Health. Hansard, Commons Debates, (17 April 2012), column 299-300, available at: <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120417/debtext/120417-0004.htm>.

¹⁴⁴ Impact Assessment at 23, para 23.

¹⁴⁵ *Ibid.* at 19, para 75.

10. QUESTION 10

People travelling from abroad may bring tobacco bought in another country back into the United Kingdom for their own consumption, subject to UK customs regulations. This is known as “cross-border shopping”. Do you believe that requiring standardised tobacco packaging would have an impact on cross-border shopping?

BAT believes that Plain Packaging would promote an increased demand for branded products from outside the UK.

As pointed out in our response to Question 9, Plain Packaging is likely to promote a demand for branded products from outside the UK. Consequently, as well as stimulating illegal cross border trade, it is also likely to increase volumes of legal cross border shopping.

The Department of Health acknowledges this in the Impact Assessment where it states:

“Standardised packs may provide an additional possibly powerful incentive to crossborder shopping, an issue which will be explored in consultation to enable a central quantified estimate of impact.”¹⁴⁶

The Impact Assessment further notes that:

“The impact on the domestic industry may be a result not only of switching between brands and quitting behaviour, but also switching from standardised tobacco packs to conventionally packaged cigarettes purchased abroad.”¹⁴⁷

Given the difficult economic climate, cross border shopping in the EU is already on the increase for heavily excised products such as tobacco and alcohol and Plain Packaging would exacerbate this trend. Plain Packaging would create a significant competitive advantage in favour of overseas branded products, as they would be perceived as better quality than UK products which would lack the perceived origin, quality and value attributes created by branding.

While these purchases are legal, as long as consumers respect the UK customs limits, this increase in legal cross border shopping would still give rise to significant losses to the Exchequer and possibly further drive consumption. Because these products are cheaper, one unintended effect is that existing smokers would smoke more.¹⁴⁸

¹⁴⁶ Impact Assessment at 19.

¹⁴⁷ *Ibid.* at 22.

¹⁴⁸ See, e.g., Cummings KM, Hyland A, Lewit E, Shopland D. “Use of discount cigarettes by smokers in 20 communities in the United States, 1988-1993” *Tobacco Control*, (1997); 6 (suppl 2): 525 – 530.

11. QUESTION 11

Do you believe that requiring standardised tobacco packaging would have any other unintended consequences?

BAT believes that requiring Plain Packaging would lead to a number of significant unintended consequences, some of which have previously been addressed in this Response. These include:

- **Increasing illicit trade and cross-border shopping (see our responses to Questions 9 and 10);**
- **Increasing commoditisation of cigarettes, resulting in decreased prices and thus increased consumption (see our response to Question 5);**
- **Negatively impacting retailers (see our response to Question 8);**
- **A marked departure from the centuries-old cornerstone of trade, by requiring companies to divest themselves of valuable intellectual property rights as a precondition to trading in the UK (see our responses to Questions 5 and 6).**
- **Legal and financial implications for the Government, including in particular, an obligation to compensate manufacturers for the expropriation of their valuable intellectual property and otherwise the violation of a number of obligations and fundamental rights protected by UK, EU and international law (see our responses to Questions 6 and 7); and**
- **A “slippery slope” precedent for policy making.**

This section addresses the point that Plain Packaging would lead to a “slippery slope” precedent for policy making, which is not addressed elsewhere in this Response.

11.1 Impermissible precedent set for other industries

At a conceptual level, the proposal has negative implications for any goods that have the potential to harm human health (e.g., foods high in fat and/or sugar, alcohol, etc.), or that are otherwise controversial, particularly in respect of a manufacturer’s intellectual property rights. Indeed the Department of Health has stated:

“The introduction of plain packaging for tobacco products may set a precedent for the plain packaging of other consumer products that may be damaging to health, such as fast food or alcohol.”¹⁴⁹

This approach raises fundamental issues far beyond the tobacco industry, and the Government will find itself on a “slippery slope” in terms of demands by interest groups and others insisting that the Government introduce Plain Packaging measures in other sectors. Indeed the House of Commons’ Health Select Committee has included Plain Packaging for

¹⁴⁹ Department of Health Consultation on the future of tobacco control, (2008), at 42.

alcohol as part of its current inquiry into the Government's alcohol strategy.¹⁵⁰ Precluding a trade mark owner from exercising its intellectual property rights as a result of the type of product associated with that trademark would impermissibly create a second class category of products to which the universal protection of intellectual property rights would not apply. Accordingly, Plain Packaging cannot and should not be introduced for tobacco products.

As the International Chamber of Commerce has noted:

*"With the plain packaging principle, the elimination of branding creates a severe trade restraint, interfering with the legitimate growth of markets and very real adverse precedential implications for other legal and branded products and services."*¹⁵¹

Similarly, the UK arm of the International Chamber of Commerce has observed:

*"This is not just an issue for the tobacco industry and health groups. The introduction of plain packaging legislation would break new ground for the UK in terms of how commercial expression is regulated - the possible consequences of which need to be carefully considered for the economy as whole...What might be viewed as a justifiable measure in narrow terms, could set a precedent which would be hugely damaging to global trade."*¹⁵²

¹⁵⁰ See Commons Select Committee. "Government's alcohol strategy", (26 March 2012) available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/news/12-03-26-alcohol-torcfe/>.

¹⁵¹ International Chamber of Commerce (BASCAP). "Submission to the Australian Department of Health and Ageing Consultation 2011" (Annex I).

¹⁵² International Chamber of Commerce UK. "ICC Stresses need for wider perspective on plain packaging". (13 April 2012). Available at: <http://www.international-chamber.co.uk/press/72-icc-stresses-need-for-wider-persepctive-on-plain-packaging>.

12. QUESTION 12

Do you believe that requiring standardised tobacco packaging should apply to cigarettes only, or to cigarettes and hand-rolling tobacco?

BAT does not believe that Plain Packaging would achieve its policy objectives, and as such, the policy should not apply to either cigarettes or hand-rolling tobacco (HRT).

Similar to cigarettes, there is no evidence to suggest that Plain Packaging for HRT would achieve the Department of Health's policy objectives. The market for hand-rolling tobacco has been a case study in the UK both of price sensitivity and also of the behaviour of consumers when faced with the availability of cross border options to purchase. Although the share of the HRT market occupied by cross border tobacco has fallen over the last ten years from around 75% to around 50%, the latest data available to Customs suggest that this market has once again started to grow. Taking into account the existing market dynamics, understanding the basic rules of supply and demand and the impact of taxation and regulation in a high price market, it is difficult to understand the point of further distortion of the market through an untried and untested policy option.

13. QUESTION 13

Do you believe that requiring standardised tobacco packaging would contribute to reducing health inequalities and/or help us fulfil our duties under the Equality Act 2010?

BAT does not believe that Plain Packaging would contribute to reducing health inequalities.

On the contrary, as we have also explained in this Response, Plain Packaging would reduce prices and incentivise illicit trade (see our response to Questions 5 and 9). This would disproportionately impact those in poorer socio-economic groups and young people, who are more likely to access cheaper and illicit products thereby exacerbating health inequalities.

In addition, while the Equality Impact Assessment identifies particular at risk groups, e.g., retailers, partially sighted people, and those who cannot read or understand written English, it has not undertaken any assessment of the impact on these groups. In order to comply with its duties under the Equality Act, the Department of Health is required to obtain evidence to assess properly the true impact of Plain Packaging on these and all other at risk groups.

13.1 The Equality Impact Assessment does not account for all the impacts of Plain Packaging or undertake an assessment of the impacts on all at risk groups

While the Equality Impact Assessment correctly identifies some of the potential negative impacts of Plain Packaging on equality, including the risk that Plain Packaging would increase the availability of illicit trade, it fails properly to reflect the very real risks (also identified in the Impact Assessment) that Plain Packaging would not only increase the current trend for smokers to down-trade, but would also give rise to increased price competition between tobacco manufacturers, leading to lower prices for legal products.

These effects would result in increased consumption of tobacco generally. This is because it is widely acknowledged that lower prices, down-trading and an increase in illicit trade would all result in a corresponding increase in the prevalence of smoking and the overall consumption of tobacco products. Illicit tobacco also exposes consumers to unregulated products with no controls on the hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

The disproportionate impact of the illicit trade on young people and poorer socio-economic groups is clear. Research cited by Action on Smoking and Health (ASH) found that:

- A third of underage smokers smoke illicit tobacco and this age group accounts for around 50% of all illegal tobacco sales; and
- People in poorer communities use illicit tobacco at much higher rates and people using illicit tobacco smoke an extra 2 cigarettes a day.¹⁵³

¹⁵³ "Smoking: illicit tobacco", (October 2011), available at <http://www.ash.org.uk/localtoolkit/docs/cllr-briefings/Illicit.pdf>.

This problem is also acknowledged in the HM Revenue & Customs and the UK Border Agency's, document "Tackling Tobacco Smuggling – building on our success", April 2011, which states:

*"Unregulated distribution networks associated with smuggling make tobacco more accessible to children and young people and perpetuate health inequalities across socio-economic groups."*¹⁵⁴

In the circumstances, BAT strongly disagrees with the Department of Health's assertion that Plain Packaging may potentially lead to an overall reduction in the consumption of tobacco and that this may help to narrow the health inequalities associated with smoking. Instead, Plain Packaging would increase, rather than reduce, any such health inequalities.

In addition, while the Equality Impact Assessment identifies particular at risks groups, *e.g.*, retailers, partially sighted people, and those who cannot read or understand written English (*i.e.* the very people who would find it most difficult to identify and differentiate between plain package products), it has not undertaken any assessment of the impact on these groups. It has also not recognised all the impacts for retailers as noted in our response to Question 8 above.

As acknowledged, the Equality Impact Assessment is incomplete. In fact it does no more than identify some risks and note that the evidence to assess these risks is not available. Clearly, in order for the Department of Health to comply with its duty under the Equality Act, such evidence would need to be obtained and a proper assessment of the impacts of all at risk groups undertaken.

¹⁵⁴ HM Revenue and Customs, UK Border Agency. "Tackling tobacco smuggling-building on our success. A renewed strategy for HM Revenue & Customs and the UK Border Agency". (April 2011), at 2, available at <http://www.hmrc.gov.uk/news/tackling-tobacco.htm>.

14. QUESTION 14

Please provide any comments you have on the consultations-stage impact assessment. Also, please see the specific impact assessment questions at Appendix B of this consultation document and provide further information and evidence to answer these questions if you can.

The Impact Assessment fails to comply with regulatory impact assessment guidelines and best practice policy-making in various respects. Specifically, the Impact Assessment:

- **does not consider alternative policy options;**
- **does not include sensitivity analyses of the costs or benefits; and**
- **does not meet the appropriate standard of evidence required to introduce a new policy measure.**

As such, the Impact Assessment is incomplete and evidence on key issues is lacking.

Furthermore, the methodology pursued in the Impact Assessment evidences a clear predisposition by the Department of Health to the implementation of Plain Packaging before a determination has been made, as a result of adequate consultation, that it is proper to implement the policy in the first place.

In addition, the Department of Health's proposal to quantify the unknown impact of Plain Packaging on smoking behaviour, by eliciting the subjective estimates of selected experts on tobacco control,¹⁵⁵ is self-serving, flawed and unreliable.

14.1 Failure to consider alternative policy options

The Impact Assessment does not consider alternative proposals, including a 'wait and see' option, as required by best practice policy-making principles. Instead, the Impact Assessment appears to favour direct government intervention without considering alternative measures targeted at the specific policy concerns, such as, legislation penalising or sanctioning youth who illegally purchase tobacco products or adults who purchase tobacco products on behalf of youth smokers.

As part of this Response, BAT has commissioned the expert opinion of Mr. Stephen Gibson, an economist and consultant who has over 24 years of extensive experience in leading major economic and strategy projects across a broad range of industries on both sides of the regulatory fence. Mr. Gibson has directed or participated in over 25 impact assessments, and provides specialist micro-economic policy advice to regulated companies, regulators and government. He has held a number of senior economics positions in various regulatory bodies and at regulated companies and, among other things, was responsible for training economists and policy advisors at Ofcom (the communications sector regulator) in regard to conducting regulatory impact assessments and for developing and rolling out the impact assessment guidelines for Postcomm (the independent regulator of postal services).

¹⁵⁵ Impact Assessment at para 53 and Annex 2.

Mr Gibson undertook a review of the Consultation and Impact Assessment against regulatory best practice and the UK Department for Business Innovation and Skills (BIS) principles of regulation that the Department of Health should have applied. Mr Gibson's opinion, (the "Gibson Opinion") is submitted with this Response (see Appendix B). Mr. Gibson states:

"While the consultation asks for proposals on alternative policy options, it does not consider or analyse policy alternatives apart from the Do Nothing baseline and standardised packaging proposal. This is not in line with best practice or [Impact Assessment] guidelines and seriously limits the value of the impact assessment in supporting policy development." (Gibson Opinion at 6)

Moreover, the Impact Assessment does not consider a 'wait and see' option, which is particularly necessary in the case of Plain Packaging because of the significant uncertainty as to the policy's costs and benefits. As Mr. Gibson opines:

"The absence of a 'wait and see' policy option is a particular deficiency in this case given the contemporaneous introduction of ending open display of tobacco products. Until this is fully introduced and the effects on demand and consumption patterns of tobacco can be assessed, forecasts of trends in the tobacco market are subject to an added level of uncertainty. Adding a further measure during a similar timeframe increases even further the uncertainty in market forecasts and risks misallocating costs and benefits from standardised packaging that have already been assumed in the previous measure and which should therefore be included in the Do Nothing base case." (Gibson Opinion at 7)

The failure to consider other alternate policy options is surprising given the Department of Health's acknowledgement of the need for a quantified assessment of the range and differential impact of different policy options. In correspondence from the Department of Health to the Public Health Research Consortium, in connection with the preparation of the PHRC Review, the Department of Health wrote:

*"We would want to convey to the research team that we recognise that this task is ambitious, even heroic, **but that they should appreciate that without a quantified assessment of the range of impact, and of the differential impact of different options, we will not be in a position to assess whether any intervention option justifies the costs imposed and the freedoms circumscribed.**"*¹⁵⁶ (emphasis added)

14.2 Lack of sensitivity analysis

The Impact Assessment is incomplete in its failure to follow the Department of Health's own recommendation to conduct a sensitivity analysis¹⁵⁷ to show that the proposal is superior by

¹⁵⁶ E-mail From: UK Department of Health, To: Mark Petticrew (PHRC), (13 May 2011) (emphasis added).

¹⁵⁷ Glover D, Henderson J, Department of Health. "Quantifying health impacts of government policies: A how-to guide to quantifying the health impacts of government policies", at 27, 28 and 33, (July 2010) ("*Sensitivity analysis should always be used to test the robustness of the preferred choice of option to changes in key assumptions.*" at 33), available at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_120108.pdf.

a clear margin to other approaches. Specifically, in those instances where the Department of Health has quantified the estimated costs and benefits of the policy option (and many of the costs and benefits, in fact, are lacking in evidence-based quantification, as discussed further below), there has been no sensitivity analyses of these costs and benefits, which could skew the balance to demonstrate greater benefits when in fact the opposite is true. As Mr. Gibson observes:

"The lack of any sensitivity analysis, particularly for a policy in which there is such a large level of uncertainty regarding the underlying evidence . . . seriously undermines the value of this analysis. . . . Without sensitivity analysis it is impossible to demonstrate that there is a clear margin between the costs and the benefits. This is because the range of plausible estimates for costs and benefits could well be overlapping and therefore the actual net benefit (benefits minus costs) of the policy measure could well be negative rather than positive." (Gibson Opinion at 10) (emphasis in original)

The Impact Assessment's cost-benefit analysis falls well below the best practices standards for policy-making, is incomplete and subject to a large margin of error.

14.3 Lack of evidence on key issues

The Impact Assessment lacks evidence to support many of its assessed costs and benefits (e.g., reduced take up of smoking, improved quit rates, loss of duty and VAT from illicit trade and cross-border sales -- see Gibson Opinion, Table 1), and indeed expressly mentions various key areas in which more evidence is needed and will be explored through the consultation process (e.g., the impacts on retailers, illicit trade and cross border shopping; see Impact Assessment at 3, 48, 76 and Gibson Opinion at 12-16). This glaring absence of primary proof underscores that there is a dearth of robust evidence on which to premise a Plain Packaging policy, and that such a policy cannot meet the demanding best practices standards of a proportionality assessment.¹⁵⁸

"As can be seen the evidence on both costs and benefits is incomplete, subject to biases and flaws and subject to large margins of error - in some cases the numbers assumed are simply plucked out of the air with no supporting justification. Effectively the [Impact Assessment] is saying that the [Department of Health] have no idea what the costs or benefits of standardised packaging will be." (Gibson Opinion at 4)

Indeed, in its *Annual Report 2011* entitled "Improving Regulation", the Regulatory Policy Committee (RPC) notes that a considerable proportion of the Department of Health's 2011 proposals failed to meet the RPC's scrutiny: in the second half of that year, two-thirds of the Department of Health's first time submissions were deemed "not fit for purpose".¹⁵⁹ Similar to the problems with the Department of Health's approach to the Impact Assessment here:

¹⁵⁸ See e.g., Department for Business Innovation and Skills. "Principles of Regulation", available at <http://www.bis.gov.uk/policies/bre/principles-of-regulation> ("The government will regulate to achieve its policy objectives only: . . . where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate").

¹⁵⁹ Regulatory Policy Committee. "Improving regulation: An independent report on the analysis supporting regulatory proposals, January-December 2011", (March 2012), at 2.55.

*"Many of these proposals were highly sensitive and complex measures for which we would therefore expect a high level of evidence and analysis in order to accept with (sic) the impacts presented. The most common flaw in these [impact assessments] was that the analysis of wider economic impacts was incomplete. For example, tobacco [impact assessments] tended to provide a full analysis of benefits, but failed to estimate the full economic costs to producers and retailers."*¹⁶⁰

The absence of evidence to support the Plain Packaging policy renders any further action on this proposal highly inappropriate.

Furthermore the Department of Health's approach in seeking to fill the numerous gaps in the evidence through the consultation process itself is misconceived. Mr Gibson states:

*"Consultation responses are unlikely to be an appropriate or effective way to provide reliable and accurate primary evidence [on such matters as illicit or cross-border trade, downtrading, tobacco consumption or consumer surplus]. This is much more likely to be gained from a combination of market research, analysis of business cost data, economic and trend analysis.... As a result, it is **extremely unlikely** that without further primary research and evidence the results of the consultation will enable an informed decision to be made on whether or not to proceed with standardised packaging."* (Gibson Opinion at 15 - 16) (emphasis in original)

14.4 Bias in favour of implementation of the Plain Packaging policy

On several occasions, the Impact Assessment skews uncertain estimates toward results that favour implementation of the Plain Packaging policy. In choosing figures and estimates that tend to exaggerate benefits and minimise costs, the Department of Health demonstrates a pre-disposition toward the policy before a determination has been made that it is proper to introduce Plain Packaging in the first place.

For example, in terms of valuing the impact that Plain Packaging would have on consumption, the Impact Assessment uses lifetime benefits values at the top of an estimate range, while simultaneously excluding significant adjustments and using quality of life year values that are double those used in other recent impact assessments. Doing so inflates the benefits figures in the Impact Assessment (see Gibson Opinion at 18). Similarly, in valuing the costs of the Plain Packaging proposal, the Impact Assessment excludes the business losses and diminution in brand value incurred by foreign investors, thereby dramatically reducing one of the costs at issue in the Impact Assessment. According to Mr Gibson, this

"is a methodological error with no apparent economic justification or precedent for the approach and if applied more widely could have catastrophic impacts for the UK economy." (Gibson Opinion at 23)

In short, the Impact Assessment demonstrates a biased approach that favours implementation of the Plain Packaging policy before all of the necessary evidence to justify such a policy is obtained and evaluated.

¹⁶⁰ *Ibid.* at 2.5.

14.5 Proposal to quantify the unknown impact of Plain Packaging is flawed and unreliable

The Department of Health acknowledges that there is a “*lack of quantifiable evidence on the likely impact of standardised packaging, given that no country has yet introduced this measure*”.¹⁶¹

To address this, the Department of Health proposes to quantify the unknown impact of Plain Packaging on smoking behaviour by eliciting the subjective estimates of selected experts on tobacco control.¹⁶²

While the Department of Health notes that expert judgements have previously been used in a range of areas (including risk of volcanic eruptions, treatments for major depression and chances of survival following gastric surgery),¹⁶³ none of these topics involves complex market decisions by consumers, and all are areas where experts can be expected to have had direct experience of previous events. However, there is currently no direct experience to draw on of the impact of Plain Packaging on tobacco consumption, and the potential impact is one that involves complex consumer decisions based on brand acceptance and market forces, such as price. Therefore, it is inappropriate to proffer the use of these examples as precedents to support the application of this technique in the unique context of people's smoking behaviour.

Furthermore, notwithstanding that the Department of Health recognises the possibility of bias, it proposes to only select experts in tobacco control and to disregard the crucial requirements of impartiality and lack of personal interest. The Department of Health is therefore proposing, by design, to obtain estimates from proponents of Plain Packaging or other tobacco control measures who can only be expected to support Plain Packaging as an effective means of regulation. As Dr. Klick observes:

“The record on the accuracy of expert predictions is not good, even in fields where the underlying research is of substantially higher quality than exists on the issue of plain packaging.” (Klick Opinion at 6)

“The Department of Health proposal seems crafted to draw the individuals who are least likely to generate accurate predictions. Specifically, the evidence favours methodological experts or experts in broad fields, whereas the selection criteria will favour individuals who have written extensively on and advocated for plain packaging and other tobacco control measures. Furthermore, by abandoning any attempt to solicit impartial scholars, the process is likely to entice individuals who have strong policy interests in favour of plain packaging that exist independently of any evidence on the causal effects of plain packaging on smoking decisions.” (*Ibid.* at 8)

“This proposal is tantamount to letting plain packaging advocates fill in whatever numbers they want in order to justify the introduction of plain packaging.” (*Ibid.* at 9)

¹⁶¹ Impact Assessment at Annex 2, para 122.

¹⁶² *Ibid.* at Annex 2, para 53.

¹⁶³ *Ibid.* at Annex 2, para 123.

Similarly, Mr. Gibson notes:

“In selecting the panel, the requirements of impartiality and lack of economic or personal stake in the potential findings are not being applied – this is a major shortcoming of the approach and undermines the credibility of the results. It is not even clear that the panel would have the right set of expertise for example in youth smoking initiation, smoking cessation, relapse, risk perception, illicit trade in tobacco and product branding and marketing that would be required to assess the impact of this policy proposal.” (Gibson Opinion at 16)

For all of these reasons, the Impact Assessment is not reliable. Because the standard of evidence and analysis in the Impact Assessment falls far below that required for a policy decision of this magnitude, the Department of Health has failed to demonstrate that Plain Packaging is fit for its purpose, justified or proportionate.

RESPONSES TO QUESTIONS IN THE CONSULTATION APPENDIX B

QUESTION 1

1. *What would be the costs to tobacco and packaging manufacturers of redesigning packs and retooling printing processes if standardised packaging were introduced?*

It is not possible to answer this question until a specific proposal is presented.

QUESTION 2

2. *Would the cost of manufacturing cigarette packs be lower if standardised packaging were introduced, compared with the current cost of manufacturing packs?*

Please see our response to Consultation Appendix A, Question 7.

QUESTION 3

3. *How often do cigarette manufacturers amend the design of tobacco packaging for brands on the United Kingdom market, and what are the costs of doing so?*

Without disclosing confidential and commercially sensitive information we can say that we refresh the design of tobacco packaging as required to meet competitive needs.

QUESTION 4

4. *How many different types of shape of cigarette pack are currently on the United Kingdom market?*

There are approximately 12 different types of shape of cigarette packs associated with BAT products sold on the UK market.

QUESTION 5 - 7

5. *Would retailing service times be affected, and if so, why and by how much, if standardised packaging were introduced?*
6. *How could standardised packs be designed to minimise costs for retailers?*
7. *Would retailers bear any other costs if standardised tobacco packaging were introduced?*

Please see our response to Consultation Appendix A, Question 8.

QUESTION 8 - 9

8. *What is the average price of a packet of cigarettes in the following market segments?*
9. *What percentage of total cigarette sales in the United Kingdom are in each of the following cigarette markets segments?*

Premium brands

Mid-price brands

Economy brands

Ultra-low-price brands

The Department of Health has not supplied a definition of the different market segments referred to in these questions. BAT segments the market into the following four categories: Premium, Aspirational Premium, Value for Money and Low. The current average recommended retail price, price range and market percentage of these segments for BAT products sold in the UK are:

Premium brands	£7.50	(£7.46 - £7.80)	19%
Aspirational Premium brands	£6.94	(£6.72 - £7.37)	19%
Value-for-Money brands	£6.60	(£6.35 - £6.67)	25%
Low price brands	£6.10	(£5.75 - £6.25)	37%

QUESTION 10

10. *How does the total price of a packet of cigarettes break down into manufacturing costs, distribution costs, tax, other costs, profits for retailers and profits for the tobacco manufacturer in the following cigarette market segments?*

Premium brands

Mid-price brands

Economy brands

Ultra-low-price brands

We understand that the Department of Health will have details of the proportion of tax paid on tobacco products. The other information requested is confidential and commercially sensitive.

QUESTION 11

11. *Would consumers trade down from higher-priced tobacco products if standardised tobacco packaging were introduced?*

The Impact Assessment acknowledges that down trading would be a consequence of Plain Packaging. Please see further our response to Consultation Appendix A, Question 5.

QUESTION 12

12. *Of the total cigarette market in the United Kingdom, what proportion is sold in cartons rather than in individual packs?*

We cannot answer the question as the term “carton” is vague and ambiguous in this context (e.g., cartons sold at wholesale or retail, cartons with 200 sticks, 500 sticks, etc.)

APPENDIX A
REPORT OF DR. JONATHAN KLINK



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Jonathan Klick
Professor of Law

June 29, 2012

I, Jonathan Klick, am a tenured full professor of law at the University of Pennsylvania in Philadelphia, Pennsylvania (USA). I am also the Erasmus Chair of Empirical Legal Studies at Erasmus University Rotterdam (the Netherlands). This position is partially funded by an Erasmus Mundus grant from the European Commission. I was previously the Jeffrey A. Stoops Professor of Law and Economics at the Florida State University. I have held visiting professor positions at Columbia University, Northwestern University, the University of Southern California, the University of Hamburg, and have been invited to be a visiting professor at the Yale Law School. I am the editor of the *International Review of Law and Economics*.

I have also taught courses on statistics and causal inference to state and federal judges in the United States through George Mason University's Law and Economics Center. I have taught similar material to state attorneys general, congressional staffers, and law professors through the Center's programs.

My training includes a master's degree in economics from the University of Maryland at College Park, a Ph.D. in economics and a J.D. in law, both from George Mason University. Professionally, I have served as a research economist on statistical methodology issues for the U.S. Bureau of Economic Analysis. I have also served as a senior economist for the RAND Corporation, contributing to its working paper series and presenting my empirical work at a number of RAND events, including its board meetings.

My academic work on the causal effects of health regulations on behavior has been published in the *Journal of Law and Economics*, the *Journal of Legal Studies*, the *Journal of Law, Economics, and Organization*, the *American Law and Economics Review*, and *Health Economics*.

I have presented my research at Harvard University, including the Harvard Medical School, Yale University, Stanford University, the University of Chicago, and many other top universities throughout the world.

My complete CV is attached to this letter.

I have been retained by British American Tobacco UK Limited to offer my opinion on the literature regarding the effect of plain packaging on smoking rates as it pertains to the U.K. Department of Health Consultation launched in April 2012. This letter provides a summary of my evaluation of this literature, as well as my evaluation of the Department of Health's plan to resolve uncertainty as to the effects of plain packaging on the number of smokers and the number of children trying smoking by surveying experts. I have limited my comments to only these issues. The lack of commentary on other points raised in the consultation should not be interpreted as agreement with or endorsement of the methodology used therein.

Executive Summary

The literature on plain packaging provides neither a reliable nor a relevant foundation for plain packaging regulations. From a relevance standpoint, only two studies look at any outcome that is even close to actual smoking decisions, and even those do not actually measure observed smoking behavior. The remainder of the literature focuses on subjective impressions and stated intentions regarding smoking behavior. There is no evidence that either of these is predictive of real world smoking choices. Relevance is further undermined given that all of these studies examine impressions in the short term where plain packs are likely to be seen as odd or unfamiliar. In a regime where all packs are plain, this effect will dissipate especially as smokers become better acquainted with plain packs.

Even putting these crucial relevance issues aside, the methods used in the plain packaging literature are flawed. Virtually every study uses self-selected samples, and the lack of double blind designs makes it likely that subjects are influenced by the expectations and preferences of the researcher. Finally, given the policy preferences of the public health community, this is an area where publication bias is likely to be present. Each of these flaws likely overstates the true magnitude of any effect of plain packaging on stated intentions and subjective impressions.

Multiple studies with the same underlying flaws do not magically remedy those flaws. In such a case, consistency of results provides better evidence of the consistency of the flaws than it does of the accuracy of the general conclusion. The scientifically honest approach to this literature is to infer that we have no sound evidence about the likely effects of plain packaging on smoking outcomes.

Further, the proposal to rely on surveys of experts to resolve the irreducible uncertainty on this issue is absurd. On issues where empirical evidence is wholly absent, consensus does not magically transform speculation into sound science. Studies of forecasts by experts generally find them to be very inaccurate and biased. This has been true across a wide range of scientific and social scientific fields. The Department of Health's proposed method of recruitment virtually ensures that any such bias will be compounded as the DOH has conceded it will not seek impartial parties. Its sample of experts will systematically draw from individuals who have demonstrated a willingness to draw conclusions about the efficacy of plain packaging even though none of the existing studies provides a sound basis for such conclusions. Indeed, many of the individuals in the sample pool have publically advocated for plain packaging despite the absence of a scientific foundation for such policies.

The Literature on Plain Packaging and the PHRC Systematic Review

Lack of real world evidence

Although a number of methodological flaws plague the literature on the effect of plain packaging on smoking decisions, as discussed below, the fundamental shortcoming of the literature is summed up nicely in the Public Health Research Consortium (PHRC) report *Plain Tobacco Packaging: A Systematic Review* when it states, "it has not yet been possible to evaluate the impact of the policy in practice (p. v)." In fact, most of the studies in this literature examine the subjects' stated views of plain packaging but observe no actual smoking choices. The two existing studies that observe some behavioral effect present significant problems for the claim that plain packaging will reduce smoking.¹

¹ A third article, Munafò M, Roberts N, Bauld L, Ute L (2011). Plain packaging increases visual attention to

In a study by Crawford Moodie (the lead author on the PHRC Report) and coauthors² in which subjects were asked to put their cigarettes in researcher provided plain packages and then record details about their smoking behavior over a two week period, many individuals did not change their smoking behavior at all when using the plain packages, even though virtually all individuals expressed negative opinions of the plain packs. This highlights the problems of jumping from evidence that individuals view plain packs negatively to the conclusion that plain packages will reduce smoking relative to retaining branded packs. Even among the few individuals who indicated some behavioral changes, these changes, such as smoking less around others or forgoing a cigarette at a specific time, there is no evidence that they actually smoked less. Further, there was no statistically significant difference in how individuals viewed health warnings between the branded and plain packages, as noted in the PHRC report (p. 54).

Though this study is one of only two to examine actual smoking behavior (albeit through self-reports) with respect to plain packaging, even it presents significant external validity challenges. That is, the negative impressions of the plain packaging and any behavioral changes resulting from those impressions were very likely motivated by the fact that the packs were different rather than because they were plain. Many of the subjects' responses suggested this, noting the novelty of the pack. Under a plain packaging regime, such novelty would disappear as all packs would be packaged similarly. Further, this study, like all others, focuses on short term impressions of plain packaging. As smokers become familiar with such packs, any perceived differences are likely to fade.

This study provides another reason to doubt the conclusion that negative impressions of plain packages will translate into less smoking, though it goes unnoticed by the authors. Namely, in this design, smokers were provided with after-market packs to put their cigarettes into, and none of the subjects reported any inconvenience or hesitance in doing so. This suggests, in a plain pack regime, if individuals really do dislike plain packs, it would be low cost for them to simply put their cigarettes in more attractive after-market packages. Given all of these issues, it seems highly unlikely that plain packaging will have much of an effect on smoking rates.

The only other study to observe some measure of behavior related to plain packaging uses an auction to elicit the value smokers place on plain and branded packs.³ The Thrasher et al study finds that individuals value plain packs less than branded packs. There are a number of methodological and interpretive problems with the study.⁴ The primary problem arises from the fact that the mean

health warnings on cigarette packs in non-smokers and weekly smokers but not daily smokers. *Addiction*, 106(8): 1505-1510, examines eye movements but not any direct smoking behavior.

² Moodie, C., Mackintosh, AM., Hastings, G., Ford, A. "Young Adult Smokers' Perceptions of Plain Packaging: A Pilot Naturalistic Study." *Tobacco Control* 20: 367-373 (2011).

³ James F. Thrasher, Matthew C. Rousu, David Hammond, Ashley Navarro, and Jay R. Corrigan, "Estimating the impact of pictorial health warnings and "plain" cigarette packaging: Evidence from experimental auctions among adult smokers in the United States," *Health Policy* 102: 41-48 (2011)

⁴ Briefly, since the purpose of this letter is not to discuss methodological issues in great depth, the model used to analyze the data in Thrasher et al is a random effects model which essentially assumes that each time a given smoker evaluates the value of a pack of cigarettes, he randomly draws a baseline value from some unknown distribution. Thus, if he evaluates the value on a Monday, his baseline value could be \$10, while on a Tuesday it could be \$2, and those values would be statistically independent despite the fact that many of his characteristics that affect his valuation remain constant. If the more appropriate fixed effects model (i.e., the baseline value for a given person's choice stays fairly constant), the likelihood the authors would have found statistically significant differences between plain and branded pack valuations would decline. Another methodological problem comes

valuation of the branded packs sold through the auction was lower than the actual price of cigarettes in the given markets where the research was conducted. That is, the smokers who were the subjects in the study generally pay X for their cigarettes yet they were only willing to pay something less than X for the cigarettes in the auction. This suggests the existence of an external validity problem even for this study that examined actual behavior with real consequences. If such generalizability problems exist for a study like this, it seems very likely that the results from studies that simply ask subjects for their impressions or intentions (with no ultimate consequences for the subjects) cannot be extrapolated to predict the consequences of a plain packaging regulation.

This auction study too suffers from the shortcoming that any identified effect of plain packaging may be an artifact of the packs simply being different. In an environment where all packs are plain, any differential opinions may disappear, especially after smokers have some time to adjust to the new packaging.

All of the other studies in this literature rely on stated impressions and smoking intentions, as opposed to actual smoking decisions. The link between these impressions and intentions and actual smoking behavior has not been validated. As stated in the PHRC report, "Without any form of validation (such as validating reported changes in cigarette consumption) [self reported impressions and intentions] have quite weak predictive validity (p. 89)." Given this, it is not possible to draw reliable conclusions about the effects of plain packaging on smoking in the real world, and, yet, this does not stop many of the researchers in this area from becoming advocates for plain packaging regulations. For example, although Crawford Moodie recognizes this fundamental disconnect between the evidence and the conclusion that plain packaging will reduce smoking, as noted above in the PHRC report (of which he is the main author), it does not stop him from advocating for a plain packaging mandate.⁵ This movement between scholarship and advocacy, especially given the paucity of reliable evidence, is very troubling and reflects an absence of scientific impartiality.

Methodological errors and biases

However, even if this fatal failing is ignored, the literature is rife with methodological errors and biases that limit the ability of an impartial referee to draw any conclusions about the likely effect of a plain packaging regulation. As Moodie et al note in the PHRC review (Table 4.1), very few of the studies they examined had representative samples.

What's more, even representative samples in this context could generate troubling biases. Specifically, researchers have raised the concern that in contexts where it is relatively easy for subjects to intuit the preferences of the researcher, subjects will provide answers that confirm the researcher's expectations even if they do not conform to the subjects' actual beliefs.⁶ This expectancy bias undermines the validity of the research. There are no examples in this literature where researchers take measures to

from the authors' failure to account for dependence across their observations. That is, if a given individual made 10 choices in the experiment, the authors count that as 10 statistically independent observations even though a given person's choice in one round is likely to be highly correlated with his choice in another round. This too inflates the statistical significance of the authors' results.

⁵ See, for example, Moodie, C., Hastings, G. "Plain Packaging: A Time for Action." *European Journal of Public Health* 20(1): 10-11 (2010).

⁶ For a seminal treatment, see Rosenthal, R. (1976). *Experimenter Effects in Behavioral Research*. New York: John Wiley.

eliminate such sources of bias, such as using double blind experiments. Instead, in every article in the literature, it is clear to the subjects that the researchers are public health researchers. This leaves open the distinct possibility that the subjects are hoping to somehow impress the researchers by providing the socially acceptable responses.

Another large concern in this literature arises from publication bias. That is, given the policy preferences of the public health community, it is extremely unlikely that a study concluding that plain packaging will not have a negative effect on smoking will be accepted by a journal such as *Tobacco Control* or any of the other public health journals that publish articles on the topic. This implies that if one were to estimate the likely effect of a plain packaging regulation on smoking rates based solely on the published literature, she would overstate the negative effect of such a regulation on smoking rates. Further, given that this publication bias is predictable, it is unlikely that researchers will even write up results that do not conform to the desired result. Thus, this bias cannot be mitigated by looking for unpublished studies with contrary findings because of the so-called "file-drawer" problem in which researchers abandon their research before circulating or publicizing a draft when they believe their results will not be well-received.⁷

Given these problems, the PHRC report's claim to provide a "systematic" review is somewhat misleading. These publication and file-drawer biases make any review of this type fundamentally incomplete in that the published literature likely is a selected sample of all inquiries started with respect to the topic. In a more important sense, the PHRC report's claim (p. v) that "This consistency of evidence can provide confidence about the observed potential effects of plain packaging" is patently false. Consistent results from studies that uniformly have the same methodological problems provide zero confidence in any conclusion except, perhaps, that the research designs were flawed in consistent ways.

This brief summary of the literature suggests that there is no scientific basis upon which to conclude that plain packaging will lead to a reduction in smoking by discouraging young people from taking up smoking, encouraging people to quit smoking, or by discouraging relapse among people who have quit smoking. Only two studies in the entire literature plausibly examine actual smoking outcomes, and neither of them examines children or people who have quit smoking. Further, these studies provide little indication that plain packaging will increase quit rates. All of the other studies have significant methodological problems. Even putting that aside, these studies make the unsubstantiated jump from stated impressions and intentions to actual behavior. There is no evidence to validate this link, as the PHRC report readily concedes.

Proper Research Design

The ideal research design for studying the effects of plain packaging on smoking outcomes would involve randomly selecting some markets (for example individual cities), introducing plain packaging in those markets, and observing actual smoking behavior over a long time period in the plain package markets as compared to the markets that retained branded packaging. The randomization would ensure that any observed change was not due to pre-existing trends or other confounding variables. Further, by making all of the packs in the market plain, the design would avoid the possibility that smokers were simply reacting to the fact that the plain packs were different from other available packs.

⁷ For a discussion of this problem, see Jeffrey D. Scargle (2000). "Publication Bias: The 'File-Drawer Problem' in Scientific Inference." *Journal of Scientific Exploration* 14 (2): 94–106.

Comparing smoking rates to control markets where branded packs remain would account for general changes in smoking behavior over time. Studying smoking behavior over a long time period would rule out the possibility that any change was simply a short term reaction to the oddness of the new packs. Most important, this design would focus on actual smoking behavior rather than self-reports of impressions and intentions which are not generally predictive of actual smoking behavior. Such a study does not exist in the literature. It is important to note that such an experiment could only be run by a government⁸, yet no government has publicly contemplated running such an experiment before instituting plain packaging regulations even though this would be the best way to provide reliable guidance as to the effect of such a regulation.⁹

While it may seem that such experimentation is not feasible, similar methods have been used in the past to help predict how behavior will respond to different policy choices. One of the seminal examples involves the British electricity market. Between 1966 and 1972, a sample of British residential electricity customers (n = 3,420) was randomized across three different pricing schemes¹⁰ and a control group that faced conventional pricing. Actual consumption was monitored over a long period to generate confidence in the likely effects of using different pricing policies. This field experiment exhibited all of the elements discussed above, and the results of this inquiry are still cited today in discussions of electricity consumption.¹¹ Employment policies have also been studied via field experiments throughout Europe, including the Restart Program in the U.K.¹²

Unfortunately, in the plain packaging literature, nothing approaches the ideal approach because actual smoking behavior is never observed. Instead, virtually all of the existing research examines individuals' perceptions of packages or their smoking intentions. Neither of these reliably translates into valid predictions of real world behavior.

⁸ An individual company could not change the packaging of competing brands, and the industry could not coordinate on such an experiment due to competition laws.

⁹ For a detailed conceptual discussion of the value of running these kinds of field experiments to evaluate regulations, see Michael Abramowicz, Ian Ayres, and Yair Listokin, "Randomizing Law," 159 *University of Pennsylvania Law Review* 929 (2011).

¹⁰ One group faced higher prices in the seasons with high demand; another group faced higher prices in high demand seasons and during high demand periods of the day; the third group paid a reduced rate for consumption below some pre-determined level and an increased rate above that level of usage.

¹¹ For a detailed discussion of the results of this field experiment, see Boggis, J. G., *Domestic Tariffs Experiment*, Load and Market Research Report No. 121, The Electricity Council, 1974.

¹² For a discussion of the findings from the Restart field experiment, see Peter Dolton and Donal O'Neill, "The Restart Effect and the Return to Full-time Stable Employment," *Journal of the Royal Statistical Society. Series A (Statistics in Society)* 159(2): 275-288 (1996) and Michael White and Jane Lakey, "Restart Effect: Does Active Labour Market Policy Reduce Unemployment?," *Policy Studies Institute at the University of Westminster* (1992). For a broader review of European efforts to use field experiments to evaluate labor market policy, see Björklund and Regnér, "Experimental Evaluation of European Labour Market Policy," in *International Handbook of Labour Market Policy and Evaluation*, Edward Elgar Publishing, 1996.

The Department of Health's Proposed Survey of Experts to Make Something Out of Nothing

Given the fatal flaws in the research on plain packaging outlined above (and conceded in the PHRC Report), the Department of Health intends to survey experts on their predictions about the effect of a plain packaging regulation on smoking outcomes. Apparently there is a belief that experts have some magical insight into an issue in which there is no real evidence, spinning the straw of flawed and inapt studies into policy gold. Although the world would be a better place if such predictions were possible, the record on the accuracy of expert predictions is not good, even in fields where the underlying research is of substantially higher quality than exists on the issue of plain packaging.

Second, the Department of Health concedes that it will be drawing on individuals who are not impartial regarding the issue of plain packaging, many of them having written advocacy pieces imploring governments to adopt plain packaging regulations despite the inadequacy of the research base. This suggests that it is foolish to think that the outcome of this process will generate an accurate assessment of the effect of a plain packaging regulation. This approach is tantamount to letting plain packaging advocates fill in whatever numbers they want in the resulting impact assessment.

The track record of expert predictions does not provide confidence in the Department of Health's proposal to resolve the uncertainty regarding the effect of plain packaging through a survey of experts. In the seminal review of the accuracy of expert predictions covering the literature as it stood in 1991, Camerer and Johnson summarize the existing evidence as follows: "Our theme is that experts know a lot but predict poorly."¹³ The prediction contexts studied by Camerer and Johnson, and the studies they draw upon, were decidedly less uncertain than the question of what effects plain packaging will have on smoking rates. In the situations they examine, the experts had actual observations to draw upon in which previous individuals had been exposed to the treatments or policies under discussion, and they still performed poorly. These results were consistent in many domains. For present purposes, it is perhaps especially useful to note that this basic conclusion followed for the studies reviewed having to do with medicine and public health, as well as for areas like finance, university admissions, and criminal recidivism. Generally speaking, these studies which find poor expert performance involve outcomes about which the experts knew much more about the topic (primarily because the issues the experts were asked about had been studied in great detail and involved less subjective outcomes) than any expert knows about the effects of plain packaging.

In a recently published study that parallels the Department of Health's proposal, a panel of ecology experts was solicited to make predictions about the findings of unpublished studies based upon descriptions of the studies' research questions and methods in various subfields of ecology.¹⁴ The experts for the study were identified based on having strong publication records in the relevant subfield or through recommendations by other recognized experts. Of the 42 experts, the median experience level was 14 years and all but two of the experts had at least five years of relevant experience. These experts were asked to make their best predictions about the results of the study as well as to provide

¹³ Colin F. Camerer and Eric J. Johnson, "The Process-Performance Paradox in Expert Judgment: How Can Experts Know So Much and Predict So Badly?" in K.A. Ericsson and J. Smith (eds) *Toward a General Theory of Expertise: Prospects and Limits* (Cambridge: Cambridge University Press, 1991), pp. 195-217.

¹⁴ Marissa F. McBride, Fiona Fidler, and Mark A. Burgman, "Evaluating the Accuracy and Calibration of Expert Predictions Under Uncertainty: Predicting the Outcomes of Ecological Research," *Diversity and Distributions*, forthcoming (posted online March 5, 2012).

upper and lower bounds for the results, as well as estimates of their confidence in their predictions. The general findings of the study were that experts outperformed a comparison group of non-expert students only marginally, and the experts exhibited substantially more overconfidence than the students. Across the four topics studied, the 80 percent confidence interval for the experts contained the truth only 49-65 percent of the time, whereas the students' 80 percent confidence interval contained the estimated parameter 76 percent of the time.

The study found no relationship between the years of experience the expert had in the relevant field and accuracy. It also found that experts with greater levels of self-assessed expertise exhibited lower accuracy. Camerer and Johnson noted this tendency as well, suggesting that it may be evidence that experts suffer from confirmation bias. Confirmation bias is the tendency to overweight evidence that confirms one's pre-existing beliefs while ignoring contrary evidence. This bias generates the perverse result that an individual becomes both less accurate and more confident simultaneously.

From the literature surveyed in 1991 to the most recent writing on the topic, there is general agreement in the literature that expert forecasts are not very accurate even in situations where empirical observations exist to help guide the predictions. This suggests that relying on experts to resolve the uncertainty surrounding the effects of a plain packaging regulation is scientifically unreliable to say the least even under the best of circumstances.

However, even if this approach had any validity, it seems that the way the Department of Health plans to go about it is designed to make a flawed approach even worse. In identifying the relevant experts, the Department of Health intends to follow the criteria laid out by Hora and von Winterfeldt. These criteria include: 1) tangible evidence of expertise (which the Department of Health plans to judge on the basis of publication on the topic of plain packaging); 2) reputation (as judged by peer nomination); 3) availability and willingness to participate; and 4) understanding of the general problem area (to ensure this, the Department of Health plans to provide participants with papers on the topic of plain packaging).

The Department of Health admits that it plans to ignore the last two criteria laid out by Hora and von Winterfeldt: 5) impartiality and 6) the lack of an economic or personal stake in the potential findings. Even before noting the problems with this staggering decision, implementation of criteria 1-4 above suggest a number of problems.

By focusing on individuals who have published work on plain packaging, the Department of Health is essentially ignoring one of the primary lessons that has emerged from the study of expert decision making in recent years. In his work on political judgment, the University of Pennsylvania psychologist Philip Tetlock notes that while expert predictions of future events generally exhibit little accuracy, what he calls intellectual foxes perform better than intellectual hedgehogs, and they do a better job incorporating new information into their forecasts.¹⁵ This classification of foxes versus hedgehogs goes back to Isaiah Berlin and, effectively, groups people with broad knowledge of an area and its methodology as foxes, while individuals with deep topic specific knowledge as hedgehogs. Tetlock came to his conclusion after analyzing thousands of specific predictions made by experts in politics, finding that topic experts tended to be more dogmatic, likely suffering from a high degree of confirmation bias, whereas methodological experts or experts in a broad area tended to generate more accurate forecasts.

¹⁵ Philip E. Tetlock, *Expert Political Judgment*, Princeton University Press, 2005.

In the context of the Department of Health's solicitation of experts, this would mitigate in favor of choosing individuals who are methodological experts, while the consultation indicates it will be focusing on individuals who have published on the topic of plain packaging. None of the individuals publishing in this area is a methodological expert and many of them publish serially on the topic of plain packaging. These individuals are unlikely to bring open minds to this topic.

As the Department of Health provides the panel experts with material to bring them up to speed on the topic, the panel is likely to be provided with a set of papers that generate the appearance of consensus when it may be merely due to the phenomenon of publication bias. Given the limited methodological backgrounds of this set of experts, most will simply accept the consensus as given.

The most egregious issue, however, is the Department of Health's decision to abandon the requirements that the experts are impartial and have no stake in the resulting policy outcome. By abandoning this crucial requirement, it is very likely that the panel will include individuals who publicly advocate for the passage of a plain packaging requirement and other tobacco control measures, despite acknowledging that the evidence base has significant gaps in it. As suggested in the reviews of expert decision making, these are also the individuals who will most overestimate their own accuracy due to confirmation bias. To compound this problem, these are exactly the kind of people who will be most eager to serve on a panel like this, while individuals with more uncertainty or who are less interested in what policy is eventually enacted are more likely to decline such an invitation.

There is no suggestion in the consultation that any attempt will be made to ensure that all perspectives are included in the expert panels. In the words of Hora and von Winterfeldt themselves, "it is important that balance exists among the experts. Without such balance, the true state of uncertainty in a given situation may be significantly understated."¹⁶

Conceptually, in the Hora and von Winterfeldt framework, beliefs about an uncertain parameter value will be distributed around the true parameter value as long as the beliefs themselves are surveyed in a way that approximates random sampling from the experts. If individuals are not drawn from all ranges of the distribution, the resulting estimate will be biased. In the plain packaging context, if only "true believers" are included in the survey, the magnitude of the effect of plain packaging on smoking will be biased upward.

In summary, the literature on expert forecasts suggests that experts are not generally very accurate in their predictions. Further, those experts who are most confident in their abilities tend to be the least accurate. This may stem from the phenomenon of confirmation bias. To make matters worse, the Department of Health proposal seems crafted to draw the individuals who are least likely to generate accurate predictions. Specifically, the evidence favors methodological experts or experts in broad fields, whereas the selection criteria will favor individuals who have written extensively on and advocated for plain packaging and other tobacco control measures. Furthermore, by abandoning any attempt to solicit impartial scholars, the process is likely to entice individuals who have strong policy interests in favor of plain packaging that exist independently of any evidence on the causal effects of plain packaging on smoking decisions.

¹⁶ Stephen C. Hora and Detlof von Winterfeldt, "Nuclear Waste and Future Societies: A Look into the Deep Future," *Technological Forecasting and Social Change* 56, 155-170 (1997).

Conclusion

The literature in this area is unreliable and largely irrelevant to the question of how plain packaging would affect smoking rates in the U.K. This is true even if all of the flawed studies are combined, since there is no sense in which the individual flaws somehow cancel each other out. There is no sound scientific basis for the claim that plain packaging will reduce smoking.

This is not an area where expertise can make up for the dearth of evidence. Despite this, the Department of Health wrongly suggests that a survey of experts can somehow create knowledge out of a state of ignorance. Further, for good measure, the proposed selection of experts will make no attempt to adjust for the systematic flaws that exist in the literature, including the invitation of individuals who have publicly stated their policy preferences. This proposal is tantamount to letting plain packaging advocates fill in whatever numbers they want in order to justify the introduction of plain packaging.

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- “What Drives the Passage of Damage Caps?” (with Catherine Sharkey) *Empirical Studies of Judicial Systems Around the Globe* (Institutum Jurisprudentiae, Academia Sinica, 2009).
- “Terrorism,” (with Nuno Garoupa and Francesco Parisi) *Criminal Law and Economics* (Edward Elgar Publishing, 2009).
- “Functional Law and Economics,” (with Francesco Parisi) *Theoretical Foundations of Law and Economics* (Cambridge University Press, 2009).
- “Econometric Studies of Law,” “Functional Law and Economics,” “Multivariate Methods in Legal Studies,” and “Formal Methods in Legal Scholarship,” *Encyclopedia of Law and Society* (Sage Publications, 2007).
- *The Health Disparities Myth: Diagnosing the Treatment Gap* (with Sally Satel): AEI Press, 2006.
- “Are Doctors Biased?” (with Sally Satel) *Policy Review*, 136(April & May): 41-54 (2006).
- “First, Do No Harm . . .” (with Thomas Stratmann) *Regulation*, 26(1): 9 (2003).
- “Drug Re-Importation’s No-Win Solution,” *Regulation*, 25(1): 6-7 (2002).

RECENT PRESENTATIONS

- Cornell University, Empirical Health Law Conference (April 2012).
- Brooklyn Law School, Federalist Society Workshop (March 2012).
- Washington University in St. Louis Law School, Federalist Society Workshop (March 2012).
- Penn/NYU Law & Finance Conference (February 2012).
- West Virginia University Economics Seminar, (February 2012).
- Rotterdam Institute of Law and Economics Workshop (December 2011).
- Regulatory Breakdown Conference, Penn Program on Regulation (September 2011).
- Journal of Institutional and Theoretical Economics Conference (June 2011).
- Law and Economics Center, Workshop on Empirical Methods for Law Professors (May 2011).
- Queen's University, Faculty of Law, Law and Economics Workshop (April 2011).
- European Masters in Law and Economics Program, Mid-Year Meeting Keynote Lecture (February 2011).
- AALS, Law and Economics Panel (January 2011)
- Law and Economics Center, American Disease Conference (December 2010)
- University of Arizona/Resources for the Future, Wildfire Symposium (November 2010).
- George Mason University, Levy Workshop (November 2010).
- Erasmus University Rotterdam, European Doctorate in Law and Economics Seminar (October 2010).
- Erasmus University School of Law, Inaugural Empirical Legal Studies Chair Lecture (November 2010).
- University of Amsterdam, Center for the Study of EU Contract Law, Workshop (October 2010).
- University of Otago, Economics Department Seminar (September 2010).
- University of Canterbury, Economics and Finance Department Seminar (September 2010).
- University of Hamburg, Hamburg Lectures on Law and Economics (July 2010).
- Penn Law European Society, Academic Program Lecture (June 2010).
- American Law and Economics Association, Annual Conference (May 2010).
- St. Louis Lawyers Chapter of the Federalist Society, Health Care Reform Lecture (April 2010).
- Temple University Beasley School of Law, Human Behavior Colloquium (April 2010).
- University of Virginia Law School, Olin Conference on Crime (March 2010).
- Erasmus University School of Law, Behavioral Approaches to Contract and Tort Group (January 2010).
- European Doctorate in Law and Economics Program, Erasmus University Rotterdam (January 2010).
- Northwestern University Federalist Society Panel Discussion (November 2009).
- University of Illinois Corporate Colloquium (November 2009).
- New York Law School Federalist Society, Health Care Lecture (October 2009).
- Fordham University Federalist Society, Health Care Reform Debate (October 2009).
- University of Pennsylvania, Wharton Research Scholars Seminar (September 2009).
- Property and Environment Research Center (August 2009).
- Harvard Medical School, Race Disparities Panel (April 2009).
- Stanford Law School, Law and Economics Workshop (February 2009).
- University of Virginia School of Law, Law & Economics Workshop (January 2009).
- Southern Economic Association, Annual Meeting (November 2008).
- Northwestern University, Searle Center, Symposium on Civil Liability (October 2008).
- University of Pennsylvania Law School, Faculty Retreat (September 2008).
- Harvard University, Petrie-Flom Center, Our Fragmented Health Care System (June 2008).
- CUNY Graduate Center/NBER, Seminar in Health, Labor, and Demography (May 2008).
- Columbia University, Empirical Methods and the Law Workshop (May 2008).
- The Rand Corporation, Institute for Civil Justice Annual Board Meeting (March 2008).
- George Mason University, Philosophy, Politics, and Economics Workshop (March 2008).
- Columbia University Law School, Faculty Workshop (March 2008).
- Claremont McKenna College/RAND, The Future of Securities Litigation Conference (February 2008).
- University of Michigan Law School, Law and Economics Workshop (February 2008).
- American Economic Association, Annual Meeting (January 2008).

RECENT PRESENTATIONS (CONTINUED)

- Harvard Law School, Law and Economics Workshop (November 2007).
- Conference on Empirical Legal Studies (November 2007).
- Emory University School of Law, Faculty Colloquium (November 2007).
- Rice University/University of Houston Economics, Microeconomics Workshop (October 2007).
- University of Pennsylvania Law School, Faculty Workshop (October 2007).
- George Mason University School of Law, Levy Fellows Workshop (October 2007).
- The RAND Corporation, Institute for Civil Justice Workshop (September 2007).
- University of Southern California School of Law, Faculty Workshop (September 2007).
- University of Southern California School of Law, Faculty Workshop (August 2007).
- Yale Law School, Faculty Enrichment Lectures (July 2007).
- Florida State College of Law, Primer on Statistics for Legal Scholars (July 2007).
- Federal Trade Commission, Behavioral Economics and Consumer Policy Workshop (April 2007).
- Yale Law School, Law Economics and Organization Workshop (March 2007).
- Florida State University, Center for Demography and Population Health Workshop (March 2007).
- University of Toronto, Law & Economics Workshop (February 2007).
- Florida State University Department of Economics, Faculty Workshop (March 2007).
- University of Georgia School of Law, Faculty Workshop (February 2007).
- University of Southern California School of Law, Law and Economics Workshop (February 2007).
- Cornell Department of Policy Analysis and Management, Faculty Workshop (November 2006).
- Boston University School of Law, Faculty Workshop (November 2006).
- University of Illinois College of Law, Faculty Workshop (November 2006).
- Northwestern University School of Law, Faculty Workshop (October 2006).
- Conference on Empirical Legal Studies (October 2006).
- American Law and Economics Association, Annual Meeting (May 2006).
- University of Maryland Department of Economics, Labor/Public Workshop (April 2006).
- Columbia University School of Law, Blue Sky Workshop (March 2006).
- American Enterprise Institute, Health Disparities Myth Panel (February 2006).
- William & Mary School of Law, Faculty Workshop (February 2006).
- Georgetown University Law Center, Law and Economics Workshop (February 2006).
- George Mason University School of Law, Levy Workshop (February 2006).
- Northwestern University School of Law, Faculty Workshop (February 2006).
- American Association of Law Schools, Annual Meeting (January 2006).
- International Society for New Institutional Economics, Annual Meeting (September 2005).
- Northwestern University School of Law, Law and Economics Workshop (September 2005).
- University of California Berkeley, Law and Economics Workshop (August 2005).
- Southeastern Association of Law Schools, Annual Meeting (July 2005).
- American Law and Economics Association, Annual Meeting (June 2005).
- West Virginia University Department of Economics, Faculty Workshop (January 2005).
- Southern Economics Association, Annual Meeting (November 2004).
- International Society for New Institutional Economics, Annual Meeting (September 2004).
- American Law and Economics Association, Annual Meeting (May 2004).

APPENDIX B
REPORT OF MR. STEPHEN GIBSON

**Standardised Packaging for Tobacco Products
Review of Department of Health Impact Assessment**

SLG Economics Ltd
July 2012

www.SLG-Economics.co.uk

Standardised Packaging for Tobacco Products

Review of Department of Health Impact Assessment

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Standardised Packaging for Tobacco Products

Review of Department of Health Impact Assessment

1 Introduction

On 16th April 2012, the Department of Health (DH) published a consultation on standardised packaging of tobacco products. SLG Economics Ltd has been retained by British American Tobacco UK Ltd to undertake a review of the Impact Assessment (IA) of this policy proposal. SLG Economics Ltd has compared the standard of analysis undertaken in the DH impact assessment with best practice and precedent in carrying out impact assessments in other regulatory areas and the Department for Business Innovation and Skills (BIS) principles of regulation which should be applied by government departments in developing policy proposals.

1.1 SLG Economics Ltd

SLG Economics Ltd is an economic consultancy set up by Stephen Gibson providing specialist micro-economic policy advice to regulated companies, regulators and government.

Mr Gibson has over 24 years' experience of leading major economic and strategy projects across a broad range of industries from both sides of the regulatory fence (a full CV is set out in Annex 3). He has directed or had a major role in over 25 impact assessments including:

- A major impact assessment underpinning Ofcom's policy proposals for regulation of TV advertising of junk food to prevent childhood obesity,
- Proposals for the switchover from analogue to digital TV,
- Proposals for launching a high definition TV service by the BBC,
- Proposals for the design of a range of spectrum auctions,
- Proposals to change the scope of the postal universal service in the UK, and
- Proposals to separate Royal Mail into different accounting entities.

Mr Gibson has been Chief Economist at Postcomm – the independent regulator of postal services, Principal Economist at Ofcom – the communications sector regulator and Head of Economics at Network Rail – the UK rail infrastructure owner, as well as a number of other senior economics positions. He was responsible for training Ofcom economists and policy advisors on how to carry out regulatory impact assessments and for developing and rolling out the Postcomm impact assessment guidelines. He has lectured at Birkbeck University on impact assessments using IAs he has worked on as case studies.

Mr Gibson is a lecturer at City University, London on their MSc in Competition and Regulation and at Birkbeck University on their undergraduate and postgraduate Industrial Economics and Applied Economics courses. He has lectured widely on economic regulation

at national and international industry conferences and seminars. He was the external supervisor for a PhD in rail regulation at Cambridge University. He has an MA in Economics and Management Studies from Sidney Sussex College, Cambridge University and postgraduate qualifications in Computer Science, Accounting and Finance and Corporate Finance. He has published five papers on regulatory and competition economics issues in peer reviewed books and journals.

2 Executive Summary

2.1 Assessment of methodology

The Department for Business Innovation and Skills (BIS) has set out its principles of regulation:

“The government sees conventional ‘command-and-control’ regulation as a last resort. We have adopted the principles below from the principles of regulation in the coalition government...”¹

“The government will regulate to achieve its policy objectives only:

- *having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches*
- *where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches*
- *where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate; accountable; consistent; transparent and targeted.”²*

This paper shows that the DH proposals:

- have been introduced as a **first rather than last resort** – it has not considered a ‘wait and see’ option which could significantly improve the evidence base on which to base a proper judgement;
- have **not demonstrated** that satisfactory outcomes cannot be achieved by alternative approaches – the IA has not even considered alternative approaches;
- have **not shown** (and could not have shown given the lack of sensitivity analysis) that the analysis of costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative approaches - the analysis of costs and benefits falls well below the standard that would be expected for a policy decision of this type, is incomplete and subject to a large margin of error and does not show any clear superiority over either the Do Nothing alternative or other potential measures;
- have **not demonstrated** that the policy can be implemented in a way that is proportionate; accountable; consistent; transparent and targeted – given the lack of quantification of potential costs or benefits it is **impossible to claim that the costs imposed are proportionate**; the IA’s methodology is **inconsistent** with the

¹ <http://www.bis.gov.uk/alternatives>

² <http://www.bis.gov.uk/policies/bre/principles-of-regulation>

government's own IA guidelines or regulatory precedent; the analysis is poorly structured and **opaque rather than transparent** and the proposed policy measure is **not targeted** at the particular policy problems identified.

2.2 Assessment of evidence and analysis

Table 1 summarises the quality of evidence and analysis in the impact assessment. As can be seen the evidence on both costs and benefits is incomplete, subject to biases and flaws and subject to large margins of error - in some cases the numbers assumed are simply plucked out of the air with no supporting justification. Effectively the IA is saying that the DH have no idea what the costs or benefits of standardised packaging will be. This is particularly concerning since a 'wait and see' policy would allow proper assessment of the impact of ending the display of tobacco products and would provide better evidence on which to base a policy decision in the UK.

The analysis is subject to a number of fundamental methodological errors which have been challenged by the Regulatory Policy Committee and could be catastrophic for the UK economy if applied more widely in government policy. While this is a consultation-stage impact assessment and therefore would not necessarily be expected to provide a complete and final analysis to support a recommended policy proposal, many of the points raised in this paper reflect fundamental concerns with the approach, methodology and evidence base that would require significant revision and additional work and then further consultation before a proper policy decision could be taken. **Overall the standard of evidence and analysis in this Impact Assessment falls well below the standards required for a policy decision of this type.**

Table 1: Standardised Packaging Impact Assessment: Standard of Evidence

Benefits	Volume	Value
Reduced take up of smoking	No current evidence, panel of experts evidence biased and flawed	Estimate of lifetime benefit subject to uncertainty. QALY valued at double previous estimates
Improved quit rates	No current evidence, panel of experts evidence biased and flawed	Estimate of lifetime benefit subject to uncertainty. QALY valued at double previous estimates
Reduced cost of treating SHS	Not included in IA	
Reduced healthcare costs	No evidence for 1% quit rate	

Costs	Volume	Value
Loss of duty and VAT from reduced consumption	No current evidence, panel of experts evidence biased and flawed	Indicative rates
Loss of duty and VAT from switching	No evidence for 22.1m pack switching assumption	Based on duty and VAT rates
Loss of duty and VAT from cross-border and illicit trade	No evidence	Based on duty and VAT rates
Redeployment of resources	Incorrect methodology, approach criticised by Regulatory Policy Committee	
Loss of brand equity	No evidence for 22.1m pack switching assumption	Estimates could be inaccurate. Incorrect methodology for treating foreign shareholders and corporation tax
Loss of profit from reduced consumption	No current evidence, panel of experts evidence biased and flawed	Estimates could be widely inaccurate. Incorrect methodology for treating foreign shareholders and corporation tax
Loss of profit from illicit trade	No evidence considered	
Loss of consumer surplus	No evidence for 22.1m pack switching assumption	No evidence for consumer surplus loss of £1 per pack

	No evidence, evidence of insufficient quality to be included in IA or incorrect methodology
	Weak evidence of insufficient quality to reach a robust IA conclusion
	Good evidence

3 Methodology

The DH impact assessment does not follow regulatory IA guidelines or best practice precedent in that it:

- Has very limited analysis of alternative policy options;
- Does not include sensitivity analysis of the costs or benefits;
- Does not consider the appropriate standard of evidence required to introduce a new policy measure; and
- Seeks to fill the large number of holes in its evidence base through consultation responses - which is not an appropriate way to provide primary evidence of the types identified.

3.1 Limited analysis of alternative policy options

While the consultation asks for proposals on alternative policy options, it does not consider or analyse policy alternatives apart from the Do Nothing baseline and standardised packaging proposal. This is not in line with best practice or IA guidelines and seriously limits the value of the impact assessment in supporting policy development.

UK Government impact assessment guidance states: *“Because direct government intervention may not be the best way of addressing a policy problem or of realising policy objectives, alternatives to traditional regulation (e.g. self-regulation; voluntary codes) need to be properly considered from the outset.”*³ The Treasury Green Book on Appraisal and Evaluation in Central Government states: *“The range of options depends on the nature of the objectives. For a major programme, a wide range should be considered before short-listing for detailed appraisal. Both new and current policies, programmes and projects should be included as options. At the early stages, it is usually important to consult widely, either formally or informally, as this is often the best way of creating an appropriate set of options.”*⁴

Even if there are no obvious alternative policy measures to achieve the DH’s policy objective, the impact assessment does not consider a ‘wait and see’ policy option. Ofcom’s IA guidelines when discussing alternative policy options states: *“another option which it will often be useful to consider is the ‘wait and see’ option. This means no new intervention*

³ HM Government Impact Assessment Guidance, August 2011, paragraph 27, page 10.

<http://www.bis.gov.uk/assets/biscore/better-regulation/docs/i/11-1111-impact-assessment-guidance>

⁴ http://www.hm-treasury.gov.uk/d/green_book_complete.pdf paragraph 5.4, page 17. In addition the Office of Rail Regulation guidance on Impact Assessments similarly states that an IA is intended to: *“place a discipline upon decision makers to demonstrate that they have considered a number of options to deal with specific regulatory policy issues”*. http://www.rail-reg.gov.uk/upload/pdf/sp-impact_assess_guidnots.pdf paragraph 2.5, page 3.

immediately, but a commitment to monitoring the situation and reviewing the position at a later time on the basis of further evidence.”^{5, 6}

3.2 A ‘Wait and See’ policy option

Inclusion of a ‘wait and see’ policy option in Impact Assessments (in addition to the Do Nothing and preferred policy option) is best practice in particular when:

- there is significant uncertainty around the levels of costs or benefits (or both) of the policy option; and
- it is likely that better evidence will become available that will improve the accuracy and reliability of the assessments of costs or benefits (or both) of the policy options.

Where both of these criteria are met, it is often the case that policy development will be put on hold while extra evidence is being assessed and analysed.⁷ If this is not the case, the impact assessment should explicitly consider a ‘wait and see’ option to assess whether further evidence would improve the decision process.⁸

The absence of a ‘wait and see’ policy option is a particular deficiency in this case given the contemporaneous introduction of ending open display of tobacco products at retail.⁹ Until this is fully introduced and the effects on demand and consumption patterns of tobacco can be assessed,¹⁰ forecasts of trends in the tobacco market are subject to an added level of uncertainty. Adding a further measure during a similar timeframe increases even further the uncertainty in market forecasts and risks misallocating costs and benefits from standardised packaging that have already been assumed in the previous measure and which should therefore be included in the Do Nothing base case.

Given the lack of evidence around the costs and benefits of the proposed measure (see discussion below), as well as disagreement over whether the policy will lead to less smoking

⁵ Ofcom Impact Assessment Guidelines, paragraph 5.16, page 14.

http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better_Policy_Making.pdf

⁶ The European Conference of Postal and Telecommunications Administrations (CEPT) Guidelines for the implementation of impact assessments in relation to spectrum matters also make the point that: *“Another option which it will often be useful to consider is the ‘wait and see’ option. This means no new intervention immediately, but a commitment to monitoring the situation and reviewing the position at a later time on the basis of further evidence. For example, it may be helpful to carry out research prior to performing the review.”* <http://www.erodocdb.dk/docs/doc98/official/pdf/ECCRep125.pdf> Section 7.3, page 9.

⁷ For example in April 2011, Andrew Lansley, the Health Secretary decided *“to pause, to listen and to engage”* during the passage of the Health and Social Care Bill to consider further substantive concerns.

⁸ In line with Ofcom IA guidelines.

⁹ For example Ofgem in their IA of the energy supply probe proposed retail supply remedies considered whether further measures (removal of automatic roll-over of fixed term contracts) should be included to supplement their preferred informational remedies solution to the problems of lack of effective competition in retail energy markets. Ofgem considered a ‘wait and see’ option: *“to see whether the informational remedies requiring suppliers to provide timely notification around contract end dates and raising objections to transfer are sufficient to address the concerns we have with the functioning of the market.”*

¹⁰ The Secretary of State is required to carry out a review of these provisions by April 2015 - Tobacco Advertising and Promotion Regulations 2012, regulation 10(3).

or switching between brands and how to value changes in smoking behaviour, it is clear that there is significant uncertainty around the costs and benefits of the preferred policy option.

The impact assessment recognises that *“Any deferral would need to take account of the difficulty of disentangling the impact of standardised packaging from other public health measures and the time lag in picking up any effects.”*¹¹ Including a ‘wait and see’ policy option would allow proper analysis and consideration of the likely impact of standardised packaging without the complicating interaction of the effects of ending open display of tobacco and would provide a better basis on which to make a policy decision. Not even considering a ‘wait and see’ option in these circumstances is a serious flaw in the methodology.

3.3 Alternative policy options

The impact assessment does not consider other more targeted and focussed policy options to address the specific market failures that the government may be concerned about. For example if a possible mechanism through which the proposed policy might be an effective tobacco control strategy is by *“increasing the prominence of the health warning”*,¹² then the impact assessment should consider policy alternatives for increasing the prominence of current health warnings (for example by increasing the frequency with which the warnings are changed and refreshed) and should review evidence on how increases in the prominence of health warnings over time and differences in the prominence of health warnings between different countries impact on differences in smoking rates.

If the policy concern is *“reducing confusion and false beliefs about the harmfulness and strength of cigarettes”*¹³, then the impact assessment should consider policy options to directly address those false beliefs. This might include educational initiatives to inform children of the effects of smoking, targeted warning campaigns and using existing laws and regulatory powers to prevent tobacco companies from misleading customers through packaging. It should also include a review of the evidence on the relationship between beliefs by smokers and non-smokers about the harmfulness of cigarettes and initiation, consumption and quit rates.

Similarly, if the concern is reducing the take up of smoking by children then different policy options might be considered. A 2009 Department of Health study concluded: *“Pupils who smoked cigarettes, both regularly and occasionally, obtained cigarettes from a variety of sources. Most commonly, pupils reported being given cigarettes by other people (63%) and more than half were given cigarettes by friends (58% of smokers). A small proportion of pupils were also given cigarettes by their siblings (10%) and parents (6%). 45% of pupils who smoked cigarettes bought them from other people. This includes 33% who bought them from*

¹¹ DH IA paragraph 38.

¹² DH IA paragraph 16.

¹³ DH IA paragraph 16.

*friends or relatives and 28% who bought them from somebody else.”*¹⁴ The Report recommended that to provide a better deterrent, all persons over 14 should be liable to a penalty or sanction for deliberately purchasing tobacco products they are not legally entitled to, and that similar penalties should apply to adults who bought tobacco products for or on behalf of children (as is already the case in Scotland). In terms of reducing smoking uptake and consumption by minors, adopting this policy in England and Wales would be better targeted and more focussed on the policy problem than standardised packaging and should therefore potentially be considered as an alternative policy option. A further consultation would provide the opportunity to set out these alternatives and seek comments on how they best address the policy concern.

Considering alternative policy options that are targeted on the alleged market failures would be consistent with proportionate and targeted regulation – two of the key principles of good regulation developed by the Better Regulation Executive and enshrined in the Legislative and Regulatory Reform Act 2006¹⁵. It would also be in line with the principle of seeking the least intrusive form of regulation possible¹⁶ and with the Coalition Government’s policy to: *“remove or simplify existing regulations that unnecessarily impede growth; reduce the overall volume of new regulation by introducing regulation only as a last resort; [and] improve the quality of any remaining new regulation”*¹⁷ and the BIS regulation operating principles: *“Before bringing forward any proposal to introduce a new regulation, departments will need to satisfy the Better Regulation Executive (BRE) / sub-committee secretariat that it passes one of two tests: that no suitable alternative, non-regulatory or self-regulatory means of achieving the same outcome exists; that the measure either reduces the burden of regulation or is deregulatory”*.¹⁸

Therefore, in terms of the government policy to *“regulate to achieve its policy objectives only:*

- *... having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches...”*¹⁹

The DH proposals **have not** demonstrated that satisfactory outcomes cannot be achieved by alternative approaches – the IA has not even considered alternative approaches and in particular has not considered alternative measures that might be targeted on the particular policy concerns.

¹⁴ E Fuller, Smoking, drinking and drug use among young people in England in 2008, 2009 (<http://www.natcen.ac.uk/media/492785/de84e05d-5326-42c1-b687-3d75416b7fbb.pdf>), page 26, section 2.4.2.

¹⁵ Section 21(2)(a)-(b)

¹⁶ Ofcom’s regulatory principles state: *“Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives”*. <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

¹⁷ <http://www.bis.gov.uk/policies/bre>

¹⁸ <http://www.bis.gov.uk/policies/bre/principles-of-regulation>

¹⁹ See footnote 2.

3.4 Lack of sensitivity analysis

The DH Impact Assessment does not (where they have quantified estimates of the costs or benefits) include any sensitivity analysis of the costs and benefits of the policy option analysed, this is an important part of any impact assessment analysis.

The Department of Health guidance on quantifying the health impact of government policies states: *“Policy appraisal should take account of any uncertainties in the estimates of costs and benefits. It is important that decision-makers should be made aware of any significant sources of uncertainty in the expected outcome and should be given an estimated range of the likely outcomes ... In most appraisals, the best approach is to estimate plausible ranges for the important uncertainties. Where, for example, there is uncertainty about the number of people whose health will be affected, a range of values should be considered as well as a central estimate ... Sensitivity analysis should always be used to test the robustness of the preferred choice of option to changes in key assumptions. Its results will usually be summarised in tables, and assessed in the accompanying text.”*²⁰

The lack of any sensitivity analysis, particularly for a policy in which there is such a large level of uncertainty regarding the underlying evidence (see discussion below) seriously undermines the value of this analysis (even for a consultation-stage impact assessment it would be expected that some attempt should be made to assess the level of uncertainty in the cost and benefit estimates that are quantified). In particular, even if the central forecast of the benefits of the proposed policy were higher than the central forecast of the costs (compared to the Do Nothing alternative), without sensitivity analysis it is impossible to demonstrate that there is a clear margin between the costs and the benefits. This is because the range of plausible estimates for costs and benefits could well be overlapping and therefore the actual net benefit (benefits minus costs) of the policy measure could well be negative rather than positive.

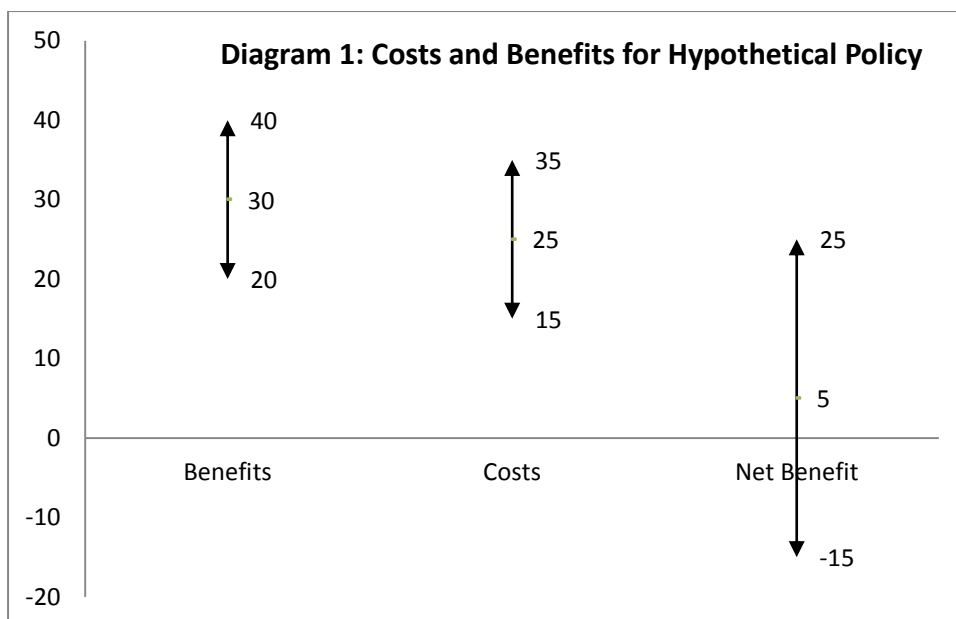
This is shown in Diagram 1 below for a purely hypothetical policy. In this example, even though the central estimate of benefits (30) is higher than the central estimate of costs (25), the actual net benefit could be negative and as low as -15 (i.e. with actual costs of 35 being almost twice actual benefits of 20).

²⁰ Quantifying health impacts of government policies: A how-to guide to quantifying the health impacts of government policies, Department of Health, pages 27, 28 and 33.

http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_120108.pdf

Treasury guidance also says: *“The results of sensitivity and scenario analyses should also generally be included in presentations and summary reports to decision makers, rather than just single point estimates of expected values. Decision makers need to understand that there are ranges of potential outcomes, and hence to judge the capacity of proposals to withstand future uncertainty”*. HM Treasury Green Book, paragraph 2.15.

http://www.hm-treasury.gov.uk/d/green_book_complete.pdf



Therefore, in terms of the government policy to “regulate to achieve its policy objectives only:

- where analysis of the costs and benefits demonstrates that the regulatory approach is **superior by a clear margin** to alternative, self-regulatory or non-regulatory approaches”[emphasis added].²¹

The DH proposals **have not** demonstrated (and could not have demonstrated given their lack of sensitivity analysis) that the regulatory approach is superior by a clear margin to alternative approaches.

3.5 Standard of evidence required

Given the weakness of the IA cost and benefit analysis (discussed further below), it is important that the appropriate standard of evidence is applied in considering how much or little reliance to place on the IA evidence. The BIS operating principles for regulation state: “There will be a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a **robust and compelling case** has been made” [emphasis added].²² Similarly in a Parliamentary Bills Committee discussion, Gillian Merron, Minister of State for Public Health said: “Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need **strong and convincing evidence** of the benefits to health, as well as its workability, before this could be promoted and accepted at an international level” [emphasis added].²³

²¹ See footnote 2.

²² <http://www.bis.gov.uk/policies/bre/principles-of-regulation>

²³ House of Commons Public Bill Committee debate, 25 June 2009, Column 305.

<http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s09.htm>

The conclusions of the IA states that the “*evidence review suggests a **possible impact** on consumption in the intended direction. A substantial impact on consumption is **plausible**, but we need a better idea of its likely scale...*” [emphasis added].²⁴ This is an incredibly weak conclusion given the importance of the policy question and nowhere near the standard of evidence required to overturn the default assumption to use “*command-and-control regulation as a last resort*”.²⁵ It is also possible (and indeed plausible) given the lack of robust evidence, that the policy would have an impact on consumption **not** in the intended direction (i.e. reduce tobacco prices and lead to increased smoking). In order for the IA to make a “**robust and compelling case**” backed up by “**strong and convincing evidence**” it would need not only much more robust evidence than it currently has, but also much more robust evidence than it is likely to obtain from the consultation process and the proposed survey of a panel of experts.

The Competition Appeals Tribunal (CAT) in its assessment of *Tesco v Competition Commission* found that the Competition Commission had not properly discharged its requirements to evaluate the proportionality of the proposed remedies: “*All the Report contains are bald and general statements of the Commission’s belief in the test’s eventual effectiveness*”.²⁶ The DH impact assessment suffers from a similar lack of evidential basis.

Table 1 summarises the quality of evidence used in the impact assessment. Areas shaded in red are those where there is either no evidence of the impact, the evidence is of insufficient quality to be included in an IA or the methodology is incorrect. Areas shaded in yellow have weak evidence that can be incorporated in an IA, but is of insufficient quality to support a robust conclusion. Areas shaded in green are areas of good evidence. As can be seen, the evidence on both the costs and benefits is incomplete with large evidential gaps, subject to a large margin of error, subject to methodological errors and falls well short of the standard that would be expected for a policy decision of this type.

²⁴ DH IA Paragraph 95.

²⁵ See footnote 1.

²⁶ Competition Appeal Tribunal (2009) ‘*Tesco v Competition Commission*’. Judgement March 4th paragraph 161.

Table 1: Standardised Packaging Impact Assessment: Standard of Evidence

Benefits	Volume	Value
Reduced take up of smoking	No current evidence, panel of experts evidence biased and flawed	Estimate of lifetime benefit subject to uncertainty. QALY valued at double previous estimates
Improved quit rates	No current evidence, panel of experts evidence biased and flawed	Estimate of lifetime benefit subject to uncertainty. QALY valued at double previous estimates
Reduced cost of treating SHS	Not included in IA	
Reduced healthcare costs	No evidence for 1% quit rate	

Costs	Volume	Value
Loss of duty and VAT from reduced consumption	No current evidence, panel of experts evidence biased and flawed	Indicative rates
Loss of duty and VAT from switching	No evidence for 22.1m pack switching assumption	Based on duty and VAT rates
Loss of duty and VAT from cross-border and illicit trade	No evidence	Based on duty and VAT rates
Redeployment of resources	Incorrect methodology, approach criticised by Regulatory Policy Committee	
Loss of brand equity	No evidence for 22.1m pack switching assumption	Estimates could be inaccurate. Incorrect methodology for treating foreign shareholders and corporation tax
Loss of profit from reduced consumption	No current evidence, panel of experts evidence biased and flawed	Estimates could be widely inaccurate. Incorrect methodology for treating foreign shareholders and corporation tax
Loss of profit from illicit trade	No evidence considered	
Loss of consumer surplus	No evidence for 22.1m pack switching assumption	No evidence for consumer surplus loss of £1 per pack

	No evidence, evidence of insufficient quality to be included in IA or incorrect methodology
	Weak evidence of insufficient quality to reach a robust IA conclusion
	Good evidence

Therefore, in terms of the government policy to “*regulate to achieve its policy objectives only*:

- ... where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches
- where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate; accountable; consistent; transparent and targeted.²⁷

The DH analysis of costs and benefits **falls well below the standard that would be expected for a policy of this type**: it is incomplete, based on assumptions with no supporting evidence, estimates are subject to large margins of error (which are not quantified) and has clear errors in methodology. It **has not demonstrated** that the regulation can be implemented in a way that is proportionate, accountable, consistent, transparent and targeted – given the lack of quantification of potential costs or benefits it is **impossible to claim that the costs imposed are proportionate**; the IA’s methodology is **inconsistent** with the government’s own IA guidelines or regulatory precedent; the analysis is poorly structured and **opaque rather than transparent** and the proposed policy measure is **not targeted** at the particular policy problems identified.

3.6 Approach to evidence gathering in the Impact Assessment

The impact assessment itself recognises that there are many areas on which it contains little or no evidence, however it seeks to fill most of the gaps through the consultation process: “*The consultation itself will seek further evidence and data to inform any future Impact Assessment that may be needed.*”²⁸ This includes evidence on the:

- **Impact on illicit trade:** “*Any risk that standardised packaging could increase illicit trade of tobacco will be explored through consultation as there is insufficient evidence on which to include analysis in this IA.*”²⁹
- **Impact on retailers and the public:** “*If selecting and serving a standardised tobacco pack takes longer than a branded pack, retailers would bear some costs. Whether these costs would be significant will be explored through consultation.*”³⁰
- **Switching between premium and economy brands:** “*The extent of downtrading which we might expect to result from standardised packs is currently unknown and is a variable on which evidence needs to be collected as part of the consultation.*”³¹
- **Impact on cross-border trade:** “*Standardised packs may provide an additional possibly powerful incentive to cross-border shopping, an issue which will be explored in consultation to enable a central quantified estimate of impact.*”³²

²⁷ See footnote 2.

²⁸ DH IA Paragraph 12.

²⁹ DH IA cover sheet, page 3.

³⁰ DH IA Paragraph 48.

³¹ DH IA Paragraph 65.

³² DH IA Paragraph 76.

- **Impact on costs to businesses from less branding:** *“The impact of both initial costs and potential future cost savings [to businesses] will be explored in consultation”.*³³
- **Transition costs to businesses:** *“we have assumed that downtrading from premium tobacco brands to ultra low price and economy brands will result in less profit for the tobacco industry and possibly retailers (more information on this will be sought through consultation)”.*³⁴
- **Consumer surplus:** *“Consumer surplus, including the issue of self-expression, will be investigated as part of the consultation”.*³⁵
- **Costs of branding and depreciation rate:** *“In consultation, we will invite views on the annual cost of maintaining a brand and the depreciation rate”.*³⁶
- **Impact on consumption and the non-duty paid market:** *“Further consultation will help to establish central estimates of the impact of standardised tobacco packaging on consumption and these unintended effects”.*³⁷

As well as the large number of areas where evidence is sought through the consultation process, many of these are areas where consultation is not an appropriate or effective way of collecting evidence – particularly where they relate to the potential effects of standardised packaging on illicit or cross-border trade, downtrading, tobacco consumption or consumer surplus. As stated in the Government Code of Practice on consultation: *“Consultation exercises can be used to seek views on the coverage of new policies, ideas of how specific groups or sectors might be exempted from new requirements, or used to seek views on approaches to specific groups or sectors that would ensure proportionate implementation”.*³⁸ Consultation responses are unlikely to be an appropriate or effective way to provide reliable and accurate primary evidence of the types identified above. This is much more likely to be gained from a combination of market research, analysis of business cost data and economic and trend analysis. As recommended by Professor Martin Cave: *“Where the existing evidence base is non-existent or poor, there is a case for the decision taker to commission research (which must be impartial and credible) which satisfies the necessary objective standard of proof. In these circumstances, it would normally be appropriate for the regulator to await that evidence before implementing a measure.”*³⁹ It is clear that the panel of experts research proposed by the DH (which only seeks to address one of the many evidential gaps) will not meet this standard of proof and will not be impartial or credible. As a result, it is **extremely unlikely** that without further primary

³³ DH IA Paragraph 58.

³⁴ DH IA Paragraph 79.

³⁵ DH IA Paragraph 83.

³⁶ DH IA Paragraph 84.

³⁷ DH IA Paragraph 96.

³⁸ <http://www.bis.gov.uk/files/file47158.pdf> Paragraph 3.4.

³⁹ Better regulation and certain tobacco control measures, Professor M Cave, BP Centennial Professor, London School of Economics, Nov 2010, paragraph 6.9, page 28. <http://www.jti.com/files/9713/3164/0508/Cave.pdf>

research and evidence “*the results of the consultation will enable an informed decision to be made on whether or not to proceed with standardised packaging*”.⁴⁰

4 Analysis of potential benefits of standardised packaging

The impact assessment identifies two key areas of benefits from standardised packaging of tobacco: reduced take-up of smoking and improved quit rates (in addition to reduced cost of treating the effects of second hand smoke which is excluded from the analysis⁴¹). These benefits are assessed in terms of a volume (the number of people not taking up smoking or quitting as a result of the policy) multiplied by a value per person not taking up smoking or quitting as a result of the policy. Both of these numbers are subject to a lack of evidence to quantify them and a high degree of uncertainty as discussed below.

4.1 Assessing the impact on consumption: the use of a panel of experts

The volume of people not taking up smoking or quitting as a result of the policy is being estimated using subjective judgement funded by the Department of Health Policy Research programme (DHPR) from a panel of experts. However in selecting the panel, the requirements of impartiality and lack of economic or personal stake in the potential findings are not being applied – this is a major shortcoming of the approach and undermines the credibility of the results. It is not even clear that the panel would have the right set of expertise for example in youth smoking initiation, smoking cessation, relapse, risk perception, illicit trade in tobacco and product branding and marketing that would be required to assess the impact of this policy proposal.

Annex 2 of the impact assessment states that expert judgements have previously been used in a range of areas including risk of volcanic eruptions, treatments for major depression and chances of survival following gastric surgery. None of the areas stated for the previous use of this technique involve complex market decisions by consumers or issues of product branding, and all are areas where experts can be expected to have had direct experience or evidence of previous similar / identical events (albeit not in sufficient numbers to allow a rigorous quantified assessment of the issue)⁴². However, unlike volcanic eruptions, treatments for depression or survival following gastric surgery, there is no direct experience to draw on of the impact of a standardised packaging tobacco policy on tobacco consumption and the potential impact is one that involves complex consumer decisions based on subtle differences in brand acceptance and other market impacts including price.

⁴⁰ DH IA Paragraph 38.

⁴¹ DH Impact Assessment paragraph 3.

⁴² For example Normand, Sharon-Lise et al (2002) *Using elicitation techniques to estimate the value of ambulatory treatments for major depression*, used an expert panel to assist with an investigation of the value of treatment for major depression. In this study experts were presented with findings from 23 years of studies on clinical trials of depression treatments. The experts were then asked to use existing studies to extend the likely impact to a hypothetical cohort of patients to extend the findings from small clinical trials to an estimate of interventions that might be applied to a system wide level.

Therefore the appropriateness of these precedents as examples of the application of this technique for this type of problem should be seriously questioned.

Indeed, as the DH Impact Assessment explicitly recognises, standardised packaging is likely to lead to switching from higher priced premium bands to cheaper economy brands and could lead to reduced prices for premium brands. It could additionally lead to switching from duty-paid cigarettes to either hand-rolled tobacco or cross-border shopping / illicit trade. This reduction in price would offset some or all of the purported benefits of lower take-up rates and higher quit rates of the policy and **could even lead to an increase in tobacco consumption** as smokers who had previously been financially constrained in their consumption are able to afford more tobacco than before due to lower cigarette prices. Even given the biases and flaws in the panel of experts approach, if it is taken forward the experts should be asked their subjective judgements of the impact on tobacco consumption of introducing standardised packaging **and at the same time reducing the price of cigarettes by 25%** (from £7.00 to £5.25), rather than comparing it against stable prices⁴³.

4.2 Valuing the impact on consumption

The DH impact assessment estimates that every young person who no longer takes up smoking has a lifetime benefit of 1.56 years and every additional adult who quits has a lifetime benefit of 1.24 years. These are based on a range of assumptions set out in Annex 1 of the IA all of which are subject to (in some cases wide) ranges of uncertainty. The IA has ignored this uncertainty and has chosen estimates of benefits that are at the top end of the range and has excluded potentially significant adjustments that would lower the estimate of lifetime benefits.⁴⁴

The lifetime benefits are valued at £60,000 per quality adjusted life year (QALY). The value for a QALY used by Ofcom in their impact assessment of restrictions on TV advertising of junk food to children to address childhood obesity⁴⁵ was £30,000. This was based on the recommendation of the Food Standards Agency (FSA) and based on a number of sources including: the value NICE apply as a passmark in appraisal of health technologies; a study of air pollution for DEFRA; a study for Department of Health of willingness to pay for a QALY

⁴³ As suggested in DH IA Annex 2, Paragraph 129a(ii).

⁴⁴ For example the social discount rate used to discount future benefits is 1.5% (DH IA Annex 1 paragraph 111) based on a 1977 study by Scott; a more recent 2002 study by OXERA estimated this to lie between 1.0% and 1.6% (HM Treasury Green Book, page 98). Similarly the study does not adjust for confounding factors (for example if smokers are more likely to drink heavily this may exaggerate the mortality impact of smoking), this is justified because *“any reduction to take account of confounding factors would be considerably less than half a life year”* (DH IA Annex 1 paragraph 118(c)); however even a three month reduction for this effect would reduce the benefit for a child not taking up smoking by 16% and for an adult who decided to quit smoking by over 20%.

⁴⁵ http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/statement/ia1.pdf

and the Department for Transport value of a statistical life⁴⁶. Using £60,000 rather than £30,000 doubles the valuation of the purported benefits from the proposal.

4.3 Reduced healthcare costs

The impact assessment states that “*modelling has estimated that, if 1% of the total prevalent smoker population of England over the age of 35 were to quit, then the lifetime cost savings would be around £162m*”⁴⁷, however there is no evidence on which to choose a figure of 1% of smokers aged over 35 quitting – it is simply a number that has been plucked out of the air.

4.4 Conclusions on valuation of benefits

Effectively the IA is saying that the DH have no idea what the impact of standardised packaging would be on tobacco consumption (if any) and that there are widely varying ways to value any such impact.

5 Analysis of potential costs of standardised packaging

The DH impact assessment identifies a number of costs of introducing standardised packaging, including:

- costs to the exchequer from lost duty and VAT,
- costs to the economy from redeployment of resources to other areas,
- costs to tobacco companies from lost profits and brand equity, and
- costs to consumers from lost consumer surplus.

5.1 Costs to the Exchequer from lost duty and VAT

The loss of duty and VAT to the exchequer is a combination of the impact of standardised packaging on:

- consumption of tobacco;
- switching from premium cigarette brands to cheaper brands and HRT;
- cross-border and illicit trade.

Effectively the IA is saying that the DH have no idea what the impact on costs to the exchequer from any of these sources would be.

⁴⁶ Mason H et al (2004) for the Social Value of a QALY Project Team. Estimating a willingness to pay based value of a QALY from existing contingent valuation studies of prevented fatalities, see footnote 142, page 152, *Television Advertising of Food and Drink Products to Children: Options for New Restrictions*, Ofcom 2006.

⁴⁷ DH IA Paragraph 57.

5.1.1 Cost to the Exchequer of the impact on consumption

The impact on consumption while quantified in precise terms in the IA at £3,900 duty plus £330 VAT per adult and £11,300 duty plus £950 VAT per young person⁴⁸ are recognised as “indicative” and depend on a wide range of factors including rates of duty, market shares, changes in smoking patterns and purchasing habits. They would be multiplied by the number of adults and young people who would be expected to quit as a result of the policy from the panel of experts, which as discussed above is a biased and highly flawed way of estimating the impact on consumption.

5.1.2 Cost to the Exchequer from switching

There would also be a loss to the exchequer from switching from premium brands to cheaper brands and HRT which attracts less duty. The IA makes no attempt to quantify the extent of switching between brands as a result of standardised packaging (it admits: “*the extent of downtrading which we might expect to result from standardised packs is currently unknown*”⁴⁹) nor does it consider the impact of switching between cigarettes and HRT (which attracts lower rates of duty). There is however an illustration that the loss of duty from a switch from premium to cheaper brands might be similar to the 21.2 million pack average annual loss of market share of premium packs between 2001 and 2010. This average decline bears no relationship to the expected impact of standardised packaging on brand switching (and there is no reason why they should bear any relationship since they measure totally different things).

Therefore the estimate of the potential loss of duty of £6.1 million⁵⁰ or loss of VAT (incorrectly calculated in the IA as £2.1m but should be £6.3m⁵¹) have no relationship to the expected loss of duty or VAT – they are effectively numbers plucked out of the air. This is also important because the illustrative figure of 21.2 million packs down-trading is used to estimate the impact on brand equity (see below), where the resulting number is again effectively plucked out of the air with no supporting evidence.

5.1.3 Cost to the Exchequer from cross-border and illicit trade

The IA does not estimate the effect on cross-border shopping or illicit trade, although it recognises that standardised packaging “*may provide an additional possibly powerful incentive to cross-border shopping ...*”⁵² If branded packs are seen as more preferable to consumers than standardised packs, then there will be an increased preference (in addition to any cost differential) in purchasing branded packs abroad to consume in the UK and the proportion of tobacco bought abroad would be likely to increase. This extra potential loss of duty and VAT is not quantified in the IA. An increase in the amount of cross-border shopping would result in a loss of duty plus VAT of £4.84 per pack for cheaper packs and £5.25 per

⁴⁸ DH IA Paragraph 52 and footnote 41.

⁴⁹ DH IA Paragraph 65.

⁵⁰ DH IA paragraph 74.

⁵¹ 21.2m packs multiplied by 30p loss of VAT per pack (£1.2 - £0.9 from DH IA Table 2).

⁵² DH IA Paragraph 76.

pack for premium packs. Every 1% increase in the volume of cross-border shopping would be equivalent to a £3.3 - £3.7m⁵³ loss of duty plus VAT to the exchequer.⁵⁴ Similarly a 1% increase in illicit trade would be equivalent to £11.0m - £12.3m loss of duty plus VAT from cigarette sales.⁵⁵ These are both therefore potentially important effects that should be properly estimated and considered. In addition the loss of duty and VAT from switching from cigarettes to HRT could also be significant given the impact assessment shows significant switching between cigarettes and HRT over time.⁵⁶

5.2 Redeployment of business towards other goods

The impact assessment considers the impact of a reduction in overall consumption of tobacco on the profitability of tobacco companies and also the packaging industry.⁵⁷ It suggests that resources would be redeployed to other industries and therefore the IA should only consider the excess profit from tobacco compared to returns elsewhere, rather than the total loss of profit. This appears to be a methodological error. In an open market economy with ready access to capital like the UK, any opportunities for productive use of capital or other resources should already be being taken up. Therefore any loss of profits from tobacco is likely to be lost – unemployed rather than redeployed. The Treasury Green Book advisory team (see Annex 4) state that the IA should *“assess the full loss in profits directly attributable to the intervention. I am not sure what would be the rationale for only calculating the loss of supernormal profits”*.⁵⁸

The DH IA approach is also not in line with the approach used in other IAs across a wide range of regulated sectors and regulators (see Annex 1). Of nearly 100 IAs reviewed by SLG Economics Ltd, only three adopt a similar approach to the standardised packing IA of discounting the loss of profit from tobacco sales. All three reflect policies associated with tobacco regulation:

- Department of Health IA of prohibiting the sale of tobacco at the point of sale.⁵⁹
- The Scottish Government IA of regulations to prohibit smoking in public places.⁶⁰
- Department of Health IA of mandatory age restriction technology or prohibition for tobacco vending machines.⁶¹

⁵³ Depending on the mix of premium/economy packs switching to cross-border trade.

⁵⁴ Based on cross-border volumes of 3% of 2262m packs per year (Source: Table 1 and Table 3 of DH IA) and depending on the mix of premium to cheaper packs bought abroad.

⁵⁵ Based on illicit trade volumes of 10% of 2262m packs per year (Source: Table 1 and Table 3 of DH IA) and depending on the mix of premium to cheaper packs produced illicitly.

⁵⁶ DH IA Paragraph 66 and Figure 4.

⁵⁷ DH IA Paragraphs 79 and 80.

⁵⁸ Email correspondence on recommended IA methodology – advice from Miriam Sachak, Economics Branch & Green Book, General Expenditure Policy, HM Treasury, 9 May 2012, see Annex 4.

⁵⁹ http://www.ialibrary.bis.gov.uk/uploaded/dh_100258.pdf

⁶⁰ <http://www.scotland.gov.uk/publications/2005/03/20827/54293>

The Regulatory Policy Committee (which was set up by Government to provide external and independent challenge on the evidence and analysis presented in IAs supporting the development of new regulatory measures) considered this question in their opinion on the IA of mandatory age restriction technology or prohibition for tobacco vending machines. The Regulatory Policy Committee report states:

“13. Another possible cost raised that has not been quantified is lost manufacturers’ profits from reduced tobacco sales. The justification given for not quantifying this is expressed as follows: ‘This is largely not an economic cost, as it would likely be offset by increased expenditure (and profit) elsewhere in the economy.’

14. This does not provide a satisfactory explanation and is a questionable treatment of direct effects.”⁶²

Therefore the approach to redeployment of resources is not in line with the vast majority of IAs across a range of regulated sectors and regulatory bodies and where it has been applied previously in IAs related to tobacco regulation it has been strongly challenged by the Regulatory Policy Committee.

5.3 Loss of Brand Value and Profits

According to the impact assessment, the cost impact on tobacco companies is a combination of:

- Loss of brand equity;
- Loss of profits from changes to consumption;
- Loss of profits from switching to illicit trade.

5.3.1 Loss of brand equity

The IA uses the price premium approach to measuring brand equity and multiplies the £1.75 price difference between premium and economy packs (less the 58p difference in duty to give £1.17 per pack loss of profit) by the illustrative 21.2m amount of switching and then reduces this by a factor of 10 to take account of the proportion of tobacco company profits received by UK shareholders and then by a further 25% for corporation tax.

While methodological criticism of the price premium approach to measuring brand equity is outside the scope of this paper and is a highly complex area, as stated above the assumption of 21.2m packs trading down is a number plucked out of the air by the DH. There is no attempt to assess the impact of price reductions resulting from increased price competition from standardised packaging in the impact assessment, there is also no

⁶¹http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_093815.pdf

⁶²<http://regulatorypolicycommittee.independent.gov.uk/the-protection-from-tobacco-sales-from-vending-machines-england-regulations-2010>

consideration of the impact on profits of any increased switching from cigarettes to HRT. Both of these effects could be significant and should be properly estimated and considered.

The IA reduces the loss of brand equity by a factor of 10 from £25m to £2.5m “to adjust for the proportion which might be gains to UK rather than overseas shareholders”⁶³ (and uses an indicative figure of 10% for this purpose). It also reduces the loss of profit per adult (£662) and per young person (£1912) who quits by a factor of 10 for a similar reason.

This approach to valuing shareholder gains is not in line with the normal approach to assessing costs and benefits used in impact assessments. The Treasury Green Book states: *“The relevant costs and benefits to government and society of all options should be valued, and the net benefits or costs calculated ... Social Cost Benefit Analysis seeks to assess the net value of a policy or project to society as a whole”*.⁶⁴ The references to costs and benefits to society as a whole make it clear that all shareholders, not just UK shareholders should be included in the IA analysis. Treasury Green Book team advice (see Annex 4) is that *“The analysis therefore should not just focus on UK [shareholders] unless the legislation is set for UK businesses only”*.⁶⁵

The DH IA approach is also not in line with the approach used in other IAs across a wide range of regulated sectors and regulators (see Annex 2). None of the nearly 100 impact assessments reviewed by SLG Economics Ltd across a wide range of industry sectors (including previous tobacco IAs), sponsoring departments (including the DH) and policy questions (including ones where the IA took a different view on redeployment of resources) adopted this approach.

Were it to be the case that wider UK government policy only took account of the impact of government policies on UK shareholders, the consequences could be catastrophic for the UK economy. In Quarter 3 of 2011 there was over £825 billion of direct inward investment into the UK plus a further £10,729 billion of portfolio investment, financial derivatives and other investment into the UK.⁶⁶ If foreign companies and investors thought that the UK government totally discounted and gave no value to the impact of their policies on those investments (as the DH IA suggests is the case) then the volume of inward investment could dramatically reduce and the returns required (for what would be seen as much more risky investments) would significantly increase. This would have potentially massive adverse effects for UK employment, growth, investment, economic activity etc.

Similarly, were foreign governments to totally discount the impacts of their policies on UK shareholders in foreign companies (which again would be consistent with them following

⁶³ DH IA Paragraph 81.

⁶⁴ HM Treasury Green Book page 19 and Annex 2, page 57. http://www.hm-treasury.gov.uk/d/green_book_complete.pdf

⁶⁵ Email correspondence on recommended IA methodology – advice from Miriam Sachak, Economics Branch & Green Book, General Expenditure Policy, HM Treasury, 9 May 2012, see Annex 4.

⁶⁶ ONS Balance of Payments Statistical Bulletin, 3rd Quarter 2011, dataset HBWI.

the DH IA approach) then the £1.12 trillion of UK direct international investment would be at risk as well as a further over £10 trillion of portfolio investment, financial derivatives and other UK investment abroad,⁶⁷ again with potentially catastrophic results for savings, pensions, investments, exchange rates, balance of payments etc.

The approach of only considering the impact on the UK shareholders of the companies impacted clearly discriminates against foreign shareholders in the policy setting process. This is a methodological error with no apparent economic justification or precedent for the approach and if applied more widely could have catastrophic impacts for the UK economy.

The IA finally reduces the impact on brand equity by a further 25% to adjust for corporation tax. Corporation tax is a pure transfer from the companies to the exchequer – any reduction in costs to tobacco companies from this transfer will be matched by an equal and opposite increase in costs to the exchequer from lower corporation tax receipts. This adjustment should be excluded from the IA analysis (or recognised but with offsetting benefits that cancel out the effect).

5.3.2 *Loss of profits from changes to the level of consumption*

The IA estimates the loss of profits to tobacco companies from changes to the level of consumption based on scaling the estimated duty lost per quitter (which in itself is a purely indicative number) by assumptions about the average ratio of profit to duty and that any change would be uniform across market segments. Neither of these assumptions is based on any evidence (indeed the IA recognises that “*premium brand users are most likely to be affected.*”⁶⁸) and the result could therefore be widely inaccurate – the estimated loss of profit per premium pack (£1.36) is over 7 times the estimated profit loss per economy pack (19p), therefore the total loss of profits will be extremely sensitive to which part of the market any changes to consumption (which could be positive or negative – if lower prices lead to increased smoking) occurs in, and yet this is assumed away in the IA.

The loss of profit per adult or young person would then be multiplied by the change in consumption rates, which as discussed above there is no sound evidence on. This would then be reduced by a factor of 10 to exclude the loss to foreign shareholders and also by 25% for corporation tax, both of which as discussed above are clearly wrong.

5.3.3 *Loss of profits from changes to illicit and cross-border trade*

The DH IA does not estimate the effect of standardised packaging on the illicit trade. There is clearly a risk that this will increase as a result of the policy. If even 1% of the legitimate trade in premium cigarette packs switched to illicit trade as a result of standardised

⁶⁷ ONS Balance of Payments Statistical Bulletin, 3rd Quarter 2011, dataset HBWD.

⁶⁸ DH IA Paragraph 54.

packaging, this would reduce tobacco company profits by around £13m pa,⁶⁹ it is therefore clearly an important effect that should be estimated and considered.

5.4 Consumer surplus

Consumer surplus is the difference between what consumers actually pay for a product and the benefit they gain from consuming that product (i.e. their maximum willingness to pay for that product less the purchase price). The DH IA recognises that the loss of consumer surplus is unknown⁷⁰, but assumes for illustration a loss of consumer surplus of £1 per pack for trading down from premium to economy packs and multiplies this by the assumed down-trading between premium and economy brands of 21.2 million packs. However again the IA has multiplied two numbers pulled out of the air - neither with any evidential basis to get another number that they use as a “placeholder” for the loss of consumer surplus. This is another important impact that should be properly estimated and considered rather than arrived at by pure speculation.

6 Conclusions on evidence and analysis

Table 1 above summarises the quality of evidence and analysis in the impact assessment. As can be seen the evidence on both costs and benefits is incomplete, subject to biases and flaws and subject to large margins of error - in some cases the numbers assumed are simply plucked out of the air with no supporting justification. Effectively the IA is saying that the DH have no idea what the costs or benefits of standardised packaging will be.

The analysis is subject to a number of fundamental methodological errors which have been challenged by the Regulatory Policy Committee and could be catastrophic for the UK economy if applied more widely in government policy. While this is a consultation-stage impact assessment and therefore would not necessarily be expected to provide a complete and final analysis to support a recommended policy proposal, many of the points raised in this paper reflect fundamental concerns with the approach, methodology and evidence base that would require significant revision and additional work and then further consultation before a proper policy decision could be taken. **Overall the standard of evidence and analysis in the Impact Assessment falls well below the standards required for a policy decision of this type.**

SLG Economics Ltd

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⁶⁹ 1% of 951m premium packs with a profit per pack of £1.36 (Table 1 and paragraph 84 of the DH IA).

⁷⁰ DH IA Paragraph 82.

Annex 1: List of a range of Impact Assessments that consider the full costs of the measures proposed

- Ofcom IA on assessing the impact of restrictions on TV advertising of junk food to children to address childhood obesity⁷¹. Ofcom took full account of the expected revenue and profit loss to television broadcasters without any adjustment for potential redeployment of lost advertising resources elsewhere.
- Home Office Impact Assessment of a Code of Practice for the Alcohol Industry⁷². The Home Office considered the full extra costs to licensees of the measures proposed, not just the incremental impact on profits compared to other industries.
- Department of Transport's Impact Assessment on Introduction of EC Regulations on International Road Transport⁷³ which considers the full cost impact of the measures on road hauliers.
- Department for Environment, Food and Rural Affairs (Defra) IA into an amendment to animal by-product regulations⁷⁴ included the full impact of the measures on farmers' profits in the IA.
- Food Standards Agency IA of revised salt reduction targets⁷⁵ included an estimate of the full cost to salt manufacturers of the measure.
- Home Office IA of Impact Assessment for the alcohol measures in the Police Reform and Social Responsibility Bill⁷⁶ includes the full impact on the profits of publicans of the measures.
- European Commission IA for regulations on the organisation of the market in wine⁷⁷ (included in their Impact Assessment Best Practice library) includes the full impact of the additional costs on wine manufacturers' profits of the measure.
- Department for Environment, Food and Rural Affairs (Defra) IA of a new English scallop order⁷⁸ to limit the extent of Scallop fishing in certain areas. The full revenue impact of the order on scallopers was included in the IA.
- Department of Health IA for a scheme to control the price of branded medicines in the NHS⁷⁹. This included the full effect of the scheme on pharmaceutical companies' profits.

⁷¹ Impact Assessment annex to Annex to Consultation on Television Advertising of Food and Drink to Children, Ofcom. http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/annexes/ia.pdf

⁷² <http://www.ialibrary.bis.gov.uk/ImpactAssessment/?IAID=a5d1b9fd17604cd99c2c0e9d3f25ddfb>

⁷³ http://www.ialibrary.bis.gov.uk/uploaded/uksifia_20112633_en%20-%20EC%E2%80%99s%20Three%20regulations%20on%20international%20road%20transport.pdf

⁷⁴ <http://www.ialibrary.bis.gov.uk/uploaded/DEFRA1396%20Final%20IA%20ABP%20IoW.pdf>

⁷⁵ <http://www.ialibrary.bis.gov.uk/ImpactAssessment/?IAID=e6403e4c98de4ef09f2df0cf37f19be1>

⁷⁶ <http://www.parliament.uk/documents/impact-assessments/IA10-149.pdf>

⁷⁷ http://ec.europa.eu/governance/impact/commission_guidelines/best_pract_lib_en.htm

⁷⁸ <http://www.ialibrary.bis.gov.uk/uploaded/DEFRA1415%20A%20New%20English%20Scallop%20Order%20-%20Final%20IA1.pdf>

⁷⁹ http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_123601.pdf

Annex 2: Impact Assessments that consider the impact on profits of the measures proposed without any reduction for overseas shareholders

- Ofcom IA on assessing the impact of restrictions on TV advertising of junk food to children to address childhood obesity IA⁸⁰. Ofcom took full account of the expected revenue and profit loss to television broadcasters without any adjustment for brand value that might transfer to overseas shareholders.
- Home Office Impact Assessment of a Code of Practice for the Alcohol Industry⁸¹. The Home Office considered the full extra costs to licensees of the measures proposed with no adjustment for the proportion of licensees' profits that might flow abroad.
- Department of Transport IA on the Airport Charges Directive⁸² which includes the estimated costs to airports and airlines of complying with the Directive, but makes no adjustment for airports being owned by international shareholders, or for airlines being in some cases totally owned by foreign governments and therefore having no UK shareholders.
- Medicines and Healthcare products Regulatory Agency (MHRA) IA of the Medicines (Products for Human Use – Fees) Regulations 2009 which considers the impact on the pharmaceutical industry of different levels of fees proposed to be charged in relation to the regulation of medicine. It considers the effects on the costs of businesses ranging from “small ‘one-man-band’ wholesale dealers, NHS Trusts and hospitals, academic research establishments, up to multi-billion pound international manufacturing businesses”⁸³, but there is no question of only the effect on UK shareholders of the policy being included.
- Department of Transport’s Impact Assessment on Introduction of EC Regulations on International Road Transport⁸⁴ which considers the full cost impact of the measures on road hauliers even though many of these international hauliers are likely to be foreign owned.
- Food Standards Agency (FSA) IA of exemption for cleansing and disinfection facilities for livestock vehicles⁸⁵ considers the benefits of exempting small abattoirs from specific hygiene requirements for cleaning livestock vehicles in terms of costs avoided, without any reduction dependent on whether the abattoirs were owned by UK or overseas shareholders.

⁸⁰ Impact Assessment annex to Annex to Consultation on Television Advertising of Food and Drink to Children, Ofcom. http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/annexes/ia.pdf

⁸¹ <http://www.ialibrary.bis.gov.uk/ImpactAssessment/?IAID=a5d1b9fd17604cd99c2c0e9d3f25ddf>

⁸² http://www.ialibrary.bis.gov.uk/uploaded/uksifia_20112491_Airport%20Charges%20Directive1.pdf

⁸³ <http://www.ialibrary.bis.gov.uk/ImpactAssessment/?IAID=d55f5581687845269234e9581f869cc4>, paragraph 4.2, page 10.

⁸⁴ http://www.ialibrary.bis.gov.uk/uploaded/uksifia_20112633_en%20-%20EC%E2%80%99s%20Three%20regulations%20on%20international%20road%20transport.pdf

⁸⁵ <http://www.ialibrary.bis.gov.uk/uploaded/Final%20FSA%20IA%20C%20D%20facilities%20in%20LTP%20plants.pdf>

- Ofcom's IA of its Second Review of Public Service Broadcasting⁸⁶ considers the impact of the measures on broadcasters which are publically quoted companies without any consideration of whether the shareholders are British or from overseas.
- Department of Health IA on a code of practice for Health and Adult Social Care⁸⁷ considers the costs of the policy on Care Homes without any consideration of whether Care Homes are owned by British or overseas shareholders.
- Department for Environment, Food and Rural Affairs (DEFRA) and FSA IA on Transmissible Spongiform Encephalopathies (England) Regulations 2010⁸⁸. This considers stricter regulations to prevent the spread of a range of animal diseases, some of which may be passed on to humans. The costs to industry are assessed with no consideration of whether this might fall on British or overseas shareholders.
- DCMS Digital Economy Act IAs⁸⁹ considers a range of costs and benefits to private companies without any mention of whether the shareholders are British or from overseas.
- Department of Health Impact Assessment of mandatory age restrictions for tobacco vending machines.⁹⁰
- Department of Health IA of prohibiting the sale of tobacco at the point of sale.⁹¹
- The Scottish Government IA of regulations to prohibit smoking in public places.⁹²

⁸⁶ http://stakeholders.ofcom.org.uk/consultations/psb2_phase2/

⁸⁷ http://www.ialibrary.bis.gov.uk/uploaded/dh_110287.pdf

⁸⁸ <http://www.ialibrary.bis.gov.uk/ImpactAssessment/?IAID=a972422ec43d4b11842123910f8aefb9>

⁸⁹ <http://www.ialibrary.bis.gov.uk/ImpactAssessment/?IAID=0a3ebae3253346b8aab00eb4a420e2c7>

⁹⁰ <http://www.ialibrary.bis.gov.uk/ImpactAssessment/?IAID=2296916d3958475394430989af9b4d83>

⁹¹ http://www.ialibrary.bis.gov.uk/uploaded/dh_100258.pdf

⁹² <http://www.scotland.gov.uk/publications/2005/03/20827/54293>

Annex 3: Curriculum Vitae, Stephen Gibson MA(Cantab), CDipAF, PGDipCS

Mr Stephen Gibson is a recognised expert in micro-economics with over 24 years applied experience across a range of regulated sectors from both sides of the regulatory fence. He has been:

- Chief Economist and Director of Economic Policy at Postcomm – the independent regulator for postal services in the UK (2007-2011);
- Principal Economist at Ofcom (2004-2007);
- Senior Consultant at NERA Economic Consulting (2003-2004);
- Head of Economics at Network Rail (1994-2003); and
- Economist/Competition Policy Analyst at Royal Mail (1989-1994).

In 2011 he set up SLG Economics Ltd, a consultancy providing specialist micro-economic policy advice to regulators, regulated companies and government.

Mr Gibson is an Honorary Lecturer in Microeconomics at Birkbeck College, London (since 2005) and is Visiting Lecturer at City University on their MSc in Competition and Regulation (since 2011). He is a member of the Academic Panel of the Centre for Competition and Regulatory Policy.

Policy development and impact assessments

Mr Gibson has wide experience of cost benefit analysis and impact assessments and using them to inform the development of public policy. He directed or had a major role in over 25 major impact assessments covering a wide range of major public policy questions including:

- A major impact assessment underpinning Ofcom's policy proposals for regulation of TV advertising of junk food to prevent childhood obesity,
- Proposals for the switchover from analogue to digital TV,
- Proposals for launching a high definition TV service by the BBC,
- Proposals for the design of a range of spectrum auctions,
- Proposals to change the scope of the postal universal service in the UK, and
- Proposals to separate Royal Mail into different accounting entities.

Mr Gibson was responsible for training Ofcom economists and policy advisors on how to carry out regulatory impact assessments and for developing and rolling out the Postcomm impact assessment guidelines. He has lectured at Birkbeck University on impact assessments using IAs he has worked on as case studies.

Regulatory Economics

Mr Gibson has a wealth of practical applied experience of regulatory economics. He has led or been heavily involved in seven major price controls in the postal, communications and rail sectors including work on:

- Cost of capital and regulated asset base;
- Form and structure of the charge control;
- Defining the high level outputs to be delivered by the regime;
- Incentive regimes, performance, quality of service regimes and charging for major infrastructure investments;
- Accounting and other separation options; and
- Regulatory incentive structures, management incentives and incentivising non-equity companies.

Competition Economics

Mr Gibson has also led or been heavily involved in a wide range of Anticompetitive Investigations, Competition Act cases, Market Impact Assessments and Market Studies including: margin squeeze, bundling, foreclosure, undue discrimination and predatory pricing investigations; an appeal to the Competition Appeals Tribunal and directing the first market study of the UK postal sector.

Industry lectures

Mr Gibson has lectured widely on applied micro-economics including most recently the prestigious Centre for Research in Regulated Industries (Rutgers University) International Conference on Postal and Delivery Economics (where his paper *A Market Study for Packages and Parcels Services* has been accepted for publication); the Government Economists in Regulation and Competition Conference 2011 - where he spoke and chaired the afternoon session; Developments in Postal Regulation organised by Ecolé Polytechnique Fédérale de Lausanne; and Cost of Capital and Financing of Regulated Industries organised jointly by Exeter Business School and the Competition Commission.

Qualifications

- MA in Economics and Management Studies from Sidney Sussex College, Cambridge;
- Post-Graduate Diploma in Computer Science from Cambridge University;
- Certified Diploma in Accounting and Finance from the ACCA;
- London Business School Corporate Finance evening programme;
- External supervisor for Cambridge PhD in rail regulation;
- Honorary lecturer in Microeconomics at Birkbeck College, London;
- Lecturer at City University, London MSc in Economic Regulation.

Peer reviewed publications

- *A Market Study of Packets and Parcels Services* in Multi-Modal Competition and the Future of Mail (M Crew & P Kleindorfer eds.)
- *Incentivising Operational Performance on the UK Rail Infrastructure* in Utilities Policy.
- *The Allocation of Capacity in the Rail Industry* in Utilities Policy.
- *The Evolution of Capacity Charges on the UK Rail Network* in The Journal of Transport Economics and Policy.
- *Charging for the Use of Railway Capacity* in Infrastructure Charging on Railways (C Nash & E Niskanen eds.)

Annex 4: Email correspondence with HM Treasury Green Book team

From: Sachak, Miriam - HMT [<mailto:Miriam.Sachak@hmtreasury.gsi.gov.uk>]
Sent: 09 May 2012 12:21
To: stephen.gibson@slg-economics.co.uk
Cc: Lowe, Joseph - HMT
Subject: [UNCLASSIFIED] RE: Information on Green Book appraisals

Stephen,

I would suggest that the IA calculates the total loss of profits relative to the baseline assuming that **this loss in profits is directly attributable to the intervention**. I am not sure what would be the rationale for only calculating the loss of supernormal profits?

On your second point the Green Book states the following

“The relevant costs and benefits to government and society of all options should be valued, and the net benefits or costs calculated.” [Point 5.8 page 19](#).

[Annex 2](#) says “Social Cost Benefit Analysis seeks to assess the net value of a policy or project to society as a whole” first line of [page 57](#).

Again, happy to discuss any of the following

Miriam

Miriam Sachak | General Expenditure Policy | 020 7270 4348

From: Stephen Gibson [<mailto:stephen.gibson@slg-economics.co.uk>]
Sent: 09 May 2012 12:01
To: Sachak, Miriam - HMT
Cc: Lowe, Joseph - HMT
Subject: RE: [UNCLASSIFIED] RE: Information on Green Book appraisals

Dear Miriam

Many thanks for the very useful response. On the first point I understand that the IA should look at costs and benefits, but one of the costs from this policy measure is a loss of profits to some companies compared to the (do nothing) base case – should the IA take account of the full loss of profits or simply the loss of supernormal profits?

Are you able to point me to something I can quote (say from the Green Book etc) on your second point about the IA analysing the costs to society as a whole rather than excluding the effects on overseas shareholders

Thanks

Stephen

From: Sachak, Miriam - HMT [<mailto:Miriam.Sachak@hmtreasury.gsi.gov.uk>]
Sent: 09 May 2012 11:24
To: STEPHEN.GIBSON@SLG-ECONOMICS.CO.UK
Cc: Lowe, Joseph - HMT
Subject: [UNCLASSIFIED] RE: Information on Green Book appraisals

Stephen

Many thanks for your email.

Firstly the assessment or appraisal of an intervention is to assess the additional costs or benefits relative to the baseline (do nothing option). So rather than considering this from a profit perspective, the Impact Assessment should calculate what are the additional costs or savings on business as a result of the legislation.

Finally economic appraisal focuses on the welfare implications of a proposal for society as a whole and for the purposes of comparing it with alternative uses of the public funds involved. The analysis therefore should not just focus on UK unless the legislation is set for UK businesses only.

Happy to discuss,

Kind regards,

Miriam

Miriam Sachak | Economics Branch & Green Book | General Expenditure Policy
2/N1 | HM Treasury | 1 Horse Guards Road | London SW1A 2HQ | 020 7270 4348

From: Stephen Gibson [SMTP:STEPHEN.GIBSON@SLG-ECONOMICS.CO.UK]
Sent: Tuesday, May 01, 2012 2:23:44 PM
To: Greenbook - HMT
Subject: Information on Green Book appraisals
Auto forwarded by a Rule

Dear sir/madam

I am reviewing an impact assessment and want to understand whether loss of profits to a business in one policy option and not the base case should be included in the IA, or whether it should be offset by likely profits in other industries (i.e. is it only the loss in supernormal profits that is of concern in the IA or the full loss of profits).

Also when considering costs/benefits of a fall in profits to UK companies, should you adjust this for the likely proportion of shareholders in that company who are UK residents (i.e. if only 50% of shareholders are British should you only take account of 50% of the extra profits generated by the policy option)

If you can offer guidance or point me to the appropriate guidance in the Green Book that would be very helpful

Many thanks

Stephen Gibson