



Response to the UK Department of Health's Consultation on the Future of Tobacco Control

5 September 2008

Japan Tobacco International is a subsidiary of Japan Tobacco Inc., the world's third largest global tobacco company. It produces three of the top five worldwide cigarette brands: Winston, Mild Seven and Camel. Other international brands include Benson & Hedges, Silk Cut, Sobranie of London, Glamour and LD. With headquarters in Geneva, Switzerland, and net sales of USD 8 billion in the fiscal year ended December 31, 2007, Japan Tobacco International has more than 22,000 employees and operations in 120 countries.

Since April 2007, Gallaher Limited ("Gallaher"), the UK-based tobacco products manufacturer, has also formed part of the Japan Tobacco Group. In this response to the FTC Document, we use the term "JTI" to refer collectively to Japan Tobacco International and Gallaher.

JTI, which has its UK headquarters in Weybridge, Surrey, has a long-standing, significant presence in the UK market. Its UK cigarette brand portfolio includes Benson & Hedges, Silk Cut, Camel, Mayfair, Sovereign and More, as well as a number of other tobacco products including cigars (such as Hamlet), roll-your-own tobacco and pipe tobacco. JTI manufactures product for the UK market at sites in the UK (in Northern Ireland and Cardiff) and outside it (for example, in Germany).

EXECUTIVE SUMMARY

JTI agrees with the key policy rationale underlying the Department of Health's Consultation on the Future of Tobacco Control (the *FTC Document*): "children and young people" should not smoke, and should not be able to buy tobacco products. JTI applauds the fact that HM Government's statistics show that the percentage of young people in the UK who smoke regularly has recently fallen, for the first time in five years, to 6%.

More can be done to eliminate youth smoking, but **JTI cannot support this unprecedented package of excessive regulatory initiatives.** None of the initiatives identified, including plain packaging for tobacco products, hiding them from view at retail outlets, banning vending machines and mandating minimum pack size, will achieve the goal of further reducing youth smoking.

Even the Department of Health rightly questions the evidence it relies upon. It describes the evidence on plain packaging as "*speculative*" and on display as – at best – "*not conclusive*". It has the burden to provide clear evidence to justify the initiatives; it is unable to do so. Indeed, leading experts have looked carefully at the evidence put forward and agree that it fails to demonstrate that the measures will actually work. In fact, the measures may be counterproductive, putting at risk the very people that the initiatives in the *FTC Document* are intended to protect, while also undermining the efforts of other government departments.

The Department of Health appears intent on moving forward with new initiatives before giving its own existing regulatory measures a chance to work. These include the recent rise in the minimum purchase age and the yet to be implemented "negative licensing" scheme for retailers.

The Department of Health has fundamentally departed from the principles and balances that HM Government itself advocated in the Tobacco Advertising and Promotion Act 2002 and the related Point of Sale Regulations 2004. This radical departure is without evidential support, and is inappropriate and disproportionate.

Incessant layering of regulation ignores HM Government's regulatory reform agenda and jeopardizes efforts by various government agencies, and JTI, to tackle youth smoking and illicit trade.

The package set out in the *FTC Document* is so excessive that its negative effects will be widespread:

§ *Contraband and counterfeit tobacco products will become easier to make, distribute and sell.* This undermines the real progress made by enforcement bodies, with JTI, to tackle the trade in illicit products and to take action when criminal gangs are caught. Whilst the *FTC Document* seeks to protect the young and "deprived communities", the measures will not stop them buying tobacco products: they will simply buy from the cheaper, illegal and unregulated market. More jobs will be transferred from legitimate UK manufacturers to organized crime groups overseas, costing the UK tax payer and the public sector in lost revenue.

§ *It would cause serious and unnecessary damage to competition.* Evidence shows that competition would be reduced and barriers to new market entrants increased by such measures. They would remove the last means by which adult smokers are able to make informed choices. Customer choice and product switching will be reduced and confusion created.

§ *Innovation and creative industries will be particularly damaged,* contrary to core HM Government policies and to the detriment of the consumer.

The measures identified unjustifiably infringe fundamental legal rights to property, expression and trade, which JTI considers are critical to protect. **They involve the unparalleled deprivation of brands,** which are – as with any consumer product – JTI’s most valuable assets. **It is wrong for any liberal democracy and free market economy to go this far.**

There are better ways of reducing youth smoking uptake and better means – on the evidence – to make them work. JTI has invested considerable time and resource in evaluating the evidence and the arguments, and puts forward in this response alternative solutions which JTI believes are less intrusive and equally effective. These more proportionate solutions include:

- § criminalization of proxy purchasing and the purchase or attempted purchase of tobacco products by youth;
- § greater resources and manpower for effective, targeted enforcement strategies by the HMRC, the UK Border Agency and Trading Standards Officers;
- § the use of adult identification functions for vending machines;
- § reinforcing retail access prevention measures, such as the ‘No ID No Sale’ programme; and
- § targeted public information campaigns to quickly and effectively raise awareness of the negative licensing scheme and the criminalization of proxy and youth purchasing.

JTI believes that the evidence is so weak, and the negative impacts of its proposals so serious, that the **Department of Health must fundamentally reassess its proposals, and consider the more proportionate solutions put forward in JTI’s response.**

JTI notes that the most critical issues for immediate consideration in the UK, as evidenced by the inclusion of consultation stage regulatory impact assessments in the FTC Document, are the proposed prohibition of the display of tobacco at point of sale and restrictions on the sale of tobacco from vending machines.

The Department of Health’s suggestion of plain packaging for the UK, on the other hand, is unprecedented. This measure is raised in the FTC Document ostensibly to seek views and comments, noting that “*specific proposals are not being considered at present*”. However, documents published within the last fortnight by the WHO Framework Convention on Tobacco Control (*FCTC*) demonstrate that the UK has been a Partner in international discussions relating to plain packaging since 2007. In the light of this, JTI addresses this issue at the outset of its response.

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DOES THE FTC DOCUMENT AMOUNT TO BETTER REGULATION?

1. JTI SUPPORTS YOUTH SMOKING PREVENTION AND BETTER REGULATION

1.1 Tobacco products carry risks to health. Appropriate and proportionate regulation of the sector is thus both necessary and right. Children and young people should not smoke, and should not be able to buy tobacco products. Adult smokers should be appropriately informed about the risks of smoking before they make the decision to smoke.

1.2 For this reason, JTI supports legislative and regulatory measures on tobacco control which meet internationally accepted principles of Better Regulation. Better Regulation forms the cornerstone of the UK Government's "*ambitious and wide-ranging regulatory reform agenda*".¹ The principles state that any regulation should be clear, transparent, accountable, proportionate, consistent, and targeted only at cases where action is needed. Regulation must be necessary and appropriate to achieve an identified and legitimate public policy objective. HM Government is publicly committed "*to intervene only when necessary and since most policy objectives can be achieved through a range of options, the Government's aim is to identify proposals that best achieve its objectives while minimising costs and burdens.*"² The FTC Document notes at page 65 that it is seeking to "*ensure our consultation follows Better Regulation best practice, including carrying out a regulatory impact assessment, if appropriate*".

1.3 It is against this benchmark that JTI has considered the FTC Document. Where JTI considers that action contemplated by the Department of Health falls short of these fundamental requirements, JTI has sought to propose effective alternative regulatory solutions that avoid many of the serious unintended consequences of the measures identified. However, JTI will question, and where necessary challenge, regulation that is flawed, unreasonable, disproportionate or without evidential foundation.

Inadequate evaluation of existing regulation

1.4 Critical in the context of Better Regulation is the need to consider the necessity for new regulation in light of existing regulatory measures. JTI is extremely concerned that the FTC Document fails to give adequate consideration to the interrelationship between:

- (a) **the measures considered in the FTC Document and recent regulatory initiatives**, which have not even been implemented or – at most – have only recently been. The UK tobacco industry is one of the most regulated of FMCG³ sectors with comprehensive measures in place regarding product composition, product packaging and labelling, product taxation, product display, advertising and sponsorship and where products cannot be used.

Of particular concern to JTI is the fact that the Department of Health is now considering far-reaching and, in part, unprecedented regulatory restrictions without any apparent consideration of the extent to which the FTC Document's primary objective of reducing smoking uptake in children and

young people is being, or will be, addressed effectively by the following recent initiatives:

- (i) HM Government's own **negative licensing scheme**, which has not even been commenced and – despite having been proposed specifically as a means of preventing the access of young people to tobacco products – is not even considered in the FTC Document;
- (ii) the **minimum age of sale for tobacco having been raised** from 16 to 18 from 1 October 2007 in England, Wales and Scotland and from 1 September 2008 in Northern Ireland; and
- (iii) the introduction for the first time in the UK of **photographic health warnings** on tobacco products, which will be phased in from autumn 2008.⁴

Given the legal duty it has to consider all relevant factors, it is not adequate for the Department of Health to limit its analysis to the statement in the FTC Document that: "*We are confident that raising the age of sale, strengthening sanctions against retailers for persistent sale to under-18s and action on reducing the availability of cheap illicit tobacco will help to reduce smoking among children into the future*".⁵

- (b) **the measures considered in the FTC Document.** The Department of Health has not sought to address the extent to which the individual regulatory measures proposed in the FTC Document could be effective in achieving the stated public policy goal and whether further steps are needed. Clearly, the impact of any new measure proposed would need to be assessed in detail before further obligations are imposed.

1.5 The continual layering of regulatory measures, without appropriate evaluation as to their effectiveness – either individually or collectively – is contrary to Better Regulation principles and the Department for Business, Enterprise and Regulatory Reform's (*BERR*) desire to simplify and reduce regulatory burdens. Any meaningful assessment of the measures considered in the FTC Document and the extent to which they are necessary cannot be made without considering the changes that have been/are likely to be effected by recent regulatory initiatives and the interrelationship between new regulatory measures.

1.6 This is particularly the case in circumstances where HM Government's own statistics indicate that recent changes are having significant success in tackling youth smoking. By way of example, the statement made in the FTC Document⁶ that the rate of smoking prevalence among those under 16 has remained constant, at 9% for the last four years, should be considered in light of the recently published 2007 figures. The rate has now fallen, for the first time, to 6%.⁷ This is also the biggest year-on-year fall recorded by this survey. JTI considers that this data is sufficiently important to warrant a detailed examination of the reasons for this fall and a reassessment of the extent to which measures considered in the FTC Document are now necessary or appropriate.

Inadequate Regulatory Impact Assessments (RIAs)

1.7 The FTC Document provides what purport to be consultation stage RIAs for only certain of the regulatory measures referred to in the FTC Document. JTI sets out below, in Schedule One to this document, its specific comments on these assessments. In summary, the principles of Better Regulation require that considerably more thorough regulatory impact analysis would need to be conducted with stakeholder input before regulatory action could be proposed for any of the measures discussed in the FTC Document. This is particularly important given that any such measures which may ultimately form part of HM Government's legislative agenda ought to be put forward by way of primary legislation on a UK-wide basis.

The importance of Government stakeholders

1.8 A critical procedural requirement of Better Regulation, to ensure that regulation is both consistent and targeted only at cases where action is needed, is that the Department of Health determine the views of other government departments and agencies best placed to comment on the likely impact of the regulatory measures discussed in the FTC Document. The proposals have far-reaching effects, necessitating the detailed involvement of various governmental stakeholders:

- (a) many aspects of the FTC Document raise illicit trade issues – these should be discussed in detail with both **HMRC**⁸ and the newly established **UK Border Agency**. This is particularly important in respect of Questions 4 and 5 of the FTC Document and those measures considered in it which are potentially inconsistent with the regulatory strategies agreed by the tobacco sector with HMRC and/or the Border Agency: see, for example, paragraphs 14.20 and 14.21 below in respect of the Verification of Genuine Product Scheme;
- (b) **HM Treasury** should be consulted about the cost to the UK tax payer and the public sector in lost revenue which such illicit trade issues will cause. This is in addition to the discussions needed concerning the potential job losses within the sector's UK manufacturing sites and reductions in economic activity in the UK which are expected to flow from the initiatives discussed in the FTC Document;
- (c) the measures will have negative operational and competitive impacts not only on tobacco manufacturers, but also a host of other stakeholders including downstream wholesalers and retailers and upstream suppliers to manufacturers (creative design houses, etc). Many of these businesses are small and medium size enterprises. As **BERR** is committed to fostering competitive markets, promoting open markets and enabling companies to compete freely and fairly, its involvement in the evaluation of the direct and indirect impacts of the FTC Document proposals is essential. Further, JTI raises in this document various concerns regarding absences of Better Regulation procedures and the additional imposition of regulatory burdens, which BERR and its **Better Regulation Executive** are seeking to reduce and manage;
- (d) given that measures already in place in the UK have reduced the areas in respect of which tobacco manufacturers are able to compete, the potential negative impact of certain of the initiatives considered in the FTC Document on competition should be discussed with the **OFT**; and

- (e) the difficulties in enforcing the measures considered in the FTC Document, and how this might be achieved in light of the current tobacco regulation enforcement strategies, should be discussed with the **Local Authorities Coordinators of Regulatory Services (LACORS)**, the body responsible for overseeing local authority regulatory enforcement and related services in the UK. Adjusting local government priorities will also necessitate discussion with the **Department for Communities and Local Government (DCLG)**.

Devolution issues

1.9 The FTC Document is directed to England and, in varying ways, to Wales and Northern Ireland. There are real questions, however, as to whether, as a matter of law or practice, various proposals in the FTC Document can properly be adopted on a devolved basis.

PLAIN PACKAGING

2. INTRODUCTION

2.1 The Department of Health seeks views on whether plain packaging, as defined in paragraph 3.64 of the FTC Document, has merit as an initiative to reduce smoking uptake by young people (Question 10), but states that specific proposals are not being considered at present. JTI notes that the reduction of smoking uptake by young people is the only stated public policy objective, and therefore it has considered the potential effectiveness of plain packaging just by reference to this goal.⁹

2.2 JTI wishes to emphasise at the earliest opportunity its categorical opposition to any such measure. It would represent an extraordinary attempt by HM Government to deprive JTI of its most valuable assets. This would be manifestly disproportionate.

2.3 No government in the world has adopted plain packaging legislation. It was considered by the Canadian and Australian governments in the mid-1990s,¹⁰ but rejected by both. Indeed, the Australian Senate Community Affairs References Committee concluded that there was “*not sufficient evidence to recommend that tobacco products be sold in generic packaging*”.¹¹

3. THE FUNDAMENTAL ROLE OF TOBACCO PACKAGING

3.1 In an economic system in which individuals, rather than governments, make the majority of decisions regarding economic activities and transactions, the ability of manufacturers to distinguish their products through packaging provides a key means by which consumers are able to freely exercise economic rights of purchase.

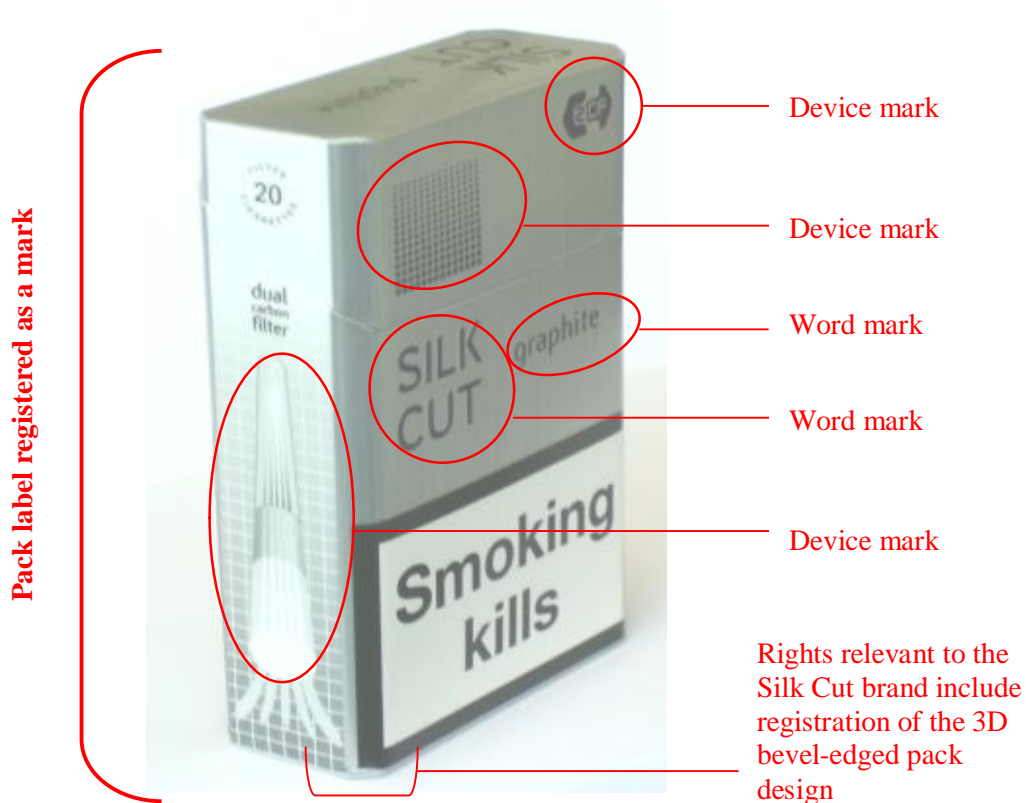
3.2 The free exercise of economic rights to purchase relies on choice. Adult smokers use packaging to identify, obtain information about and choose tobacco products, easily and without confusion. Distinctive product packaging is fundamental to facilitate inter- and intra-brand¹² navigation and competition, and is the primary tool for developing brand equity, innovation and non-price competition. It is particularly important where other channels of interaction with consumers are restricted.

3.3 These principles underlie the public policy justification for the grant of exclusive intellectual property rights. Such rights are recognised and protected as fundamental rights under Community and national law, international law and under Community and national intellectual property laws. They are further recognised and protected by national and Community competition and economic policy. Any plain packaging legislation would have to be scrutinised for compatibility with the wording and purpose of the provisions of such laws. Justifiably, there is a heavy burden on governments seeking to displace such rights.

3.4 The Japan Tobacco Group owns a broad range of sophisticated intellectual property rights in relation to the packaging of its tobacco products (including both unregistered¹³ and registered trade marks¹⁴ (*IPR*)). Its portfolio of registered trade marks, which includes approximately 850 registrations in respect of tobacco products sold in the UK, incorporates both UK national and Community trade mark registrations. In this context, IPR may take a variety of forms including word marks,

devices or design marks, colour marks, whether alone or claimed as an element of another type of mark and the shape of goods or their packaging.¹⁵ Extensive efforts are taken to protect such rights by way of a rolling programme of trade mark registrations, oppositions, renewals and enforcement actions, consisting of infringement actions and passing off actions by JTI in addition to actions taken by regulatory enforcement agencies.

3.5 By way of example, the following illustrates the national and Community trade mark registrations which relate to Silk Cut Graphite, a JTI product currently sold in the UK and elsewhere in the European Community.



3.6 The existence and enforceability of IPR has been recognised as of paramount importance to the functioning of the internal market and as necessary incentives for investment in R&D and innovation. The development of brand equity and goodwill is fundamental to market economies, consumer choice, innovation and product development. It flows, as economic value, through all levels of the supply chain.

3.7 JTI has invested very substantially in its IPR, brands and products, and this is reflected in the strong brand equity of JTI's UK brands. As a fundamental branding tool, packaging:

- (a) **facilitates brand navigation:** packaging makes a product readily recognisable and allows consumers to easily find their preferred JTI product. This in turn sustains brand loyalty;

- (b) **reaffirms brand equity and identity:** packaging is one of the last remaining, and therefore an essential, means by which JTI's products identify and differentiate themselves;
- (c) **enables consumer choice:** branding, and in turn the packaging that supports that branding, facilitates greater product variety and thereby increases consumer choice;
- (d) **supports product innovation:** packaging allows JTI to convey product changes and improvements;
- (e) **maintains quality standards:** packaging serves as a guarantee to consumers that JTI stands behind its products and the products' quality, integrity and reliability;
- (f) **facilitates market entry for new products:** branding, and the packaging that supports it, decreases the barriers to market entry for new products by acting as a means through which products differentiate themselves from others;
- (g) **inhibits illegal activity:** distinctive packaging complicates the manufacture of counterfeit products and provides an incentive to manufacturers to preserve the integrity of their products; and
- (h) **assists intermediate distributors and retailers:** distinctive product packaging facilitates the product supply and stocking processes.

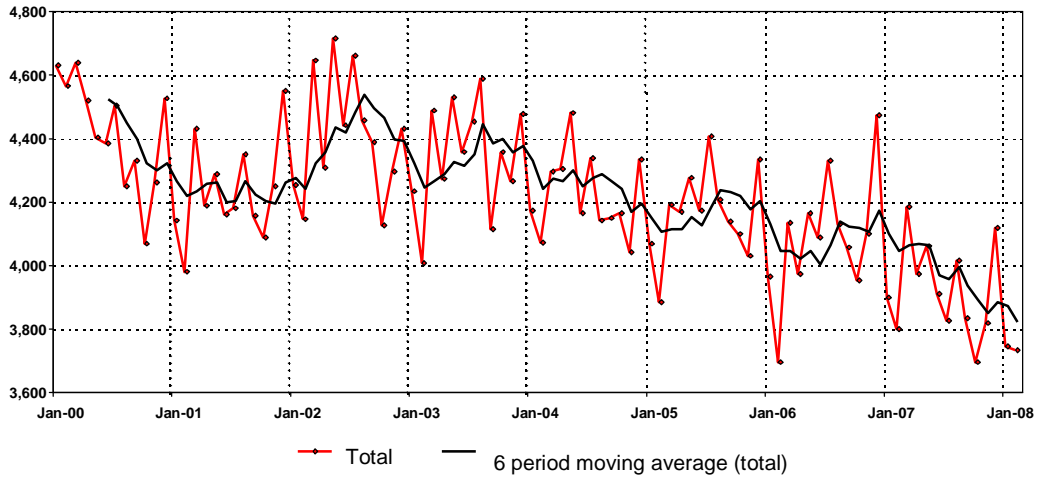
3.8 Given that it has both branding and functional roles, the packaging of tobacco products can be understood as having a continuing, independent function in itself, as well as being an integral and inseparable part of what is purchased by adult smokers when they buy a tobacco product. Dr Andrew Lilico, the expert commissioned by JTI to conduct an economic analysis of the impacts of plain packaging and point of sale display restrictions in the UK, explains this further at paragraphs 1.8 and 2.2 to 2.6 of the report appended to this document.

4. INTER- AND INTRA-BRAND COMPETITION

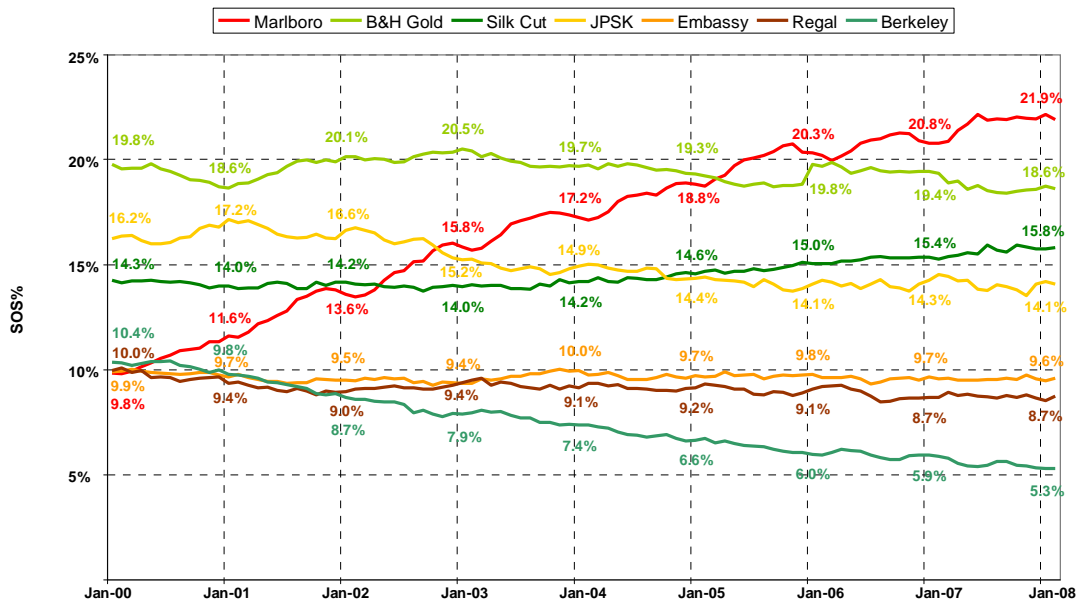
4.1 In the UK's system of undistorted competition, businesses must be in a position to relate to their customers.

4.2 The UK tobacco market is highly competitive. The graphs below (all of which are based on retail audit data provided by AC Nielsen) demonstrate that it is a mature and declining¹⁶ market in which tobacco manufacturers compete and innovate in order to increase market share. The second and third graphs show the movements in UK market share of cigarette brands in certain price segments (premium-priced and value-priced cigarettes) between January 2000 and January 2008.¹⁷ It is clear from these graphs that the market share of UK brands fluctuate significantly, illustrating that there is genuine inter-brand competition, particularly when a new brand or product is introduced to the market.

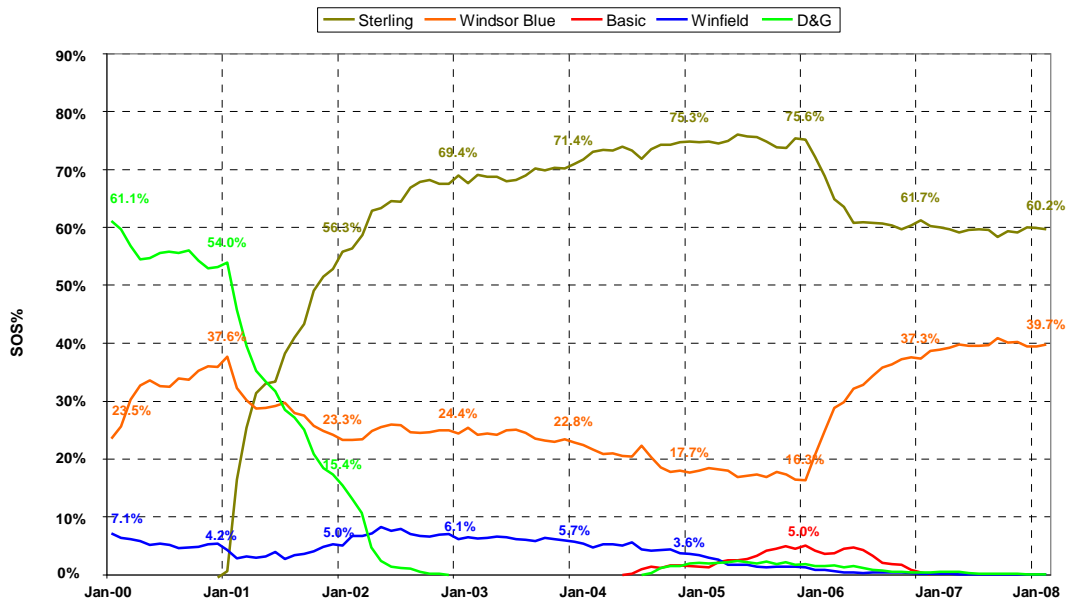
UK Cigarette Volume (in millions of cigarettes)



UK Cigarette Share of Premium Price Segment %



UK Cigarette Share of Value Price Segment %



4.3 The small physical size of tobacco packaging and the manner of point of sale purchase necessitates that a tobacco packet be readily recognisable to trade and consumers not only by its brand name but also by the overall design of the packaging.

4.4 JTI invests and innovates in its packaging design and quality in order to compete with product available to existing adult smokers. JTI and other companies, both within the tobacco sector and also in the context of other FMCG, use product packaging in a myriad of ways and this scope for creativity motivates efforts to differentiate the product from others. Packaging comes in many different shapes, sizes, colours, designs and materials. One specific, functional example is the way a cigarette pack opens. As well as packs using a flip-top lid, consumers can choose soft packs, 'push and slide' packs and front opening packs (as in a classic cigarette case).

4.5 Tobacco companies need, and have a right, to distinguish and differentiate their products, without confusion, from those of their competitors.¹⁸

4.6 In this regard, tobacco packaging performs a fundamental role in respect of existing adult smokers who have already made the decision to purchase a tobacco product. Evidence demonstrates that the vast majority of consumers have decided to purchase a (specific) tobacco product prior to visiting the retail outlet at which they make that purchase. This issue is discussed further at paragraph 9.29 below. That evidence undermines assertions that packaging at point of sale incites people to smoke when they would not otherwise have done so or promotes smoking uptake.

4.7 Instead, it supports the analysis that packaging plays a fundamental role in brand navigation, brand differentiation and intra-brand competition. Consumers in the UK can easily identify their preferred product or select an alternative product at the point of sale.

4.8 Consumers are entitled to expect a product to be of a quality consistent with previous experience and to hold the trade mark proprietor liable for failure to perform.¹⁹ In that context, trade marks guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin.²⁰ If packaging is no longer distinctive:

- (a) competition is distorted because consumers are less able to identify their choice of product or select alternative products; and
- (b) the responsibility of the trade mark proprietor to the consumer is potentially jeopardised as consumers are less likely to be sure of the origin and quality of the goods they buy.

5. PLAIN PACKAGING WILL NOT ACHIEVE THE STATED POLICY GOAL

5.1 JTI supports the FTC Document's stated objective of reducing smoking uptake by young people, but notes the complete absence of reliable evidence to suggest that plain packaging will lead to a reduction in youth smoking uptake.

5.2 The Department of Health has acknowledged that the research evidence in support of mandating plain packaging is "*speculative*"²¹ as it relies on asking people what they might do in a certain situation and assumes that changes in the packaging

will lead to changes in behaviour. The body of evidence is also recognised as being both “*small and necessarily experimental*”.²²

5.3 Dr Warren Keegan, the expert commissioned by JTI, concludes that his analysis of the publicly available consumer survey evidence on the likely impact of plain packaging (which includes the studies relied upon in the FTC Document): “...shows no reliable evidence to suggest that plain packaging will lead to a reduction in youth smoking uptake” (page 27 of Dr Keegan’s report).

Evidence relied upon by the Department of Health

5.4 Five consumer survey studies are relied upon in the paragraphs of the FTC Document relevant to plain packaging (3.64 to 3.81). None of these studies were conducted in the UK. In addition, the five studies are all limited by their age: the research for the earliest study cited was conducted in 1990; the most recent study was conducted in 1999.

5.5 Each of the five studies relied upon in the FTC Document has been considered by Dr Keegan in detail (see pages 15 to 25 of Dr Keegan’s report). The key flaws in each study identified by Dr Keegan are set out below:

- (a) **Expert Panel Report for Health Canada (1995):** This study is put forward by the Department of Health as its primary evidence that “*plain packaging reduces the brand appeal of tobacco products, especially among youth*” (referred to in paragraphs 3.66 and 3.67 and endnote 53 of the FTC Document). It suffers from key methodological flaws, such as the uses of conditioned responses, and the other limitations discussed by Dr Keegan at pages 20 to 22 of his report. These flaws are in part recognised by the study itself, but not by the Department of Health. The study also makes a number of causal conclusions which, in Dr Keegan’s view, are not actually supported by the results of the research conducted (see pages 22 to 25 of Dr Keegan’s report).
- (b) **University of Toronto Centre for Health Promotion (1993):** This study, which is referred to in paragraph 3.68 and endnote 54 of the FTC Document, relies on an extremely small sample size and, therefore, any data extracted from its results cannot be generalized to any broader population (see page 17 of Dr Keegan’s report). The authors actually base the study’s “*major conclusions*” on the responses of a small number of teenagers. The study fails to demonstrate that cigarettes in plain packages are “*less appealing to youth*”. Again, the authors of this study reach conclusions about the potential impact of plain packaging that, in Dr Keegan’s view, are not supported by the results of the study.
- (c) **Beede P. and Lawson R. (1992):** This study, which is referred to in paragraph 3.69 and endnote 55 of the FTC Document, suffers from an unreliable data collection method and unsupported conclusions. Dr Keegan notes at page 15 of his report that the data collection process for this study was methodologically unsound and did not support quantitative findings. Further, Dr Keegan notes that the authors link brand differentiation (resulting from branded packs) and smoking uptake behaviour despite the fact the study does not support this conclusion.

- (d) **Rootman I. and Flay B. (1995):** This study, which is referred to in paragraph 3.70 and endnote 57 of the FTC Document, is – in Dr Keegan’s view – not reliable science. It is limited to the selective reporting of data and verbatim responses and is written in strong advocacy language (see page 19 of Dr Keegan’s report).
- (e) **Goldberg M., Liefeld J., Madill J. and Vredenburg H. (1999):** Dr Keegan notes at page 25 of his report that the document referred to in paragraph 3.69 and endnote 56 of the FTC Document is a later analysis of the data collected for the recall and recognition component of the Expert Panel Report for Health Canada (1995) discussed above. It includes no additional data and therefore provides no new evidence.

5.6 Dr Keegan’s analysis demonstrates that there is no reliable evidence to support claims that cigarette packaging and pack graphics have an impact on the decision of young people to begin smoking. Indeed, the Expert Panel Report for Health Canada (1995) study contains the following observations regarding the role of packaging in youth smoking uptake:

- (a) *“teenagers view the process of starting to smoke as being largely unaffected by the brand, package, or promotional activities of cigarette sellers”*; and
- (b) *“in most first trials of smoking, there are few package, brand or brand promotion elements present”*.²³

Packaging is not a predictor of youth smoking

5.7 The considerable body of evidence and research which exists on the predictors for smoking initiation does not suggest any link between packaging and youth uptake.

5.8 First, the FTC Document does not identify packaging as a predictor for the onset of youth smoking. The Department of Health states, at paragraph 3.8 of the FTC Document, that predictors include:

- (a) age and sex;
- (b) home environment, with those living with smokers being statistically more likely to take up smoking as opposed to those living with non-smokers;
- (c) drug use and drinking alcohol, where there is a direct correlation between the number of units consumed and odds of becoming a regular smoker; and
- (d) truancy and exclusion from school.

5.9 Secondly, the work of societal influences as a causative factor in smoking uptake by young people is acknowledged in HM Government’s *Smoking Kills White Paper*, 1998.²⁴ As noted by NICE, in their July 2008 *Public Health Draft Guidance – Mass Media and Point of Sales Measures to Prevent the Uptake of Smoking by Children and Young People*, having a parent or sibling who smoked is particularly strongly associated with uptake, as is parents’ approval or disapproval of smoking.²⁵

5.10 Thirdly, another factor not expressly referred to in the FTC Document is that of peer influence, which has been recognised as one the main factors leading to smoking uptake by the young. The Expert Panel Report for Health Canada (1995) on

the likely impacts of plain packaging on youth smoking relied upon in the FTC Document reported that “*practically one hundred percent said the reason they might start smoking or would smoke is to be cool or fit in*”.²⁶

5.11 In this context, JTI is concerned that the introduction of plain packaging might be accompanied by the genuine risk of promoting smoking initiation. As the FTC Document notes: “*Children may be encouraged to take up smoking if plain packages were introduced, as it could be seen as rebellious*”.²⁷

6. PLAIN PACKAGING IMPEDES AND RESTRICTS LAWFUL ACTIVITY, WHILST FACILITATING ILLEGAL ACTIVITIES

6.1 The potential economic, policy and legal effects of any regulatory proposal should be balanced carefully before action is taken. As set out below, a range of serious consequences would flow were HM Government to take forward plain packaging as a regulatory initiative. Given that its adverse effects are manifest, and in the absence of reliable evidence to support the policy objective relied upon, plain packaging is flawed and would breach JTI’s fundamental rights.

6.2 Mandatory plain packaging for tobacco products would lead to a series of negative and undesirable consequences, including:

- (a) the deprivation and/or impairment of JTI’s fundamental rights including the right to property, freedom of expression and freedom to trade;
- (b) the erosion of the brand equity that has been built up and which is currently attributable to JTI’s brands, and a disproportionate impact on JTI as a premium brand owner;
- (c) undermining the progress being made in tackling the illicit trade in tobacco products;
- (d) the serious and unnecessary damage to the legitimate economic interests of tobacco manufacturers, their connected industries and competition in the UK tobacco sector; and
- (e) a diminished contribution to the UK economy.

Deprivation of property and/or the impairment of fundamental rights

The fundamental right to property

6.3 A plain packaging measure, if it could be adopted at all, would represent an extraordinary attempt by HM Government to deprive JTI of its most valuable assets. Deprivation of property is presumed to be disproportionate and hence unlawful unless JTI is compensated at the full value of its property.²⁸

6.4 The fundamental right to property is recognised in Article 1 of Protocol 1 of the European Convention on Human Rights (*ECHR*), and is one of the rights scheduled to the Human Rights Act 1998. The ECHR guarantees that every person is “*entitled to the peaceful enjoyment of his possessions*” and that property rights are “*practical and effective*”.²⁹

6.5 This protection extends to intellectual property rights,³⁰ such as JTI's IPR and the goodwill of the business associated with the use of these rights. Effective and adequate protection of such rights is enshrined in European Community and international law. English Courts are required to apply national and Community legislation in the light of the wording and purposes of international law.³¹

6.6 Registration of a trade mark confers the exclusive right on the proprietor to prevent third parties not having his consent from doing certain specified acts.³² This allows the proprietor to prevent acts by a third party that will "*affect or be liable to affect the functions of the trade mark*".³³ The proprietor has a legitimate interest, related to the specific subject matter of the trade mark right, which he is entitled to protect.³⁴

6.7 The specific subject matter of a trade mark includes not only the essential function, which is to guarantee the origin of the goods concerned,³⁵ but also the associated functions of communicating to consumers the product's quality, integrity and reliability, as well as other characteristics.³⁶

6.8 JTI's established property rights are its most valuable assets, reflecting its investment in its brands.

6.9 A plain packaging measure would be a complete prohibition on the use of a substantial part of JTI's trade mark portfolio in the UK as soon as it came into effect. Indeed, the FTC Document states this prohibition on use as the very purpose of the proposal: "*Except for the brand name ... all other trademarks, logos, colour schemes and graphics would be prohibited.*"³⁷

6.10 JTI would be left unable to exploit its IPR commercially, which would render them, for all practical purposes, valueless in the UK. At the very least, mandating plain packaging would prevent JTI from making the paradigm use of its trade marks, that is to say on the packaging of the product itself, thereby depriving JTI of a substantial benefit and value of the specific subject matter of such marks.³⁸ Forcing brand names to be "*written in a standard typeface, colour and size*"³⁹ is an intolerable restriction on the normal and fair use of JTI's word marks.

6.11 Mandating plain packaging would affect the substance of the property to such a degree that there would, at least, be a *de facto* deprivation, and – depending on the formulation of the measure – potentially a *de jure* deprivation. This equates to the total extinction of ownership.

6.12 A plain packs requirement would, depending on the formulation of the measure, have at least the following IPR-related impacts:

- (a) UK registered trade marks may be vulnerable to revocation;⁴⁰
- (b) current UK national trade mark registrations could be declared invalid⁴¹ and future trade mark applications may be refused or, if granted, subsequently invalidated;⁴²
- (c) future Community Trade Mark applications may also be refused or, if granted, subsequently invalidated;⁴³
- (d) to the extent that JTI was deprived of its trade mark registrations:

- (i) JTI would be deprived of its ability to prevent third parties not having JTI's consent from doing certain specified acts;⁴⁴
 - (ii) JTI would be deprived of its ability to oppose trade mark applications and apply to invalidate trade mark registrations at either a national or Community level;⁴⁵ and
 - (iii) UK regulatory authorities would be deprived of their ability to take action to tackle illicit trade of tobacco products whether by criminal prosecutions or under Regulation (EC) No. 1383/2003;⁴⁶
- (e) to the extent that JTI was prevented from using its trade marks on the packaging of its products, its ability to take action:
- (i) to prevent the acts by a third party which affects or is liable to affect the functions of the trade mark by reason of a likelihood of confusion on the part of the public would be impaired;⁴⁷
 - (ii) to protect its Community and national trade marks with a reputation would be diminished and ultimately extinguished in so far as such use by the third party took place in the UK. That is to say the rights to extended protection for JTI's registered trade marks with a reputation and to oppose further commercialisation of goods would ultimately be lost including such rights conferred by Community trade mark registrations in the UK;⁴⁸ and
 - (iii) to oppose trade mark applications and apply to invalidate trade mark registrations at either a national or Community level would likewise be affected;⁴⁹ and
- (f) JTI will ultimately lose its proprietary rights in its unregistered trade marks, thereby preventing it from being able to sue for passing off in the UK and from relying on such rights in the context of opposition or invalidity proceedings either at the national or Community level.⁵⁰

6.13 HM Government is only entitled to deprive JTI's property rights protected by the ECHR, the WTO TRIPS Agreement (*TRIPS*),⁵¹ the Paris Convention for the Protection of Industrial Property (the *Paris Convention*)⁵² and national and Community law relating to trade marks, in very limited circumstances. Given the absence of reliable evidence that the stated public health objective – to reduce smoking uptake by young people – would be achieved by mandating plain packaging, any such measure would be in breach of these rights and obligations.

6.14 In such circumstances, a plain packaging measure would also be in breach of the requirements of the WTO Agreement on Technical Barriers to Trade.⁵³

Freedom of expression

6.15 Freedom of expression, both to impart and receive communication, is commonly recognised as a cornerstone of democratic society. This fundamental right undoubtedly extends to commercial communications.⁵⁴ It is protected in the UK by virtue of Article 10 of the ECHR, the Human Rights Act 1998 and common law.

6.16 JTI acknowledges that this freedom is not an absolute right and that the protection of the public health is a valid objective, for the purposes of which restrictions may be necessary in a democratic society. The burden is on HM Government to justify any restriction. HM Government must demonstrate that (a) the measure is rationally connected to the objective, identified as the reduction in smoking uptake by young people, (b) there should be no less restrictive alternative measures that achieve the same ends, and (c) there must be proportionality between the deleterious effect of the measure and its salutary effects.

6.17 Plain packaging meets none of these tests: there is no reliable evidence of a rational connection with the stated policy objective; it is not a minimal impairment of JTI's freedom of expression given that alternative, substantially less restrictive, regulatory solutions are available to reduce smoking uptake by young people and other regulatory measures have yet to be commenced; and it is disproportionate.

Freedom to trade

6.18 The freedom to trade and conduct business are rights protected under English law, as well as under the EC Treaty and general principles of EC law. Such freedoms are an essential element of free-market economics that must be exercised under conditions of equality. It includes the freedom to engage in an economic or commercial activity and the freedom to contract.

6.19 Infringements of this right are contrary to public policy unless there is a legitimate interest meriting protection and the restraint is reasonable and proportionate. In this regard, the burden lies again with HM Government as a matter of both the free movement of goods under EC law, if indeed there is an impediment to inter-State trade, and fundamental rights. As with the freedom of expression, it is clear that any proposal to restrict JTI's freedom to trade must withstand this constitutional scrutiny. Plain packaging fails to do so.

Undermining progress being made in tackling the illicit trade in tobacco products⁵⁵

6.20 The impacts of plain packaging on illicit trade would be so significant that it would be reckless of the Department of Health and other responsible government departments to ignore them. They are sufficiently important to warrant a detailed reassessment of the extent to which a plain packaging measure is necessary.

6.21 The FTC Document addresses specifically the serious consequences of the illicit trade in tobacco products⁵⁶ and recognises that stakeholders are concerned that this problem would actually be exacerbated by the introduction of plain packaging for tobacco products.⁵⁷

6.22 JTI believes that mandated plain packaging will significantly impede and restrict the lawful activity of manufacturers, while unintentionally facilitating illicit trade. Ultimately, this will jeopardize the objectives of the FCTC regarding elimination of all forms of illicit trade.

6.23 It will also be at odds with the objectives of EU law in the context of the enforcement of intellectual property rights and illicit trade (namely that effective means of enforcing such rights are of paramount importance for the success of the

internal market, as infringements of intellectual property rights are increasingly linked to organised crime).⁵⁸

6.24 These impacts are made more serious by the tendency of those responsible for illicit trade to evolve their criminal activities to take advantage of regulatory developments or to focus on new activities where one form of illicit trade has been made more difficult or less profitable.

6.25 By way of example, since a drop in the UK of the contraband trade in leading brands following the introduction of the Know Your Customer programmes implemented by the major tobacco manufacturers in the UK market and new supply chain control legislation,⁵⁹ criminal gangs have focussed on the contraband trade in ‘cheap whites’.

6.26 In essence, ‘cheap whites’ are generic brands sold at prices significantly below legitimate products because UK duty is not being paid, and many of which use brand names or pack design very similar to the brands of legitimate manufacturers. This is demonstrated below by reference to three examples of ‘cheap whites’ understood to be currently available in the UK – Gold Classic, Raquel Gold Classic, British Heritage – and the legitimate JTI brand Benson & Hedges Gold:



This trade in ‘cheap whites’ is highly likely to target the demographic group – young people – which the Department of Health believes plain packaging might best protect.

6.27 For this reason, JTI sets out in Section 16 of this document a detailed analysis of the unintended consequences that it expects plain packaging will have as regards illicit trade and the extent to which it risks undoing much of the progress made in this context. In summary, JTI is extremely concerned that mandating plain packaging will:

- (a) facilitate the manufacture of counterfeit products;
- (b) remove key cost constraints for counterfeiters, as each pack is essentially the same;
- (c) complicate regulator investigations/prosecutions;
- (d) result in the continued creation of branded packs by counterfeiters, without JTI being able to enforce its trade marks;
- (e) increase the trade in ‘cheap whites’;
- (f) crystallize pack design for the benefit of counterfeiters;

- (g) frustrate tracking and tracing initiatives;
- (h) restrict the ability to identify counterfeit product; and
- (i) impair the ability of enforcement authorities, as well as JTI, to take infringement action.

6.28 To the extent that plain packaging facilitates the trade in counterfeit and/or contraband cigarettes and risks undoing much of the progress made in tackling this trade, it will have these additional negative consequences:

- (a) undermining the FCTC's illicit trade objectives, as well as the UK's stated aim of using pricing as a means of tobacco control regulation;
- (b) posing further risks to consumers;
- (c) worsening the social inequalities identified in the FTC Document;
- (d) depriving governments of revenue;
- (e) causing significant losses to legitimate business; and
- (f) profiting serious criminal organisations.

6.29 There is real substance underpinning each and every one of these concerns. We provide more detail on a number of these issues in Section 16 below, as well as JTI's response to Question 4 of the FTC Document.

Erosion of brand equity and a disproportionate impact on premium brand owners

6.30 JTI is a premium brand owner and central to its UK product portfolio are its premium cigarette brands, including Benson & Hedges Gold, Silk Cut, Camel and More. JTI has invested very substantially in its brands, as reflected by the brand awareness and strong positive associations that the brands have engendered amongst adult smokers.

6.31 Plain packaging eradicates branding and will erode brand equity most notably in leading, premium brands. Premium brand owners, such as JTI, will therefore be disproportionately affected as they have most to lose. Plain packaging will impact JTI to a greater extent than other tobacco manufacturers whose market share consists largely of sub-premium or value brands, or even own-label brands.

6.32 The discriminatory effect of plain packaging for JTI (and other premium brand owners) would be exacerbated if plain packaging was to lead to 'downtrading' in consumer purchasing and the eventual commoditisation of tobacco products. Again, this would impact JTI to a greater extent than other tobacco manufacturers whose UK market share is more reliant on non-premium value brands.

Serious and unnecessary damage to legitimate economic interests and competition

6.33 As identified in the report of Dr Lilico (see, for example, paragraphs 5.12 to 5.17), the market is likely to experience significant repercussions from the

implementation of plain packaging. It is highly likely that, were the UK to mandate plain packaging, at the point of time such legislation takes effect it will result in:

- (a) a significant reduction in the typical ‘brand switching’ activity that JTI would normally expect to see carried out by existing adult smokers in the UK market, as consumers’ navigation between brands is frustrated;
- (b) a corresponding increase in brand consolidation as consumers are left to request and purchase those brands of tobacco products familiar to them;
- (c) a significant reduction in consumer choice in legitimate tobacco products as JTI and other manufacturers who comply with legislative requirements are hampered in their ability to successfully launch new brands into the market; and
- (d) a barrier to new entrants as entities seeking to enter the tobacco market will be unable to compete effectively with existing market participants on any basis other than price. As identified in the report of Dr Lilico at paragraphs 5.22 to 5.23, the erosion of the competition position that brands afford would very probably result in an increased focus upon price as one of the most important remaining dimensions of competition.

6.34 Plain packs could also lead, for practical purposes, to the crystallization of market shares such that the competitive process is undermined and market shares become (more-or-less) fixed.

6.35 As identified by Dr Lilico at Sections 4 and 5 of his report, the operation of competitive markets provides stimulus for innovation and the provision of products with distinct characteristics, a wider choice and greater efficiency. In the absence of the ability to distinguish products by virtue of packaging, manufacturers may be reluctant to invest in R&D and new products and/or would be forced to rely on product pricing as the primary basis for competing and distinguishing its brands from those of its competitors. Dr Lilico states, at point 8 of the Summary of the Report’s Findings, that “*a plain packs requirement would probably all-but end product innovation*” and that the negative competition effects would be noticeable and material.

6.36 Various effects may flow:

- (a) **market dynamics will be impaired:** as Dr Lilico finds, the dynamics of concentration are likely to be very noticeably impaired, with materially greater market power of well-established brands and loss of competitive position for firms that depend upon innovation or brand proliferation.
- (b) **price effects/potential commoditisation:** an anticipated market reaction to plain packaging would be rapid falls in the prices of premium product, and then price stabilisation later as ongoing competitive pressures are reduced. Manufacturers could increasingly be forced to compete on the basis of price.

This would run counter to one of HM Government’s key policy aims of reducing youth initiation as lower prices generally mean increased availability and greater access for youth to tobacco products.⁶⁰

The Department of Health has sought to address this concern in the FTC Document by stating that, if a decrease in price were to follow the introduction of plain packaging, increases in tax on tobacco could counter the effect. High tobacco taxation rates and/or tax rates largely in excess of those practiced in neighbouring countries have already resulted in UK consumers increasingly purchasing lower priced tobacco products rather than premium brands, and have encouraged the illicit trade in tobacco products. As Dr Lilico notes at paragraph 5.24 of his report, the risk of counterfeit and contraband increasing might well limit the scope for tax rises to offset these price falls.

- (c) **lowering of quality standards:** a downward shift in product prices could lead to a reduction in the quality of tobacco products as margins are impacted. Further, where price becomes increasingly significant as the key product differentiator, there is an increased opportunity for others to enter the market with poor quality products through brands with no lasting presence, meaning those market entrants can effectively avoid responsibility for substandard products.
- (d) **a reduction in consumer choice and a barrier to new entrants** (other than those reliant on lower prices as a differentiator), as discussed above.

6.37 Plain packaging would, in JTI's view, also be likely to impact on operation of a fair and competitive market in tobacco products as it would generate genuine confusion amongst existing smokers who, at the point of sale, would be unable to recognise their preferred brand of JTI product.

6.38 Consumers, having made a decision to purchase a tobacco product and on entering a shop, would be faced with a gantry of identical looking packaging. Instead of being able to easily recognise their preferred brand, it is likely that material delay and inconvenience would be incurred in determining which of the various packets is the desired product. If consumers ultimately discern that their preferred brand is unavailable, they will then be unable to navigate easily and freely between the alternative products on sale. The inability of consumers to recognise their preferred product is likely to result in consumer dissatisfaction. This may result in unintended loss of custom for JTI and could potentially lead to the loss of franchise to another brand on a temporary or permanent basis.

6.39 Consumers proactively seek information about the products that they wish to purchase. Restricting the ability of consumers to make informed purchasing decisions would also be contrary to the free flow of information which underpins a successful market economy.

6.40 Plain packaging would similarly cause significant confusion and disruption for participants in the product supply chain. For retailers and wholesalers, tasks which would have relied upon visual pack recognition, such as re-stocking, shelving and pack selection at a customer's request, will be made more difficult if that point of reference is removed. This may lead to an increase in the administrative burden for retailers due to the added time required to stock gantries in an appropriate manner and/or locate products in response to consumer requests.

Diminished contribution to the economy

6.41 Any change to the packaging of JTI's products that is required as a result of plain packaging is likely to lead to significant job losses and reductions in income and economic activity in the UK on the basis of:

- (a) a shift from the legitimate to the illicit trade; and
- (b) 'downtrading' from premium to cheaper legal tobacco products.

Such a change will also represent a significant transition cost for JTI.

6.42 Plain packaging will undermine any future investment and innovation by the tobacco sector in packaging which will have severely detrimental economic impacts on numerous service industries, including pack designers, pack manufacturers and printing and ink suppliers. To put this in context, a 2004 study estimated 80,000 jobs among suppliers, wholesalers, distributors and retailers were dependent on the UK tobacco industry.⁶¹ The implications of requiring plain packaging, in terms of the serious and unnecessary damage to the legitimate economic interests of tobacco manufacturers, their connected industries and competition in the tobacco sector, are discussed further by Dr Lilico at Section 7 of his report.

Question 10: Do you believe that plain packaging of tobacco products has merit as an initiative to reduce smoking uptake by young people?

JTI's response: No.

DISPLAY OF PRODUCT IN RETAIL ENVIRONMENTS

7. INTRODUCTION

7.1 The FTC Document appears to pre-judge the debate regarding the display of tobacco products in retail environments. No meaningful consideration is given in the FTC Document to taking forward the existing regulatory regime, or even considering the adopted, but not yet implemented, measures regarding youth smoking prevention. Rather, the Department of Health seems set on introducing a ban on the display of tobacco products – a measure that would fundamentally depart from the principles and balances that the Government itself advocated regarding the Tobacco Advertising and Promotion Act 2002 (*TAPA*) and the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004 (*POS Regulations*). This radical departure is without evidential support, and is inappropriate and disproportionate.

7.2 Point of sale product display, and its role for tobacco manufacturers and retailers in the UK, should be set in the context of existing prohibitions on advertising, sponsorship and promotions. All television commercials for cigarettes were banned in the UK on 1 August 1965. Non-television advertising campaigns came under stricter guidelines in 1986, which notably prevented advertisements from showing a person smoking. The 1989 Television Without Frontiers Directive⁶² banned all forms of television advertising for cigarettes and other tobacco products. *TAPA* then progressively banned, with criminal sanctions for non-compliance, general advertising in the UK such as on billboards and in cinemas, promotions, sponsorship of national and international sporting events, retail advertising (except for one A5 advert) and merchandising such as ash trays or parasols. The 2003 Tobacco Advertising Directive⁶³ banned tobacco advertising on radio, printed publications, the internet and international sponsorship.

7.3 None of these measures have treated the display of tobacco products themselves as advertising. Tobacco products can be displayed at point of sale, in combination with one A5 size advertisement (the content of which is limited to “*any feature of the tobacco product and no other information*” and the surface area of which must contain a mandatory health warning).

7.4 JTI fundamentally disagrees with the proposal to introduce a display ban as:

- (a) there is no credible evidential basis to support a ban on the display of tobacco products. The Department of Health has no meaningful basis on which to claim that a ban would be effective in achieving any of the public policy objectives set out in the FTC Document, in particular the primary objective of reducing smoking uptake by children and young people. The proposal is fundamentally flawed due to the absence of clear and credible evidence;
- (b) it would impede and restrict lawful activity whilst facilitating illegal activities; and
- (c) it would have wide-ranging negative effects on competition and the supply chain, notably on retailers.

In light of these reasons, as well as the fundamental constitutional and intellectual property rights that would be engaged by a ban, the proposal is manifestly disproportionate.

7.5 JTI supports the maintenance of principles and balances inherent in the existing point of sale restrictions (Option 1), together with more effective and targeted enforcement of the current regulatory regime, the new legislative measures aimed specifically to tackle youth smoking, discussed further in Section 19 of this document, and government led public information campaigns.

7.6 Further, JTI believes that the consultation stage regulatory impact assessment in relation to display in retail environments (*Display RIA*) is wholly inadequate and fails to provide the necessary framework for considering either further restrictions on the display of tobacco products or a complete ban. It is incomplete, superficial, and an ‘assessment’ in form and not in substance. Schedule One details a number of JTI’s concerns, which would need to be addressed in any further consultation.

8. THE DEPARTMENT OF HEALTH HAS PREDETERMINED THE IMPOSITION OF A DISPLAY BAN AND UNJUSTIFIABLY DEPARTS FROM THE PRINCIPLES AND BALANCES OF THE CURRENT REGULATORY REGIME

8.1 The FTC Document lists three options regarding point of sale: no change to the current regulatory regime (Option 1); unspecified further restrictions (Option 2); and requiring retailers to remove tobacco products from display (Option 3). The approach to these options in the FTC Document is confused in principle, and the Department of Health appears to leap-frog the existing regulatory regime and established principles, to reach a pre-determined view that the display of tobacco products should be prohibited. JTI’s concerns regarding this inappropriate approach flow from the FTC Document.

(a) *No consideration of the effectiveness of current and forthcoming regulation*

8.2 As previously noted, youth smoking prevalence in the UK has recently fallen, for the first time in five years, to 6%. It is unclear why the Department of Health would suggest a prohibition on tobacco packaging display in circumstances where youth smoking prevalence is falling and additional regulatory measures are already on the statute book. Better Regulation principles would suggest that evaluation and assessment are appropriate before more regulation is layered on existing measures. This is particularly the case where the proposed prohibition departs fundamentally from the current regulatory approach.

(b) *A prohibition is the only Option assessed*

8.3 Neither the FTC Document nor the Display RIA evaluate either of Options 1 or 2. Only Option 3, a prohibition, is assessed. The Department of Health is unable to fulfil its obligation to explain why less intrusive and equally effective measures have been dismissed. The approach taken is startling given the history and extent of point of sale regulation.

8.4 TAPA does not provide the Government with the power to require retailers to remove tobacco products from display (Option 3). This is self-evident from the wording of TAPA and the legislative intent. TAPA clearly distinguishes between advertising and product packaging display, permitting the latter and essentially prohibiting the former. Tobacco packaging and the display of tobacco packaging are not themselves ‘advertising’.

8.5 TAPA acknowledges, however, a potential overlap between the otherwise distinct issues of display of tobacco packaging and advertising. Section 8 empowers HM Government to adopt secondary legislation to impose restrictions on point of sale (Option 2) where “*display ... also amounts to an advertisement*”. Parliament provided therefore that certain display practices could be treated as “*quasi-advertising*”,⁶⁴ in which case HM Government retained a power to adopt regulations to restrict such practices. No such regulations have been introduced to date, and the FTC Document makes no attempt to assess what restrictions might be appropriate or necessary under Option 2.

8.6 The FTC Document simply refers, in this regard, to a 2006 report prepared by LACORS, entitled “*Tobacco advertising and promotion: What the manufacturers did next*” (the **LACORS Report**). The LACORS Report did not consider that the display of tobacco packaging itself either constituted advertising or in any way contravened the spirit of TAPA. It concluded (on page 3) that “*levels of compliance have been found to be high*”. The LACORS Report considered a number of practices which it considered are legal, but asked whether they might have the effect of promoting tobacco products. It should be noted that certain of the photographs used in the LACORS Report, in fact, predated the POS Regulations.⁶⁵ The FTC Document does not, however, cite any evidence regarding the practices that the Department of Health believes are contrary to the POS Regulations or which have changed since the introduction of the POS Regulations in such a way as to warrant further regulatory intervention under Section 8 of TAPA. The Department of Health simply refers to an “*apparent growth*” in the size of tobacco displays, and notes the lack of research in this area (paragraph 3.25).

8.7 JTI does not consider that the LACORS Report is sufficient to justify Section 8 regulations, a view seemingly shared by the Department of Health. Notwithstanding this, it is surprising that, on the basis of the LACORS Report, the Department of Health has not sought in the FTC Document to assess in more detail measures under Section 8, which would be less restrictive than a ban on the display of tobacco products. The failure to assess the evidence and potential restrictions under Option 2 evidences the pre-judgment in favour of a ban on tobacco product display.

8.8 Indeed, there appears to be a lack of enthusiasm by the Department of Health towards the TAPA/POS Regulations regime. Following publication of the LACORS Report, the Tobacco Manufacturers’ Association (**TMA**), a trade association for tobacco companies that operate in the UK whose members include JTI, BAT and Imperial Tobacco, approached LACORS in order to discuss the matters raised. The TMA proposed that the parties work to create a ‘voluntary agreement’ clarifying the use of gantries, and that the parties meet twice yearly to review additional display issues should they arise. The TMA urged, and LACORS sought, Department of Health involvement in the discussions. Regrettably, whilst LACORS met with the Department of Health, tripartite discussions involving the TMA were not pursued by the Department.

(c) *The Department of Health abandons, without justification, its position that tobacco packaging itself is not advertising*

8.9 The Department of Health has abandoned the position clearly and correctly adopted in TAPA that tobacco product packaging is not, itself, advertising. Without any evidential or expert analysis, the Department of Health incorrectly asserts that tobacco packaging is advertising: “[d]isplay is treated as a form of advertising in

TAPA but is not specifically defined ... [d]isplay could be considered a form of advertising, encompassing any way of showing tobacco products with a view to promoting their sale” (both paragraph 3.17). In the section on plain packaging, it similarly states: *“tobacco packaging can function as portable advertisements...”* (paragraph 3.71).

8.10 The assimilation of tobacco product packaging and advertising is a leap of logic and a fundamental departure from the position under TAPA and the POS Regulations, both of which provide criminal sanctions. The reason for the Department of Health departing in this way seems clear: it is essential to the Department of Health’s purported justification of Option 3. This leap is unjustified and incorrect.

8.11 As indicated above, TAPA provides that tobacco packaging *itself* and its display do not constitute ‘advertising’. Furthermore, this conclusion is consistent with marketing theory. Dr Keegan addresses this point in his expert report at page 4. It is also confirmed by the LACORS Report and the findings of various studies referred to in the FTC Document, discussed below.

8.12 JTI submits that there is no basis for HM Government to depart from its previous positions on this point, and that the attempt to do so evidences a pre-judgment of the Department of Health’s position in favour of Option 3.

(d) The Department of Health abandons, without justification, the Government’s justifications and balances under TAPA and the POS Regulations

8.13 HM Government legislated on the basis of a detailed examination and has repeatedly sought to justify the TAPA and POS Regulations regime on the basis that it provides fair and proportionate regulation in the face of competing rights and objectives. For example:

- (a) rejecting a suggestion that TAPA provide for a complete ban on tobacco advertising and display, Lord Clement-Jones, the responsible Minister in the House of Lords, stated: *“...I do not believe that in the current circumstances [a total display ban] would be proportionate. This Bill is not a witch hunt of smokers, the thin end of the wedge or draconian. The end certainly justifies the means. This Bill is an important step towards a key public health goal: the reduction of tobacco consumption and the death and disease which result from it”*;⁶⁶
- (b) paragraph 33 of the Explanatory Notes to Section 8 of TAPA provides: *“The Government regards the current practice of storing tobacco products for the most part in a gantry with minimal advertising as perfectly satisfactory and has no current plans to make regulations under this section. However, the Government feels that it is important to have the power to control displays if displays of products start to become quasi-advertisements”*;⁶⁷
- (c) one of the stated aims of the POS Regulations, as set out in the Consultation paper, was to *“[permit] a reasonable level of information about the products and their prices to be given to consumers so they can make their purchases”*;⁶⁸

- (d) it continued that: “*the sale of cigarettes and other tobacco products is a legal activity and both retailers and adult consumers have a right to carry out transactions without any unnecessary inconvenience*”;⁶⁹
- (e) the Final RIA, at paragraph 65, summarised the POS Regulations as “...*stri[k]ing the right balance between measures needed to achieve our aim of protecting children from the influence of tobacco advertising, the legitimate interests of the tobacco industry and retailers, and the right of consumers to be aware of the products available and their prices*”;
- (f) the Final RIA, at paragraph 75, explained that the POS Regulations regime was chosen because “...[it] *provides a compromise between seeking to prevent the advertising and promotion of tobacco, whilst recognising that purchasing tobacco products is legal and that those who choose to do so require information about what they are buying*”; and
- (g) during the Third Reading debate, the Parliamentary Under Secretary of State for Public Health said, in relation to the amended clause 8 of TAPA: “*It is perfectly legitimate to have a certain amount of advertising at point of sale and for products to be displayed, with prices, so that they can be sold, because after all tobacco is a legal product*”.⁷⁰

8.14 These political sentiments were effectively adopted by Mr Justice McCombe when he held the POS Regulations to be proportionate to the objective of promoting health, on the basis that: “*The traditional shop gantry and display will remain and the customer will be able to see what is available*”.⁷¹ He went on to say that: “*the combination of display, price list, generic advertising and the limited A5 advertisement proposed could have a significant effect of demonstrating, at POS, the products available, their prices, the pack sizes available and **their characteristics** (such as tipped or un-tipped, menthol content, size and the like)*” (emphasis added).⁷²

8.15 In the face of these political and judicial comments regarding the proportionality and fairness of the TAPA / POS Regulations regulatory regime, based on the continued display of tobacco products, there is a very heavy burden on the Department of Health to justify such a fundamental departure as the proposal to prohibit display. As indicated above, the FTC Document makes no attempt to identify what display practices since 2004 would justify further restrictions under the existing regime (Option 2), let alone justify a leap to a display ban.

8.16 Furthermore, the FTC Document contains no consideration of the A5 advertisement, which is permitted under the POS Regulations. The Government believed that the A5 advertisements were a reasonable and proportionate measure at the time of the introduction of the POS Regulations,⁷³ and there is neither evidence – nor even any suggestion – that there have been developments in practice since 2004 regarding the A5 advertisement that would justify a departure from the Government’s previous and clearly held position. Given that the case for change in this regard has simply not been suggested, let alone made out, JTI does not consider the A5 document further in this response.

8.17 Lastly, these political and judicial statements severely undermine any suggestion that a “*plain price list*”⁷⁴ would be adequate or proportionate. The Display RIA mentions, but does not assess a “*plain price list*”. The body of the FTC

Document does not mention it at all. A “*plain price list*” is patently inadequate and disproportionate.

8.18 JTI is deeply concerned by the apparent pre-judging of the issues on tobacco product display, and the failure by the Department of Health to interrogate any ‘option’, even as foreshadowed by TAPA, other than a complete ban. The FTC Document is fundamentally flawed and lacks the evidential basis on which to justifiably depart from existing positions. The proposed display ban amounts, in the words of the ministerial proponent of TAPA, to “*a witch hunt of smokers*”, “*the thin end of the wedge*” and “*draconian*” (see paragraph 8.13(a) above). The remainder of this section will address only the proposed display ban; in any event, the meaningfulness of this ‘consultation’ process should be questioned.

9. A DISPLAY BAN WILL NOT ACHIEVE THE STATED POLICY OBJECTIVES

9.1 The FTC Document lists four reasons to justify a display ban, namely:

- (a) protecting children and young people from the promotion of tobacco;
- (b) providing an environment that supports smokers who are trying to quit;
- (c) “*denormalising*” tobacco use; and
- (d) ensuring that health messages about the dangers of tobacco use are not undermined.

9.2 In order to progress with the proposed display ban, the Department of Health must point to “*clear evidence*” that such a measure is likely to result in changes in behaviour which, in turn, are likely to benefit public health.⁷⁵

9.3 Putting to one side the actual reliability of the evidence which is discussed below, it is immediately apparent that the majority of the research relied upon relates to ‘advertising’ (or off-pack ‘promotional activities’) and **not** to ‘display’ of tobacco products. ‘Advertising’ research findings are irrelevant. It is irrational for the FTC Document to state that certain studies concerning “*advertising in the broadest sense*” are “*still useful in demonstrating young people’s greater sensitivity to the promotion and prominent display of tobacco products at point of sale*” (paragraph 3.41). As well as explaining why such studies are not relevant, Dr Keegan explains at page 28 of his report:

“Many studies test the effects of retail display in conjunction with the effects of in-store advertising and/or use the terms interchangeably, or use inconclusive results regarding the effect of retail display on smoking behaviours in conjunction with positive in-store marketing results to advocate for increased restrictions on both. In studies where authors group retail display with in-store marketing, it is often impossible to determine any particular effect that is associated with the retail display alone.”

9.4 Further, the FTC Document does not itself portray the evidence as clear or compelling. The Department of Health’s own evaluation is an insufficient basis for a display ban. The Department of Health claims the evidence – taking account of ‘advertising’ generally – is “*strong*”, but:

- (a) acknowledges that the evidence about the public health benefits of a display ban “*is not conclusive*” (paragraph 3.45);
- (b) refers to “*Health Canada’s 2006 consultation*” which found that an impact on tobacco consumption as a result of a display ban “*remains very speculative*” (paragraph 3.45); and
- (c) indicates that the impact of the display ban in Iceland is “*not definitive*” (paragraph 3.29).

9.5 JTI considers that, in fact, there is no cogent evidence on which to justify a ban or further restrictions on tobacco product display. It is inappropriate and contrary to Better Regulation principles to base policy initiatives on manifestly flawed evidence.

The Department of Health’s ‘key rationale’: children and young people

9.6 The FTC Document states, at paragraph 6 of the Display RIA and in similar terms at paragraph 3.24, that: “*The key rationale in controlling the display of tobacco products at the point of sale is the protection of children and young people from the promotion of tobacco. So long as tobacco is prominently marketed there is a danger that new generations of smokers will be recruited.*”

9.7 The Department of Health has, however:

- (a) **cited no clear or credible evidence in the FTC Document**, and JTI is not aware of the existence of any relevant evidence, demonstrating that a display ban or further restrictions will reduce smoking uptake in young people. Rather, the Department of Health has sought improperly to rely upon: (i) irrelevant evidence which relates to advertising; and (ii) methodologically flawed studies which do not even support the Department of Health’s own conclusions;
- (b) **provided no statistical evidence** that a display ban would, in fact, affect rates of consumption or prevalence of smoking amongst young people by reference to the experience in jurisdictions that have introduced a display ban. In fact, expert analysis of that data indicates that there is no discernable impact in reducing the already existing decline in smoking; and
- (c) **failed to consider the relative impact of predictors of youth smoking**, such as family and social influences (considered above).

No credible consumer survey evidence

9.8 A detailed and thorough consideration of consumer survey studies on the likely impact of a ban on the display of tobacco products in terms of children and young people initiation has been conducted by Dr Keegan. This review extends considerably beyond the relevant studies cited in the FTC Document to a wider range of studies addressing the display issue. His findings are set out at pages 28 to 44 of his report. Dr Keegan concludes that there “*is no reliable evidence to suggest that a ban on retail display of cigarettes will lead to a reduction in youth smoking uptake*”.

9.9 Dr Keegan considers that the studies reviewed, that purport to justify a display ban, are “*marred by methodological limitations and unsubstantiated and tangential*”

findings". He continues: "These limitations are frequently of such severity as to not simply affect the weight of a given study as related to others, but disqualify the study's findings as altogether unreliable" (see page 42 of Dr Keegan's report). To summarise, the evidence is flawed for a variety or combination of the following reasons:

- (a) **biased survey question design:** the use of leading, confusing, unbalanced or misguided questions;
- (b) **invalidation by age or environment:** beliefs and behaviours measured in a previous or markedly different regulatory environment, in particular where extensive tobacco advertising was permitted, "*have limited relevance to today's reality and cannot be viewed as predictive*". There is no basis for drawing parallels with the UK. This limitation of the research presented in the FTC Document, which in places is actually acknowledged by the Department of Health, is concerning;
- (c) **measurement of impressions or perceptions of the respondent, or even their perceptions of others', and not actual behaviour:** "*observing what people do is a better predictor of behavior than recording how people respond to questions about what they think they will do, or what they think others will do, or what they report they have done*";⁷⁶
- (d) **lack of statistical significance of findings due to the small sample sizes and the informal nature of focus study groups:** for example, relying on data collected from just 20 former and current smokers in New Zealand regarding the effects of retail display of cigarettes on smoking behaviours;⁷⁷
- (e) **insufficient account of the reliability issues of data collection from minors, in some cases as young as 11:** for example, asking a question for which the respondent child has no factual basis on which to formulate an informed response: "*Do you think other kids your age will try smoking if they see cigarette displays in convenience stores, variety stores or corner stores?*";⁷⁸
- (f) **interviewing smokers and ex-smokers in an after-the-fact interview** and asking them to think about prior shopping experiences over the course of their lives, rather than interviewing respondents as they left the retail environment: none of the studies adopted the latter methodology; and
- (g) **conclusions that are not supported by the research and/or relying on results that are not statistically significant to bolster the study results.**

9.10 For the reasons described above, the consumer survey studies expressly relied upon in the FTC Document which relate to 'advertising' and **not** display of tobacco products are irrelevant. Thus, six studies referred to in the FTC Document should be excluded from the consideration of the display ban assessment.⁷⁹

9.11 A seventh study cited by the Department of Health, by Henriksen et al., relates to retail tobacco marketing.⁸⁰ The Department of Health states (at paragraph 32(b) on page 76 of the FTC Document) that this study "*found that exposure to tobacco marketing in convenience stores was associated with a 50% increase in the odds of ever smoking*". However, the Department of Health admits that there are many reasons why it may "*not [be] entirely fair*" to rely on this study to support a display

ban including the fact that “*the **tobacco advertising** that the Californian children were exposed to appears to be less restricted than the current UK situation...*” (emphasis added).

9.12 This is a significant understatement. The study, to use the terms of the authors, “*examined whether adolescent smoking is associated with exposure to stores that contain **widespread** tobacco marketing*” (emphasis added). In 2003 (as remains the case), Californian legislation permitted general and retail advertising, including advertising in retail establishments, periodicals and in the form of sporting event sponsorship. As mentioned above and as explained by Dr Keegan, product display is not the same as advertising.

9.13 In his review of the Henriksen study, Dr Keegan notes that the “*first methodological limitation of this study is that it has no direct relevance to retail display*”. On examination of the survey methodology, Dr Keegan concludes that the study’s purported findings amount to “*a predetermined result stemming from a biased survey procedure. This is a fatal flaw and renders this study unreliable and invalid*” (see page 29 of Dr Keegan’s report).

9.14 Ultimately, therefore, the only study cited in the FTC Document purporting to address the impact of point of sale display on children and young people is Wakefield (2006).⁸¹ The FTC Document states (at paragraph 3.30), in particular, that the Wakefield (2006) study “*found that cigarette advertising and bold displays in stores predisposed young teenagers to smoke*”. The Wakefield (2006) study is not however reliable evidence from which to draw these conclusions:

(a) the study is characterized by many of the methodological limitations identified above, including the fact that it measures the perceptions and impressions of young respondents with biased questions. An example of a potentially biasing factor is identified in Dr Keegan’s report at page 34: “*Prior to the execution of the questionnaire, the authors engaged in a branding discussion with the respondents...such a conversation sends the respondent into the interview situation thinking about branding in an immediate, vivid manner that is not consistent with a normal state of awareness.*”

(b) even though the study is unreliable, the authors acknowledged that displays did not affect future intentions to smoke:

“*Exposure to point-of-sale advertising, **but not displays**, tended to weaken student’s resolve not to smoke in the following year. Findings also indicate that exposure to advertising, **as opposed to a pack display on its own**, influenced whether students would accept a cigarette from one of their friends if they offered*” (emphasis added).

Statistical evidence of the effect of a display ban

9.15 The FTC Document cites various jurisdictions which have introduced, or which plan to introduce, limitations or prohibitions on the display of tobacco products. The only evidence cited of a “*potential benefit*” in reducing prevalence among young people is various statistics from Iceland, which introduced a display ban in 2001. The FTC Document states that the impact is “*not definitive*” but cites: “*The number of 16-17 year olds who had smoked in the last 30 days was 32% in 1995 (six years prior to the implementation of the display ban), 28% in 1999 and 20% in 2003.*”

When asked if they had ever smoked cigarettes, the percentage of 16-17 year olds who reported that they had fell from 61% in 1995 to 46% in 2003” (paragraph 3.29, ESPAD Reports). The use of this data is misleading and inaccurate on a number of levels.

9.16 First, no attempt is made in the FTC Document to isolate the decline in the cited statistics to the display ban. The ESPAD Reports tend to demonstrate that the decline cannot be attributed to the display ban as analogous trends appear in respect of the UK, where tobacco products were visible at the relevant dates. In fact, the acceleration in the decline over the relevant period was even more pronounced in the UK than in Iceland.⁸²

9.17 Secondly, the data cited by the Department of Health from the ESPAD Reports is only a selective snapshot for the years 1995, 1999 and 2003. It is thus impossible to see when the decline occurred between 1999 and 2003. For example, did it occur evenly between 1999 and 2001 (prior to the introduction of the display ban) and between 2001 and 2003 (after the introduction of the display ban)? It is entirely plausible that the decline occurred predominantly prior to the introduction of the display ban. The Department of Health asserts, however, that “it does point to the potential benefit in reducing prevalence among young people”.

9.18 Thirdly, it is not clear why the FTC Document cites data from the ESPAD Reports for years 1995, 1999 and 2003 when Statistics Iceland makes available on its website **annual** prevalence data for 15 to 19 year olds. The annual prevalence data for all age groups in Iceland, set out in the expert report of Dr Lilico (see Section 6 of his report), demonstrates that such snapshot figures are simplistic and that it is more appropriate to consider the evidence as a whole. Even if a snapshot approach were justified, the ESPAD and Statistics Iceland data do not show the same ‘trend’. On the Statistics Iceland data that the percentage of 15 to 19 year olds in Iceland who have ever smoked in fact increased between 1995 and 2003:

	1995	1999	2003
ESPAD Reports (16-17 year olds): percentage who have ever smoked	61	56	46
Statistics Iceland (15-19 year olds): percentage who have ever smoked	31.2	32.8	34.2

Source: European School Survey Project on Alcohol and Other Drugs (www.espad.org) and Statistics Iceland (www.statice.is).

9.19 Fourthly, the FTC Document makes no attempt to evaluate the possible effect of a display ban on youth smoking in other markets in which tobacco products are removed from display. In particular, no comparative analysis is conducted to establish whether a repeated international trend can be seen in prevalence rates around the time of the introduction of display bans. Dr Lilico has set out in his expert analysis, the percentage of people in various age ranges in Iceland, Thailand, Manitoba and Saskatchewan that are daily smokers, for the periods for which data is available, see Section 6 of his report. Those jurisdictions have had no display of tobacco product for a period that allows the same evaluation of data and trends pre and post the removal of tobacco products from display. Where possible, Dr Lilico ran established statistical tests to assess whether there is statistical impact on prevalence trends.

9.20 Dr Lilico concludes that: first, “*smoking prevalence is statistically unaffected, so far*” by display bans in Manitoba and Saskatchewan (paragraph 6.14 of his report), and, secondly, display bans have not yet had any impact upon established trends in prevalence and consumption (paragraph 6.20 of his report). This is true for all countries and jurisdictions considered and for any age group, including the younger age group.

9.21 The Department of Health’s conclusion that a display ban would have a “*potential benefit*” in reducing prevalence amongst young people is clearly based on an incomplete and selective analysis, and is flawed. There is, in fact, no evidence, on the basis of international examples and on the data available, that a display ban would accelerate the already existing decline in youth smoking in the UK.

9.22 The above findings are not surprising. Health Canada and the Norwegian Department of Health and Care Services have questioned the likely efficacy of measures to restrict display:

- (a) in its 2006 Consultation Document, “A Proposal to Regulate the Display and Promotion of Tobacco and Tobacco Related Products at Retail”, Health Canada acknowledged that: “[i]t is possible that the restrictions on tobacco displays at retail will have an impact on this trend [fall in tobacco consumption], but this remains very speculative at this time”.⁸³
- (b) a similar conclusion was reached by the Norwegian Department of Health and Care Services during a 2007 public hearing considering a proposed ban: “[t]he Ministry would note that there is currently no scientifically published study showing what specific effect a prohibition on display of tobacco products at retail establishments might have on the proportion of smokers”.⁸⁴

9.23 JTI therefore believes that a ban on the display of tobacco products will have no discernible impact in reducing the numbers of young people who start smoking. There is insufficient evidence on which the Department of Health can proceed with a display ban on this basis.

The Department of Health’s ‘other rationales’

Supporting smokers who are trying to quit

9.24 The FTC Document does not contain any analysis at all of the way in which the Department of Health believes that future controls on the display of tobacco products will assist existing adult smokers “*who are trying to quit*”. Nor does the FTC Document present any reliable evidence to suggest that a ban on retail display will lead to an improved environment for those trying to quit smoking. Rather, the FTC Document asserts that “*there is evidence that point of sale displays can stimulate impulse purchases among those not intending to buy cigarettes and, importantly, among adult smokers who are trying to quit*”.⁸⁵ The Department of Health relies on two documents: (a) a study by Wakefield (2008); and (b) documents referred to in Rogers (1995).

- (a) Wakefield (2008)

9.25 The Wakefield (2008) study is fundamentally flawed, as shown by Dr Keegan’s review. First, the study is purely attitudinal, asking people to self-report on

behaviour including their potential reaction to point of sale display. Self-report data is of limited reliability. Second, Dr Keegan uses this study as an example of biased survey questions. Dr Keegan concludes that the “*questioning used in this study is leading, suggestive, and conditions the respondents to provide answers that support the conclusions the authors wish to reach.*” By way of example, Dr Keegan refers to the opening question put to the respondents: “*When you are in a supermarket, milk bar/convenience store or petrol station, how often do you notice the cigarette pack display near the cash register?*” As noted by Dr Keegan: “*This question, as phrased, assumes that a cigarette display exists at the wide array of store types presented, and tells the respondent that they have noticed this display...This presentation makes it very difficult to answer this question in the negative, i.e. that the respondent does not notice the display that he/she is being told exists...Thus, it is unknown whether the respondent’s answer is based on an accurate recollection of their experience or is influenced by the information presented in the question*” (see page 38 of Dr Keegan’s report).

9.26 The ‘findings’ of the Wakefield (2008) survey also stand in marked contrast to a 2005 survey commissioned by Health Canada,⁸⁶ which found that 80% of former smokers believed that “*walls of cigarettes*” had no impact on their purchasing behaviour, 16% said it confirmed their decision to quit, and only 3% said it made them start smoking again. Given that former smokers reported that ‘cigarette walls’ confirmed their decision to quit five times more often than they made them start again, to the extent that any reliable conclusions can be drawn, this suggests that product displays can positively affect quitting motivation. It appears that not only is there an absence of empirical evidence about the likely actual effect, as opposed to perceived influence, of a display ban on those intending to stop smoking, there is also conflicting attitudinal ‘evidence’.

9.27 In addition, a recent British survey⁸⁷ asked a group of adults who had quit smoking or “*tried quitting in the last two years*” to consider which situations caused them to be the most and the second most tempted to smoke again. Again, this research suffers from being attitudinal and asking individuals to self-report on their behaviours. Being in a shop where tobacco was sold was the most tempting for only 1% of those who tried quitting, and was chosen by only 3% overall. It was, by far, the least chosen option.⁸⁸ Besides, it does not follow that the 3% of respondents who reported being tempted to purchase cigarettes while being in a shop ultimately did purchase cigarettes on these occasions; in fact, the feeling of being tempted may have acted to reinforce their decision to quit, as was reported in the Health Canada research above.

(b) Rogers (1995)

9.28 The FTC Document further claims that “[r]esearch has shown that tobacco impulse purchases increase by as much as 28% when there are displays of tobacco products at point of sale.”⁸⁹ The research referred to in support of this statement is a 1995 paper by Rogers et al., subject to the age-related limitations discussed above, which examines the effectiveness of community mobilisation efforts against tobacco promotion.⁹⁰ It does not speak to the potential impact of tobacco product displays. The passage cited by the FTC Document is also not a finding of the Rogers paper. It is in fact sourced from the work of the Point-of-Purchase Advertising Institute.⁹¹ This is a ‘marketing industry trade group’ which is likely to have a strong motivation to convince people of the effectiveness of point of sale activities. As acknowledged in the FTC Document, this research was carried out in the United States “*where there*

are few restrictions on in-store advertising".⁹² The reference is therefore limited by both its scope and its age given that the 28% figure is reflective of the point of purchase environment in the United States in 1992, so – even if the conclusions were sound – they are problematic to apply to the UK.

9.29 In any event, purchases of tobacco products are not appropriately characterised as “impulse purchases”. First, the Department of Health itself contends that the purchase of a tobacco product is highly planned, with the vast majority of consumers having decided to buy a (specific) tobacco product prior to visiting the retail outlet at which they make that purchase. Second, in considering the small percentage of cases where the consumer has not planned to buy a tobacco product (referred to in the FTC Document as ‘impulse purchases’), the surveys relied upon by the Department of Health do not differentiate between different types of ‘impulse purchase’.⁹³ Of particular importance is the conflation of ‘pure’ and ‘reminder’ impulse purchases – generally accepted as independent categories of impulse purchase. A pure impulse purchase is a ‘now or never’ purchase decision whereas a reminder impulse purchase is a ‘now or later’ decision where a consumer is reminded to make a purchase in accordance with a prior purchasing decision. Any effect of displays on ‘now or later’ impulse purchases would obviously not affect smoking initiation, cessation or incidence.

9.30 Neither the Wakefield (2008) study, nor the other materials relied upon by the Department of Health, constitute sufficient evidence of the likely effect of a ban on the display of tobacco products in the UK on the purchasing behaviours of existing adult smokers who wish to quit. Further, JTI is not aware of the existence of any other evidence that would support a display ban on that account.

“Denormalisation”

9.31 The Department of Health’s third rationale for recommending further controls on the display of tobacco products is “*denormalising tobacco use.*” “*Denormalisation*” seeks to eradicate smoking as “*an accepted adult behaviour*”.⁹⁴ JTI is unaware of “*denormalisation*” having been previously advanced in the UK as a rationale for regulatory action. Indeed, there is no express discussion of this rationale in the FTC Document in relation to a display ban: it simply asserts, at paragraph 3.31, that “[r]esearch suggests that prominent display of tobacco products can convey the impression, particularly to young people, that smoking is a common and socially acceptable activity”, when the research relied upon contains no such suggestion and in fact asserts the opposite, as appears from the review conducted by Dr Keegan (see page 42 of Dr Keegan’s report).

9.32 In any event, JTI does not accept that “*denormalisation*” is a legitimate public policy objective that can justify tobacco regulation. “*Denormalisation*” is not, and cannot be, a self-standing objective. It is not legitimate to seek to discriminate against, stigmatize or ostracize existing adult smokers, or to treat the purchase or use of tobacco, as “abnormal”, “unacceptable” or “tainted”. As a policy objective, it runs counter to the hallmarks of a democratic society (notably pluralism, tolerance and broadmindedness), lacks any evidential foundation and is arbitrary. JTI considers that “*denormalisation*” adds nothing to underlying public health rationale.

Not undermining health messages

9.33 The FTC Document does not explain the mechanism by which further controls on tobacco displays are expected to operate so as to “ensur[e] that health messages about the dangers of tobacco use are not undermined” (paragraph 3.23). Nor does the FTC Document make clear how the display of tobacco products – which includes the display of mandated health warnings – in any way serves to undermine mandated messages.

9.34 The FTC Document provides no evidence to support its suggestion that the display of tobacco products in retail outlets undermines health messages and no evidence that further restrictions on display will actually serve to reinforce the health messages. Indeed, the Wakefield (2006) study, on which the FTC Document so heavily relies, gives no credence to these concerns.⁹⁵ This rationale for a display ban is fundamentally flawed.

10. A DISPLAY BAN WILL IMPEDE AND RESTRICT LAWFUL ACTIVITY, AND FACILITATE ILLEGAL ACTIVITY

10.1 Not only would the introduction of a prohibition on the display of tobacco products not achieve any of the objectives identified in the FTC Document, any proposed further restrictions on tobacco display would, in all likelihood, lead to a series of negative and undesirable consequences, including:

- (a) serious and unnecessary damage to the legitimate economic interests of JTI, its connected industries and the market dynamic of the tobacco sector;
- (b) significant and unnecessary impairment of JTI’s fundamental rights as a commercial entity; and
- (c) the promotion of counterfeit and contraband tobacco products.

The importance of display at the point of sale

10.2 The ability of JTI to display its products in retail outlets is one of the last remaining, and therefore critical, means by which JTI maintains connection with existing adult smokers. Through product display, existing adult smokers can identify that JTI’s products exist, that products are available, that they have choices and that different brands have different characteristics. As noted above at paragraphs 8.13 and 8.14, these fundamental requirements have been acknowledged, and relied upon, by the UK Government and the Courts.

10.3 A display ban would deny existing adult smokers their right to be aware of, and to have the information required to make informed choices between, the wide range of tobacco products available in the UK.

Opportunity to capture significant market share

10.4 The Department of Health recognises concerns, at paragraph 3.38 of the FTC Document, “that a ban on the display of tobacco products could restrict trade” but attempts to dismiss these concerns by simply stating that “evidence shows that most smokers make up their minds about which brand of tobacco they will buy long before they reach the shop, with less than 3% of tobacco-purchasing customers deciding to change brand at the point of sale”. The implication is that product display has no

meaningful competitive function. First, the “*evidence*” cited, as Annan,⁹⁶ is not a study. It is merely a set of incomplete PowerPoint slides, produced for a different purpose, which make passing reference to undated research done by a third party in countries other than the UK. There is no available underlying data for this research. This prevents any assessment or analysis by the Department of Health or anyone else. Secondly, a similar implication is made in paragraph 3.78 of the FTC Document by reference to Wakefield (2006), which is unreliable and cannot be regarded as credible evidence (see Dr Keegan’s expert report at pages 34 to 37).

10.5 It is extraordinary that the FTC Document does no more than rely upon a set of incomplete PowerPoint slides produced for a different purpose and an implication as its complete analysis of “*distortion of competition and lack of consumer information*”. This betrays a complete absence of understanding of the competitive nature of the UK tobacco market (see the graphs below paragraph 4.2 above) and consumer information needs. JTI considers that a display ban would have a profound negative effect on the competitiveness of the UK tobacco market and on consumer information.

10.6 First, the FTC Document acknowledges that “*brand imagery facilitates product differentiation for current smokers at the point of sale*” (paragraph 3.78). JTI also relies upon the broader analogous statements made by HM Government in 2002 and 2004 referred to above. The FTC Document fails to examine how consumers could become aware of new products – particularly new brands – in a display ban environment and taking into account the existing extensive communication restrictions. JTI believes that a display ban would make new market entry extremely difficult, if not almost impossible.

10.7 Secondly, even if the figures cited in Annan were assumed to be correct, ‘brand switching’ of 3% of the total purchases of tobacco products in the UK equates to 1,372 million cigarettes. The ability of a manufacturer to capture even 0.1% of its competitors’ market is critical, making ‘brand switching’, where an existing adult smoker changes his or her tobacco product of choice, either temporarily or permanently, fundamental to commercial success. As Dr Lilico demonstrates, competition in many markets depends on switching by a marginal number of consumers, and the result of switching by only a minority benefits **all** consumers (paragraphs 3.7 to 3.15 of his report). Point of sale display is therefore critical in facilitating ‘brand switching’ amongst existing adult smokers.

10.8 Thirdly, JTI does not accept the model of purchasing behaviour which appears to have been adopted by the Department of Health. It is incorrect to assume that smokers invariably have only one particular brand of cigarette which they always smoke.⁹⁷ Many smokers have a favourite second (or even third) brand, which they may smoke occasionally or buy when their preferred brand is unavailable. This is a phenomenon that occurs particularly when retailers are out of stock. Even when smokers display strong loyalty regarding their preferred primary brand, they may be significantly less loyal to their second brand. Point of sale display is therefore a useful tool by which companies can encourage that second brand preference.

10.9 Further, it is not right to rely simply on a ‘snapshot’ of the behaviour of certain smokers at a certain point of time. If the ‘snapshot’ was to be taken on a different day, the 3% who switch is likely to consist of different people to the previous 3%. Switching, therefore, has a cumulative effect. This is demonstrated clearly by the fact

that over 80% of smokers have switched brands at least once during their lives.⁹⁸ The economic importance of ‘brand switching’ is, therefore, self-evident.

10.10 Fourthly, even if Wakefield (2006) was a credible study to be relied upon, it shows that a total of 9.1% may use the display to navigate between brands. This represents a large share of the consumer market in tobacco products: in the context of the UK, the figure of 9.1% of total purchases equated to approximately 4,163 million cigarettes in the 2007 calendar year.⁹⁹ If 10 million adults in the UK smoke cigarettes,¹⁰⁰ then 910,000 of these existing adult smokers may (on any given day) use the display to navigate between brands.¹⁰¹

10.11 Finally, if the Department of Health’s position is correct, it is not clear how a display ban could achieve the alternative stated rationale of “*providing an environment that supports smokers who are trying to quit*”.

10.12 It is therefore clear that point of sale displays are a platform for genuine competition between tobacco companies. It is entirely understandable and entirely legitimate that JTI should wish to facilitate consumers’ navigation between different products so that they can easily select an alternative product at point of sale, when they are ready to ‘brand switch’.

Market impacts

10.13 A display ban can be expected to distort competition and impede operation of the free market in a number of important ways, as summarised briefly below.

10.14 First, denying existing adult smokers access to important visual cues and information at the point of sale, including reminders as to brand, price, availability and product characteristics, will result in a reduction of ‘brand switching’ activities. Reduction in awareness of certain brands as a result of a display ban is likely to lead to brand consolidation and tends towards crystallization of the market, translating into stronger brand loyalty for already successful and established brands. Consumers are unlikely to switch brands where they do not know what alternatives are available or the attributes of such alternatives.

10.15 Secondly, the inability of consumers to access visual cues and information at point of sale will stifle product and packaging innovation. The evidence demonstrates that the tobacco sector is innovative. Without product display, innovative manufacturers will be denied any opportunity to communicate improvements or changes to existing brands, the existence of new products and to use their product innovations to compete for market share. This will further crystallize the market, prevent new companies and new brands entering the market and reduce consumer choice. One unfortunate effect of a display ban would be to prevent manufacturers from conveying information about the availability and attributes of products with features likely to be of interest to existing adult smokers including, for example, products using fair-trade or organic tobacco, as they are developed.

10.16 Expert analysis of the evidence on innovation from other markets in which display bans have been introduced confirms this assessment. Dr Lilico concludes that display bans materially impair new innovation (see, for example, point 8 of the Summary of the Report’s Findings). Further, the negative competition effects arise more quickly than theory would predict, and are much more marked, creating something akin to effective crystallization for practical purposes.

10.17 Thirdly, the evidence demonstrates that competition will be reduced, between companies and between brands, in a post display ban environment. Dr Lilico carried out a series of empirical investigations to assess the possible impact of display bans in various markets, including Iceland and Thailand. Using statistical bases (Herfindahl-Hirschman analysis and Chow test thereon), Dr Lilico concludes that the introduction of display restrictions marked a break in the competitive process and that the effect of regulation has been that of “freezing” significantly the competitive forces in the market (see paragraph 5.35 of his report).

10.18 Fourthly, it is expected that a display ban, precluding any opportunity for manufacturers to communicate the properties of their brands to consumers, would leave manufacturers to compete primarily on the basis of price. By forcing tobacco manufacturers to compete solely on the basis of product price, the result is a downward pressure on product prices and towards an eventual commoditisation of tobacco products. This would run counter to the key policy aim of reducing youth initiation and consumption – lower prices meaning increased availability and access for youth to tobacco products.

10.19 Lastly, as Dr Lilico notes at Section 7 of his report, a display ban would have indirect negative effects on employment and tax revenues in the UK, on account of the increased opportunities for criminals involved in contraband/counterfeit activities.

The impact of a display ban on illicit trade

10.20 As explained above, the fight against the illicit trade in tobacco products is a critical business priority for JTI. Accordingly, JTI is extremely concerned that a display ban may serve to encourage the trade in illicit cigarettes and thereby, perversely, frustrate the pursuit of the Government’s objective of reducing smoking prevalence in children and young people.

10.21 This is a concern shared by others. A recent survey suggests that 77.5% of retailers questioned think that a display ban would further increase the trade in illegal tobacco,¹⁰² and one commentator has stated:

“...if I were a smuggler, counterfeiter or thief, what would I most want to happen? First, I’d want a tax regime that every year made illegally sourced products increasingly cheap. Second, I’d want a lot of my main competitors – local retailers – to exit the market either because their store is no longer viable or because they couldn’t be bothered with all the hassle of selling tobacco. On top of this I’d want those still in the game to be unable to display branding or prices, or any marks of legitimacy, to minimise the distinction between legal and illegal stock.”¹⁰³

10.22 A display ban will impact on illicit trade in three specific ways:

- (a) it may blur the public’s perception of the difference between legal and illicit tobacco products given the existing trend for illicit products to be sold ‘under the counter’ by certain retailers.¹⁰⁴ Consumers’ resistance to purchasing illegal tobacco products is likely to be diminished;
- (b) illicit tobacco products are not only sold by street vendors and at markets but are also sold by a small minority of unscrupulous retailers. Unscrupulous retailers could more easily blend illicit tobacco products into the supply chain.

This is not the case, currently, where products are displayed in a gantry and consumers will likely find suspicious a retailer who ignores the products on the gantry and instead reaches under the counter to sell illicit products; and

- (c) storage of tobacco products ‘under the counter’ is also likely to pose further challenges to the enforcement activities undertaken against such traders. For example, where products are to be stored out of sight, it will not always be evident to officers conducting their enforcement activities – or indeed JTI’s own sales force representatives – whether certain retailers are using two ‘under the counter’ compartments (one of legal products and a hidden, second one containing illicit products) and therefore it will be more difficult to determine whether illicit products are being supplied to adult smokers. Further, an inspector will not be able to scan visually a gantry on entry into a retail outlet, in order to identify any illicit product.

As a display ban will facilitate the trade in counterfeit and/or contraband tobacco, it will have the additional negative consequence set out at paragraphs 16.21 to 16.36 below.

Impairment of fundamental rights

10.23 The proposal to prohibit the display of tobacco products engages a number of JTI’s fundamental rights, which are protected under various legal instruments, including the freedom of expression (to impart and receive information), the right to trade, the right to property and intellectual property rights:

- (a) Prohibiting display at the point of sale denies JTI its right to trade and to communicate with existing adult smokers about the attributes of its products and, as a corollary, denies those individuals of their right to receive information. Prohibiting commercial expression at point of sale impairs the very essence of commercial free speech and JTI’s rights to engage in commerce.
- (b) A prohibition on the display of tobacco products would impair the functions of JTI’s trade marks and JTI’s ability to enforce and protect its trade marks.

10.24 JTI recognises that these freedoms are not absolute rights and that their restriction can, in certain circumstances, be justified. Tobacco products carry health risks and the protection of public health is a valid objective, for which it may, in certain circumstances, be necessary to impose restrictions on fundamental rights.

10.25 However, the burden lies with the Government to demonstrate that restrictions are necessary and proportionate to achieve, in the least restrictive manner, the identified legitimate public policy goals. For the reasons given above, JTI does not consider that this burden has been met, and infringements of these fundamental rights are not justified.

Effect on small business retailers

10.26 Sales of tobacco products are an important revenue stream for a large number of retailers across a range of different retail businesses. JTI supports fully, and urges the Department of Health to give careful consideration to, the concerns raised to date

by retailers. These include certain of the points made by the Association of Convenience Stores (ACS) in its 18 August 2008 response to the FTC Document:¹⁰⁵

- (a) loss of business through diversion to larger retailers, including loss of secondary and 'footfall' purchases, which would disproportionately affect small retailers, with the potential for a significant number of them to go out of business;
- (b) an increase in the sale of counterfeit tobacco products, including an increase in counterfeit products entering legitimate trade;
- (c) an increase in transaction times – the ACS estimates such times could double, leading to longer queues, which is the biggest reason for the loss of repeat customers according to ACS;
- (d) security implications, such as:
 - (i) the loss of the role of gantries in keeping products secure; and
 - (ii) the increased likelihood of theft if it takes longer to retrieve a tobacco product or to retrieve it from a location which does not allow the retailer to monitor customer activity – the ACS estimates such losses at £1.33 million per year; and
- (e) the cost of implementation, including shop refits, which the ACS estimates would be as much as £252 million, and ongoing costs such as staff training and the need for additional staff to allow for more frequent refills and to monitor customer activity.

Question 8: Do you believe that there should be further controls on the display of tobacco products in retail environments?

JTI's response: No.

VENDING MACHINES

11. VENDING MACHINES

Background to the UK vending sector

11.1 The vending sector's share of the total UK cigarette market has been in decline for several years and has declined at a significantly faster rate than the total UK market.

11.2 In 2007, vending sector cigarette volume equated to 677 million cigarettes, representing 1.4% of the UK cigarette market, down from 4.7% in 1997 and 3.4% in 2000 (AC Nielsen data).

11.3 The vending sector's share of the UK cigarette market has since declined further to 0.9% at June 2008 year-to-date (AC Nielsen data).

11.4 JTI estimates that, in 2008, there are approximately 52,600 vending sites in the UK, which compares with 70,000 in 2002, a decline of 24.8%. Of these sites, approximately 21,500 or 41% are owned by the UK's largest vending operator, the remainder are owned by independent operators across the UK. JTI does not own any vending sites in the UK.

11.5 Premium cigarette brands equate to 45.5% share of the UK vending sector. When combined, the premium and sub-premium sectors equate to 79.9% share (AC Nielsen data).

11.6 Vending prices typically range from £5.70 to £6.50 (Industry data/JTI estimates).

JTI's position

11.7 JTI believes that access to cigarette vending machines should be strictly controlled to prevent sales to children. We do not, however, support the prohibition of vending machines, which would prevent legitimate access by adult smokers. Instead, we would support Option Two of the FTC Document "*that requires mechanisms on all tobacco vending machines to restrict underage access by young people*".

11.8 While we support the NACMO Code of Practice on the siting of machines, we believe it could be further enhanced by requiring vending machine operators to introduce adult identification functions in their machines. This would ensure that those under the age of 18 cannot access tobacco products from such machines.

11.9 JTI has experience of introducing such systems in other countries around the world, including Austria and Japan, and would be willing to share further information on the costs, timings and technicalities of the different types of adult identification functions available.

11.10 The issues identified in the FTC Document by reference to the relationship between vending machines and smoking uptake by young people do, however, reinforce the importance of effective measures to prevent access by children and young people to tobacco products. We set out below, at Section 19, the alternative

regulatory solutions which JTI believes have the potential to be more effective and successful means of addressing this specific concern than prohibiting the use of vending machines.

11.11 As set out below, when the new negative licensing scheme under the Criminal Justice and Immigration Act 2008 is brought into force, retailers who are found guilty of selling tobacco to under 18s three times within two years, whether in person or via a vending machine on their premises, will be made subject to an order preventing them from selling tobacco either personally or on certain premises for up to one year. Such orders will apply equally to the sales from vending machines to encourage those operating vending machines to restrict youth access.

Illicit trade

11.12 To the extent that restricting the use of vending machines facilitates the trade in counterfeit and/or contraband cigarettes, the measure will have the additional negative consequences set out at paragraphs 16.21 to 16.36 below.

Vending RIA

11.13 The FTC Document provides what is purported to be an RIA for the vending machine measures referred to in the FTC Document. JTI sets out below, in Schedule One to this document, its specific comments on this analysis. In summary, the principles of Better Regulation require that considerably more thorough regulatory impact analysis would need to be conducted with stakeholder input before any regulatory action could be proposed in respect of vending machines.

Question 9: Do you believe that there should be further controls on the sale of tobacco from vending machines to restrict access by young people? If so, what is your preferred option?

JTI's response: Yes. Option Two (require mechanisms on all tobacco vending machines to restrict underage access by young people).

MINIMUM PACK SIZE

12. PACKS OF 10 CIGARETTES

JTI's position

12.1 JTI's position is clear. Those under 18 should not be purchasing tobacco products in the UK at all, irrespective of whether the product is a pack of 20 or 10 cigarettes. It is right that it is illegal to sell a tobacco product – whatever its pack size – to such individuals.

12.2 This reinforces the importance of effective measures to prevent access by children and young people to tobacco products. We set out below the alternative regulatory solutions which JTI believes have the potential to be a more effective and successful means of addressing this specific concern than mandating a minimum pack size. These include reinforcing retail access prevention and criminalising the proxy purchase of tobacco and the purchase, or attempted purchase, of tobacco products by under 18s.

Removing choice from existing adult smokers

12.3 JTI considers the unsubstantiated use of the terminology “*kiddie packs*” in the FTC Document, for example, at paragraph 3.82, to be misguided and unhelpful. This is particularly the case given:

- (a) the importance of the Department of Health ensuring an objective and evidence-based assessment of all potential regulatory initiatives; and
- (b) the fact that the sale of a tobacco product to anyone under 18 is a criminal offence in the UK.

12.4 JTI does not support proposals prohibiting the sale of packs containing fewer than 20 cigarettes as it removes an important element of adult consumer choice. This is acknowledged at paragraph 3.87 of the FTC Document. It would remove this choice from a large number of existing adult smokers. Within the UK, 20.1% of the UK cigarette market comprises 10-pack sales.

12.5 Packs of less than 20 cigarettes are purchased by many adult smokers on a regular basis who may want to manage their day-to-day spending or moderate their consumption. This is reflected in the 2006 report of the Smoking Prevention Working Group referred to in the FTC Document,¹⁰⁶ which stated that prohibiting the sale of packs of 10 cigarettes: “[c]ould discourage smokers who are trying to “cut down to quit” by requiring them to buy larger packs”.¹⁰⁷

12.6 Existing adult smokers who occasionally buy 10-packs instead of their usual pack of 20 cigarettes, may do so for a variety of reasons. For example:

- (a) when they do not have enough cash to buy a pack of 20;
- (b) their usual brand of 20 is not available at the retail outlet;
- (c) to top up their supply of cigarettes; or
- (d) to try a different brand where one has been launched on the market.

Absence of evidential analysis in the FTC Document

12.7 The FTC Document states that: “[m]ost recent figures show that...most 11–15 year olds now buy packs of 10”¹⁰⁸ without indicating the basis for this assertion. It is, perhaps, extrapolated from NHS figures for smoking among young people in England in 2006 (see endnote 24 of the FTC Document). If this is the case, JTI notes that:

- (a) the 2006 survey does not demonstrate that “most 11–15 year olds now buy packs of 10”. At most, it indicates that just over half (54%) of the 11–15 year olds questioned bought a pack of 10 cigarettes on the occasion when they last bought cigarettes from a shop.¹⁰⁹ It does not address whether they regularly buy 10-packs;
- (b) the FTC Document fails to make reference to the fact that the same NHS survey shows (at paragraph 2.4.4) that:
 - (i) “Pupils who smoked were likely to get cigarettes from several sources... About half of regular smokers were given cigarettes by friends. Most occasional smokers were usually given cigarettes by friends (74%)”;
 - (ii) “Just under a quarter of current smokers (24%) said they found it difficult to buy cigarettes from a shop...”;
 - (iii) “...the proportions of younger pupils who had tried to buy cigarettes [had fallen] sharply; for example, 18% of 11 year olds tried to buy cigarettes in a shop in 1990, compared with 3% in 2006”; and
 - (iv) “...Since the mid-1990s, pupils have been increasingly likely to have been refused at least once when trying to buy cigarettes; the proportion of pupils who had tried to buy cigarettes but been refused rose from 29% in 1993 to 53% in 2006”; and
- (c) the equivalent 2007 data, which has been made available since the FTC Document’s publication,¹¹⁰ makes no reference to the extent to which 10-packs are or are not purchased by young people.

12.8 Interestingly, the FTC Document acknowledges that “[t]here is less evidence to demonstrate the effectiveness of banning packs of 10 than there is for other proposals within this part of the consultation”. This is a damning indictment of the Department of Health’s own justification for increasing the minimum size of cigarette packs when the lack of credible evidence for other regulatory initiatives discussed in the FTC Document is considered.

12.9 This absence of evidential support for a change in the pack size regulatory regime is reinforced by the report of the Smoking Prevention Working Group, which is relied upon in the FTC Document:

“...there is apparently no objective evidence to demonstrate the effectiveness of banning packets of ten (also known as ‘kiddie’ packs) as a means of reducing young people’s access to cigarettes. In the absence of good evidence for its effectiveness, we consider that banning the sale of packs of

ten in Scotland is unlikely to make a useful contribution to preventing smoking by young people at this stage.”¹¹¹ (Emphasis added.)

Disproportionate impact

12.10 JTI is also concerned that, as an owner and manufacturer of premium brand 10-packs in the UK, it will be disproportionately affected by increasing the minimum size of cigarette packs.

12.11 Banning 10-packs will impact JTI to a greater extent than tobacco manufacturers whose market share consists largely of sub-premium and/or value brands, or even own-label brands. Existing adult smokers of premium brand 10-packs may be unable to afford to purchase larger quantities of the same product, leaving them with no choice but to ‘downtrade’ to either a brand for which a pack of 20 cigarettes is cheaper than their preferred brand or to an illicit product.

A pack size ban facilitates illicit trade

12.12 The FTC Document itself acknowledges that increasing the minimum pack size, from packs of 10 cigarettes, could drive more smokers to purchase illicitly traded tobacco products, because they could no longer afford to purchase larger quantities of the legitimate product.¹¹²

12.13 JTI notes that the Department of Health is concerned that the potential illicit trade impact of banning 10-packs will be likely to have “*the greatest effect on young people and people with less disposable income*”.¹¹³ It would be perverse if a regulatory measure imposed by HM Government were to increase the exposure of the two sections of society that the FTC Document seeks to protect the most (young people and “*deprived communities*” in the UK) to illicit trade products.

12.14 This risk is exacerbated by the fact that, by banning 10-packs, HM Government would be intentionally moving to a cigarette pack size (20-packs), where significant counterfeit experience/existing trade currently exists in the UK. There is very limited evidence that counterfeit 10-packs are currently traded within the UK. Only three individual examples of JTI’s 10-pack products being counterfeited have been identified by the UK enforcement agencies in 2007 and 2008.

12.15 JTI is not alone in being concerned by such illicit trade impacts of a pack size ban. While respondents’ predictions of how others will behave is susceptible to criticism, a recent survey indicates that 87.1% of retailers questioned think that smokers will be driven to buy a pack of 20 cigarettes from an illicit trade source when they would normally buy a 10-pack from a legitimate source.¹¹⁴

12.16 By facilitating the trade in counterfeit and/or contraband cigarettes, a ban on 10-packs will have the additional negative consequences set out at paragraphs 16.21 to 16.36 below.

Question 11: Do you believe that increasing the minimum size of cigarette packs has merit as an initiative to reduce smoking uptake by young people?

JTI’s response: No.

ILLICIT TRADE

13. INTRODUCTION

13.1 Question 4 of the FTC Document asks “*How can collaboration between agencies be enhanced to contribute to the inland enforcement against illicit tobacco?*”.¹¹⁵ JTI believes that contraband and related counterfeit trade is an issue that needs to be addressed through constructive partnership with governments and public authorities. JTI has always offered its full cooperation in the battle against smuggling, and participated in a number of public and industry programmes aimed at preventing all types of contraband. In this regard, JTI sets out below:

- (a) examples of the measures it has taken to address illicit trade;
- (b) its position on illicit trade; and
- (c) its recommendations for further action to tackle illicit trade and, in particular, for enhanced collaboration between the regulatory agencies responsible for tackling illicit trade in the UK, namely HMRC and the UK Borders Agency.

13.2 While a precise figure identifying the extent of the trade in illicit tobacco products is difficult to determine, its seriousness has been reiterated in the UK by the Department of Health in the FTC Document,¹¹⁶ and by HM Treasury and HMRC in their March 2006 report “*New responses to new challenges: Reinforcing the Tackling Tobacco Smuggling Strategy*” (the **2006 Report**).¹¹⁷ Reflecting this fact, in the 2008 budget, the UK Chancellor of the Exchequer announced that tackling tobacco smuggling would be a priority for the newly established UK Border Agency.

14. MEASURES TAKEN BY JTI TO ADDRESS ILLICIT TRADE

14.1 As identified in this paper, JTI has been working on a technical level and an executive level with individual governments, the World Customs Organization (**WCO**), the European Union and several anti-counterfeit associations around the world. JTI is disappointed that the FTC Document fails to acknowledge the measures it – and other industry members – have taken to address illicit trade issues. Therefore, we summarise these measures below and offer recommendations for future action by HM Government in this regard.

Agreement with the European Commission and 26 Member States of the EU

14.2 The signing of a 15-year agreement with the European Commission and all EU Member States other than the UK (the **Agreement**), defining Japan Tobacco International’s cooperation to combat the illegal trade of cigarettes in the European territory, was announced on 14 December 2007.¹¹⁸ This historic step received widespread support.¹¹⁹

14.3 The Agreement built upon and confirmed a number of initiatives that have been implemented by Japan Tobacco International over the years. Under the terms of the Agreement, Japan Tobacco International will:

- (a) maintain and expand its current internal compliance programmes that address the manufacture, sale, distribution and storage of cigarettes;

- (b) facilitate investigations of reported breaches and suspicious transactions;
- (c) continue its certification of contractors and customers while ensuring transparent payment procedures for all transactions;
- (d) maintain a Chief Compliance Officer, who shall have the authority and be responsible for:
 - (i) defining, with a Corporate Responsibility Committee, various compliance objectives; and
 - (ii) undertaking and executing any and all of the commitments made under the Agreement by Japan Tobacco International;
- (e) to the extent permitted by law, terminate their business relationship with any relevant customer or contractor upon Japan Tobacco International coming into possession of substantive evidence that the customer or contractor has unlawfully, knowingly or recklessly engaged in or facilitated the manufacture, sale, distribution and/or storage of illegal product or any other related illegal activities; and
- (f) make payment of USD 400 million over 15 years to the European Community and participating Member States, which can be used in additional support for anti-contraband and anti-counterfeit initiatives to help address these problems over the European territory.

14.4 The Agreement provides for clear processes around seizures and close cooperation with the European Commission, OLAF¹²⁰ and the law enforcement authorities of Member States. It also includes a guarantee to make payments in the event of future seizures in the European Community of Japan Tobacco International genuine products above defined quantities.

14.5 JTI is concerned that the regulatory initiatives discussed in the FTC Document will have a negative effect on such steps taken to tackle illicit trade at a Community level.

Know Your Customer¹²¹

14.6 JTI believes that many of the problems associated with economic sanctions, export controls, illicit trade and money laundering can be avoided by making sure you 'know your customer'.

14.7 To this end, Japan Tobacco International formally enhanced its Know Your Customer programmes in 2003, and continues to implement them across its operations. In this, JTI also cooperates closely with its parent company, Japan Tobacco Inc. Such programmes ensure that product is only sold to customers who have integrity and can substantially demonstrate their commitment and ability to fully comply with all local laws as well as its stringent internal standards. As JTI will sell its products only to customers that have a reputation for honesty and integrity, key aspects of the programme include:

- (a) customer classification;¹²²
- (b) certification requirements for certain customers;¹²³ and

(c) customer background checks.¹²⁴

14.8 This ensures that JTI's customers are able to demonstrate, via legal documentation and other information, that they are in fact bona fide, meaning that they act in good faith and do business without any fraudulent intent.

Track and Trace

14.9 Another cornerstone of the Agreement and JTI's position on the FCTC protocol on illicit trade (the *FCTC Protocol*)¹²⁵ is the use of effective tracking and tracing regimes. JTI believes that measures to track and trace the sale of cigarettes, if clearly defined and evaluated, could represent a new tool in the fight against contraband trade. However, it is important that international standards are developed to ensure a uniform approach is adopted. This requires criteria on:

- (a) commercially feasible marking and scanning technologies;
- (b) database format and content requirements; and
- (c) regulations on reciprocal sharing of, and access to, data.

14.10 Going forward, JTI is committed to identifying and implementing viable technologies, including tracking and tracing, which are cost-effective and proven to significantly enhance its existing efforts to stop product diversion and prevent the trade of contraband product.

JTI's Code of Conduct

14.11 The position under the Agreement is reflected in JTI's Code of Conduct (October 2007), which applies to the entire company, including its subsidiaries and affiliates. It also applies to all company employees worldwide, as well as to all company agents and representatives. The Code of Conduct states in unequivocal terms that: "*JTI is committed to do everything possible to prevent its products from ending up on the illegal market*".¹²⁶

Gallaher

Application of the Agreement

14.12 Subsequent to the acquisition of the Gallaher Group on 18 April 2007, JTI has put in place a framework and timetable to ensure the application of the Agreement to the former Gallaher entities in a way which reflects the specific constraints of Gallaher's business and to establish a comprehensive plan to bring Gallaher within the scope of the Agreement upon effective completion of that plan. This was reflected in a separate agreement entered into by Japan Tobacco International on 14 December 2007 with the European Commission and the same 26 Member States of the EU.¹²⁷

14.13 General compliance obligations applied immediately to Gallaher under this further agreement. Others, like the introduction of the Know Your Customer and the tracking and tracing programmes discussed above, are to be introduced in respect of Gallaher on realistic yet aggressive time scales.¹²⁸

Memorandum of Understanding (MoU) with HMRC

14.14 As recognised by HMRC, Gallaher has played a key role in assisting HM Government in its efforts to combat the illicit trade of tobacco products in the UK. To this end, in April 2002, Gallaher became the first tobacco manufacturer to sign an MoU with HMRC in order to seek to limit the illicit trade of both contraband and counterfeit tobacco products into the UK, while minimising obstacles to legitimate trade. Reflecting this fact, on 23 April 2002, the then Financial Secretary to the Treasury and UK Minister for Customs and Excise, stated:

*“We are pleased to have reached this Understanding with Gallaher to work together to drive down smuggling. We hope this will set a standard which all tobacco manufacturers will want to follow in minimising their brands presence in the smuggled market”.*¹²⁹

14.15 Subsequently, Gallaher has entered into similar agreements with a number of other Customs authorities in Europe and, in the UK, BAT and Imperial have entered into similar agreements with HMRC. A revised, common HMRC MoU was signed in March 2006 by Gallaher, BAT and Imperial.

14.16 In 2006, the objectives of the MoU were supported by the introduction of new supply chain control legislation in the UK which places obligations on tobacco manufacturers around the world to ensure, as far as reasonably practicable, that they avoid supplying cigarettes to those likely to engage in the illicit trade of cigarettes in the UK.

14.17 Although this legislation does not go as far as the MoU, it does have the effect of placing broadly similar obligations as those set out in the MoU on all tobacco manufacturers whose product might be targeted at the UK illicit market. Failure to comply with these obligations may result in a penalty of up to £5 million.

14.18 In light of the above, it is vital that the Department of Health gives due account to the steps that have been agreed between HMRC and UK tobacco manufacturers under the MoUs, and the importance attributed to the MoUs by HM Treasury and HMRC, before taking any action as a result of the FTC Document.¹³⁰ In this regard, the 2006 Report makes clear that the MoUs entered into with Gallaher and others:

*“...have played a crucial role in making it harder for smugglers to source tobacco, and now have a proven record of success.”*¹³¹

*“Through cooperation between the Government and the UK tobacco manufacturers, formalised in the MoUs, smugglers have found it increasingly difficult to obtain supplies of genuine UK manufactured cigarettes.”*¹³²

Ongoing cooperation with HMRC

14.19 Since the 1990s, Gallaher has taken numerous steps, often following consultation or in conjunction with HMRC, to ensure control and management of sales globally. In addition, Gallaher has – since the signing of the revised MoU in 2006 – continued to cooperate closely with the HMRC on a number of levels to assist in its objective of tackling illicit trade, for example:

- (a) by providing evidence, including a large number of witness statements, to HMRC and Trading Standards Officers (*TSOs*), in support of criminal prosecutions;
- (b) by providing comments on the potential scope of the FCTC Protocol;¹³³ and
- (c) in the context of the Verification of Genuine Product Scheme.

Verification of Genuine Product Scheme

14.20 Gallaher has, together with the other members of the TMA, worked closely with HMRC to incorporate technology on cigarette packs to allow the easy identification of genuine/counterfeit product in the retail network as part of the Verification of Genuine Product Scheme, which uses a covert security feature for packs of cigarettes and hand rolling tobacco to tackle the threat from counterfeit tobacco.¹³⁴

14.21 Clearly, any proposals made by the Department of Health pursuant to the FTC Document also need to take into account the important work currently being undertaken by HMRC and tobacco manufacturers in this context and should not undermine or contradict strategies which have been agreed with other UK regulatory agencies.

15. JTI'S POSITION ON ILLICIT TRADE ISSUES

15.1 JTI's position on the illicit trade in tobacco products is, therefore, clear and unequivocal. We believe that:

- (a) governments should be encouraged to adopt **comprehensive strategies to tackle cigarette smuggling and product counterfeiting**, an area of concern which is causing substantial losses to governments and industry stakeholders.
- (b) the **FCTC Protocol¹³⁵ is a positive measure to raise awareness of this growing phenomenon** and provide guidance to member countries on proven policies and approaches to fight against illicit trade.
- (c) contraband damages JTI's business and undermines its brands and **JTI is not, and will not be, involved in the illegal sale of its products**. JTI certainly has a role to play in eliminating contraband because its products are being smuggled and counterfeited by others. JTI is committed to fighting the illicit tobacco trade and to preventing its products from ending up on the illegal market.
- (d) **tobacco contraband and counterfeit are issues that need to be addressed through constructive partnerships with governments and international agencies**. JTI cooperates fully with government authorities, regulators and law enforcement authorities in the fight against illicit trade and consults with them on effective ways to prevent or eliminate tobacco smuggling and counterfeiting in their jurisdictions.
- (e) HM Government's approach to **tobacco taxation increases the incentives for those involved in the illicit trade** of tobacco products in the UK. Illicit trade continues to be encouraged by: (i) high retail prices driven by the UK's high rates of taxation on tobacco products, which are some of the highest rates in

the world; and (ii) the potential profits these policy decisions provide for those involved in the contraband trade.

High tobacco taxation rates and/or tax rates largely in excess of those practiced in neighbouring countries has resulted in UK consumers increasingly purchasing lower priced tobacco products rather than premium brands. This inevitably encourages contraband inflows as smuggling is driven by consumer demand for a cheaper, or banned, product.

The tax strategy HM Government has implemented has created a situation where UK consumers have and will continue either to avoid tax by buying cigarettes legally abroad or to evade tax by buying illicit cigarettes, whether manufactured legitimately or counterfeit, from illegal sources.

- (f) tackling illicit trade is critical if HM Government is to give effect to its intention to **reduce smoking amongst young people and the poorest groups in UK society**, as they would be seriously impacted upon by any regulatory measures that have the unintended consequences of increasing the availability of lower priced, illicit tobacco products.¹³⁶
- (g) **no regulatory action should be taken by HM Government which is at odds with the objectives of EU law** in the context of the enforcement of intellectual property rights and illicit trade (namely that effective means of enforcing such rights is of paramount importance for the success of the internal market and as infringements of intellectual property rights are increasingly linked to organised crime).¹³⁷

16. THE IMPACT OF PLAIN PACKAGING ON ILLICIT TRADE

16.1 JTI sets out below the unintended consequences that plain packaging might have as regards illicit trade and the extent to which it risks undoing much of the progress made in this context as part of the efforts described above. (The impact of a display ban, in particular, on illicit trade has been considered above.)

Plain packaging facilitates the manufacture of counterfeit products

16.2 Plain packaging would indirectly facilitate the manufacture of counterfeit packaging. The use of colour and ‘stylized elements’ is one of the factors that make the production of counterfeit product packaging more difficult. It increases the complexity entailed in producing counterfeit goods, based upon techniques that can be implemented effectively by legitimate manufacturers on an industrial scale. However, such techniques are far less economic and more complex to implement on a smaller scale (for example, in a clandestine environment rather than a legitimate factory set-up).

16.3 As the use of sophisticated and complex pack design assists in the prevention of counterfeiting, mandating plain packaging would remove significant barriers to, and actually promote the manufacture of, counterfeit packaging. The Agreement – described in further detail at paragraphs 14.2 to 14.4 above – reflects this, in that it states that the determination of whether cigarettes are counterfeit involves consideration of “*the look, shape, colour, and size of the packaging*” and “*the size, font, colour, language and content of the text appearing on the packaging*” (emphasis added).

Removal of key cost constraints for counterfeiters as each pack is essentially the same

16.4 Counterfeit trade would not only be assisted significantly by the fact that a pack of, for example, Benson & Hedges, in plain packaging is easier to replicate than the existing sophisticated and complex pack design. Just as important is the fact that, once a counterfeiter has mastered the UK plain packaging design for Benson & Hedges, very few design alterations are needed to this master design to produce counterfeit plain packaging versions of **each and every other pack sold in the UK market**.¹³⁸

16.5 In this way, some of the key cost factors that are currently barriers to the illicit trade market in the UK for many putative counterfeiters would be removed. Packaging uses complex colour pack design and these designs are extremely diverse between the different brand types. These place a significant cost burden on counterfeiters. The designs would disappear if plain packaging were to be introduced.

16.6 Removing this cost of entry, and opening the market to criminals for whom it is not currently economic to manufacture sophisticated counterfeit packs, risks undoing much of the progress made in tackling illicit trade as it is expected to increase:

- (a) the number of counterfeiters able to sell 'fake' product for the UK market;
- (b) the number of counterfeit products on the market; and
- (c) the profit being made by counterfeiters from this illicit trade and, consequently, the sums available for them to invest in further contraband/counterfeit activities and/or other criminal activities.

These negative consequences are exacerbated by the likely increase in the illicit trade in 'cheap whites' after mandating plain packaging, an issue which is discussed further below.

Plain packaging complicates regulator investigations/prosecutions

16.7 A key investigative tool for UK enforcement agencies is the ability to carry out forensic analysis of counterfeit tobacco packaging to determine its source. Currently, the colour design of such packaging can be analysed in a way that allows HMRC, TSOs and others to identify whether one counterfeiter is responsible for the production of a number of fake products seized and that several products were produced on the same machine. Often this provides evidence, which is critical in criminal prosecutions, that links one criminal gang to a large number of fake products seized.¹³⁹ Simplifying the pack design, and thereby increasing the number of counterfeit organisations, would inevitably make it harder to link counterfeit packaging to individual counterfeiters.

Continued creation of branded packs by counterfeiters

16.8 JTI is concerned that counterfeiters are likely to continue to produce tobacco products' packs using existing pack designs where plain packaging is mandated. In this way, they will 'adopt' the brand imagery that genuine manufacturers would no longer be allowed to use. This will be assisted by the fact that:

- (a) consumers can be expected to assume that branded counterfeit packs made available are not ‘fake’, but have been produced in jurisdictions where plain packaging had not been introduced. This concern is supported by existing evidence that counterfeiters rely on such assumptions to increase the credibility of their counterfeit product by deliberately manufacturing packs for sale in the UK which replicate the mandatory health warnings used in other EU markets;¹⁴⁰ and
- (b) certain consumers are likely to want to continue to use existing branded packs.

16.9 In this way, the imposition of plain packaging would create an opportunity for the counterfeit industry to:

- (a) expropriate manufacturers’ branding;
- (b) perversely, charge a premium for this fake product; and
- (c) shift sales volumes away from legitimate manufacturers.¹⁴¹

Plain packaging will result in the increased trade in ‘cheap whites’

16.10 The evolution of the illegitimate trade in tobacco products is powerfully demonstrated by the increased trade in ‘cheap whites’, described further above. It stems not only from the success of the Know Your Customer programmes implemented by the major tobacco manufacturers in the UK market and new supply chain control legislation in the UK, which has resulted in a drop in the contraband trade in JTI products by criminal gangs. It also reflects the fact that ‘cheap whites’ are not always placed under the same scrutiny in the UK as counterfeit products, where the legitimate manufacturer plays a key role in identifying the existence of illicit products and in the enforcement process.

16.11 Recent large scale seizures of the Raquel brand highlight the influx of ‘cheap whites’ into the British Isles. By way of example, in January 2008, more than five million Raquel cigarettes were seized by Customs Officers in the West Midlands. The lost revenue on the cigarettes was estimated to be almost £1 million.¹⁴² Just one day later, Raquel cigarettes with an estimated street value of £2.1 million were seized coming into Dublin Port. The loss to the Irish Exchequer associated with this seizure was approximately £1.7 million.¹⁴³

16.12 The HMRC Annual Reports also illustrate ‘cheap whites’ to be a growing concern. Data identifies that total seizures of “*Other (including non-UK brands)*” cigarettes, the category which includes ‘cheap whites’, constituted 18% of the total amount of seizures in 2003 to 2004, with this figure rising to 30% in 2005 to 2006.¹⁴⁴ JTI understands that the Annual Report for 2006 to 2007 is expected to be published in autumn 2008.

16.13 JTI is concerned that plain packaging would facilitate this trade in ‘cheap whites’. In JTI’s view, it is inevitable that such products would continue to use branded packaging, even in the face of a plain packs restriction in the UK, given that certain consumers are likely to want to continue to obtain existing branded packs. Those conducting the contraband trade in ‘cheap whites’ are also highly likely to target young people, the demographic group which the FTC Document implies might be best protected by mandatory plain packaging.

Plain packaging crystallizes pack design

16.14 Mandated plain packaging also crystallizes pack design. Legitimate manufacturers would be denied the opportunity to innovate and compete through packaging, something that is standard industry practice for all manufacturers of FMCG, including JTI. As a result, counterfeiters would only need to meet a static government-mandated design, rather than having to keep up with manufacturers' evolving packaging innovations and developments. In this way, plain packaging would, again, effectively reduce the burden on counterfeiters and open the market to new counterfeiters.

Plain packaging frustrates tracking and tracing initiatives

16.15 As noted above, JTI is committed to identifying and implementing viable technologies, including tracking and tracing, which are cost-effective and proven to significantly enhance its existing efforts to stop product diversion and prevent the trade of contraband product. We are concerned that the use of plain packaging designs will both (a) undermine such technologies given the use currently made of coloured pack design to determine origin/supply chain history; and (b) necessitate changes to the way in which tracking and tracing is conducted. This is an additional regulatory burden placed on legitimate manufacturers which is not faced by those involved in the illicit trade of products.¹⁴⁵

Ability to identify counterfeit product

16.16 Consumers' ability to identify counterfeit product would be undermined by plain packaging as pack design is one of the means by which consumers can assess whether they purchased a genuine or counterfeit product. This undermines one of the essential functions of a trade mark, which – as explained above – is to guarantee the identity of origin of the goods so that the consumer can, without possibility of confusion, distinguish the goods from others. Reducing the ability to carry out this visual authentication is likely to:

- (a) undermine consumers' ability to identify counterfeit product;
- (b) reduce the likelihood that suspicious product would be rejected by them; and
- (c) result in less counterfeits being identified and fewer complaints about fake products to manufacturers and enforcement authorities.

16.17 Consumers' perception of product quality is likely to be influenced where – because they are unable to identify a product is counterfeit from its packaging – they believe they are smoking a genuine product.¹⁴⁶

16.18 Additionally, the counterfeit trade will be facilitated where regulation makes it harder for both competent regulators and the industry to identify and detect counterfeit product.

Plain packaging reduces the ability to take enforcement/infringement action

16.19 As explained at paragraphs 6.12(d) and (e) above, JTI has serious concerns that plain packaging will reduce the ability of enforcement authorities, and JTI, to take action in the UK against third parties trading in illicit tobacco products which use JTI's trade marks without consent.

Further unintended consequences relevant to illicit trade

16.20 To the extent that plain packaging facilitates the trade in counterfeit and/or contraband cigarettes and risks undoing much of the progress made in tackling this trade, it will have the following additional negative consequences.

Further risks posed to consumers

16.21 In the FTC Document, the Department of Health has noted that the illicit trade in tobacco:

- (a) “...ultimately presents a significant threat to public health in many countries, including the UK”;¹⁴⁷ and
- (b) “...harms health in our communities by creating a cheap and unregulated source of tobacco, undermining the Government’s targets for reducing smoking prevalence, especially among young people and those in routine and manual groups”.¹⁴⁸

Question 5 of the FTC Document also acknowledges “the wider risks to our communities from smuggled tobacco products”.

16.22 Due to an absence of product-related information being provided to them (see further below), regulators are left unable to determine certain issues of product safety for illicitly traded products and consumers cannot rely on the existence of regulatory oversight that occurs for legitimate products. This is particularly the case where counterfeiters make no effort to comply with applicable regulation/industry best practice for tobacco products concerning:

- (a) **ingredients usage** requirements, such as the Department of Health’s voluntary agreement on the approval and use of new additives in tobacco products;¹⁴⁹
- (b) **mandatory ingredients reporting** requirements, such as the requirement to report annually to the Department of Health a list of the ingredients used in the manufacture of each product and the reasons for the ingredients’ use;¹⁵⁰
- (c) **toxicological analysis**, such as that necessary to provide to the Department of Health all available toxicological data concerning the ingredients used in the manufacture of each product;¹⁵¹
- (d) **new brand approval**, such as the requirement to notify the Secretary of State for Health of the tar, nicotine and carbon monoxide yields shown on product packaging at the time of launch;¹⁵² and
- (e) the testing and verification of **maximum permitted yields of tar, nicotine or carbon monoxide** for tobacco products.¹⁵³

16.23 JTI notes the comments made in the FTC Document about the tar, nicotine and carbon monoxide yields of illicit products,¹⁵⁴ but considers it is unlikely that counterfeit products will adhere to the rigorous standards set down as to the maximum permitted levels of constituent elements such as tar. Indeed, contrary to the suggestions made by the Department of Health at paragraph 2.32 of the FTC Document, HMRC has indicated that higher levels of tar and carbon monoxide are found in counterfeit cigarettes:

“...there’s a host of other hazards to be found in the counterfeit carton – from higher levels of cancer-causing carcinogens to extra tar. Tests on counterfeit hauls revealed that cigarettes contained up to: 160 per cent more tar; 80 per cent more nicotine and 133 per cent more carbon monoxide than their genuine counterparts.”¹⁵⁵

These test results were also set out by HM Treasury and HMRC in the 2006 Report in which it is stated that:

“Consumers who buy counterfeit cigarettes generally do so in the belief that the product is genuine. Not only are they being conned, but they may run additional health risks from smoking counterfeit cigarettes.”¹⁵⁶

16.24 Those manufacturing counterfeit product may fail to conduct the necessary scientific assessment of their product, product ingredients, smoke constituent yields and manufacturing processes. This results in a lack of transparency to consumers about the product and removes from regulators the ability to determine issues of product safety and from consumers the ability to rely on the existence of regulatory oversight. It also puts the legitimate manufacturer at a clear competitive disadvantage in terms of the regulatory compliance and product stewardship costs associated with meeting all applicable regulation/industry best practice.

Illicit trade and inequalities

16.25 As noted above, JTI believes that tackling illicit trade is critical if HM Government is to give effect to its intention to reduce smoking amongst certain demographic groups in the UK given that they are especially price sensitive.¹⁵⁷ The concern about the social inequalities that would be reflected by an increase in illicit trade is reflected in the FTC Document.¹⁵⁸

16.26 ‘Cheap whites’ and counterfeit tobacco products are generally distributed through unregulated criminal networks that are more accessible to youth and “*disadvantaged groups*” than regulated channels, which further undermines HM Government’s stated public health objectives to reduce smoking and address health inequalities.

Depriving governments of further revenue

16.27 The European Commission has stated that counterfeit products “*almost always escape taxation because goods are either smuggled into Europe or come in with forged or invalid documents*”.¹⁵⁹ Reflecting this fact, the FTC Document notes that:

“Smuggling is estimated to cost taxpayers as much as £3 billion per year in lost revenue – money that would otherwise be spent on funding schools, hospitals and other important public services...”¹⁶⁰

16.28 Industry figures estimate the revenue loss to HM Government in 2007 from the illicit trade in tobacco products as being in excess of £4 billion.¹⁶¹

16.29 Any increase in counterfeit and/or contraband tobacco products flowing from the measures considered in the FTC Document would further erode legitimate government revenue from tobacco taxes. This would be exacerbated where such measures facilitate the trade in ‘cheap whites’ for which UK duty is not paid.

Cost to legitimate business

16.30 As the FTC Document notes, the illicit trade in tobacco products damages legitimate businesses, which are undercut by those evading tax.¹⁶²

16.31 Such losses need to be considered by reference to the likely diminished contribution to the UK economy that could be caused by plain packaging and an increase in the trade of illicit tobacco products. The TMA has estimated that, in 2007, consumer spending on tobacco products amounted to £12.6 billion with 91% of this figure being spent on cigarettes.¹⁶³

16.32 Tax revenue raised on these sales amounted to £9.9 billion – £8.0 billion in excise duty plus £1.9 billion in VAT – with 93% of revenue derived through cigarettes. JTI has made significant duty and tax payments to the UK Exchequer in the financial year ending 31 March 2008. For example, Tobacco Product Duty payments made by JTI in 2007/2008 amounted to over £3.1 billion. JTI's total payments to the UK Exchequer, including VAT and Corporation Tax, amounted to over £3.5 billion in this period.

16.33 JTI loses significant sums from counterfeit and contraband each year in the UK alone. While precise data on the total volume of illicit tobacco products is elusive, the FTC Document makes reference to HM Government's latest estimate being that "...the illicit share of the tobacco market in the UK is between 8 and 18%. That means that today, of all cigarettes smoked in the UK, one in six is either counterfeit or smuggled. Over half of all hand-rolled tobacco (HRT) is smuggled" (paragraph 2.29).

16.34 Regulatory measures which have the unintended consequences of increasing the availability of lower priced, illicit tobacco products will also shift employment opportunities away from the legitimate industry's skilled workforce, including those within JTI's UK factories, to those working for the criminal organisations responsible for illicit trade. Currently, JTI operates UK manufacturing sites in Cardiff and Lisnafillan, and employs a large number of individuals in non-manufacturing roles in the UK and more than 22,000 people around the world. The TMA has estimated that, in 2007, 4,927 Full-Time Equivalent¹⁶⁴ Employees were directly employed by the UK tobacco companies.¹⁶⁵ The tobacco sector also supports employment and income in ancillary support industries such as tobacco leaf growing and curing, printing and wholesale and retail trade. By way of example, a 2004 study estimated a further 80,000 jobs among suppliers, wholesalers, distributors and retailers were dependent on the UK tobacco industry.¹⁶⁶

16.35 In addition to the significant loss caused to tobacco manufacturers, retailers continue to be seriously impacted by the illegal trade in counterfeit and contraband cigarettes and tobacco being carried out by criminals operating in the UK. The Independent Retail News Annual Survey on Smuggling carried out in 2007, revealed contraband and counterfeit cigarettes cost retailers almost £1 billion over a 12-month period, the equivalent of £416 a week or £21,632 for the average UK retailer.¹⁶⁷

Profits serious criminal organisations

16.36 It has long been recognised that the illicit trade in tobacco products profits serious criminal organisations. This has been emphasised by HM Government on a number of occasions. For example, the HMRC report "*Counterfeit Cigarettes*

2004”,¹⁶⁸ the 2006 Report¹⁶⁹ and the FTC Document: “*Illicit tobacco is linked to organised crime and smuggling of other illicit goods such as drugs, alcohol and weapons. Some of the organised criminal gangs responsible for drug smuggling into the UK are also engaged in the illicit trade in tobacco products*”.¹⁷⁰

The FTC Document’s answer to these concerns

16.37 In the FTC Document, the Department of Health has suggested that the concerns of stakeholders about the potential impact of plain packaging on illicit trade can be addressed in the following way:

“A way to counteract this potential problem would be to require other sophisticated markings on the plain packages that would make the packages more difficult to reproduce. In addition, the colour picture warnings, which must appear on all tobacco products manufactured from October 2008, would remain complicated to reproduce.”¹⁷¹

This statement is not sufficiently detailed in terms of what is actually being contemplated by the Department of Health so as to enable JTI to provide a full response to it at this stage. However, JTI sets out below its preliminary views on this statement on the basis of the information which has been made available.

Consistency with measures agreed with HM Government

16.38 JTI has worked closely with both OLAF and HMRC to develop measures that make the production of counterfeit tobacco product packaging more complex and less economically viable. Efforts by the Department of Health to “*make packages more difficult to reproduce*” must take into account the work currently being undertaken in this context and should not consist of inconsistent and duplicative measures. New measures that are duplicative of existing processes are likely to divert focus away from key areas such as monitoring and recording the movement of tobacco products through the supply chain.

16.39 As plain packaging is itself manifestly disproportionate, it would be entirely inappropriate for plain packaging to be introduced in a way:

- (a) that also creates a significant additional and unnecessary packaging compliance obligation, with potentially dramatic cost consequences on tobacco manufacturers; and
- (b) which is inconsistent with the regulatory strategies agreed with other competent authorities (such as HMRC and OLAF).

Effectiveness of the FTC Document’s answer in addressing JTI’s concerns

16.40 JTI is concerned that any visual pack markings contemplated by the Department of Health in the context of “*sophisticated markings on the plain packages*” are unlikely to be an effective barrier to illicit trade. Experience in the UK has demonstrated that visual pack marking can increase significantly the costs associated with, and the complexity of, the production of counterfeit products; but it is only a partial answer. It does not prevent illicit trade given the significant ability of counterfeiters to reverse-engineer and copy visual pack verification technologies.

16.41 The ability of “*the colour picture warnings*” referred to in the FTC Document to act either as a meaningful deterrent or an effective obstacle to illicit trade is also undermined significantly by the fact that the colour designs are easily accessible to counterfeiters in electronic form. As noted in the explanatory notes to the relevant UK regulations:

“*a CD with the required images and an European Commission guidance document on editing the images is available from the Department of Health, and can be sourced by emailing picture.warnings@dh.gsi.gov.uk or writing to the Tobacco Programme at the address given...*”¹⁷²

Further, the same/similar photographic warnings are already being replicated on a large scale by counterfeiters in other markets.

16.42 The answer put forward to illicit trade concerns in the FTC Document would not be effective in addressing many of the difficulties noted above. Even if “*sophisticated markings on the plain packages*” were an effective barrier to illicit trade – which is not accepted, for the reasons stated above – and “*colour picture warnings*” would actually “*make the packages more difficult to reproduce*”; these measures would only be responsive to the issue that the use of sophisticated and complex coloured pack design assists in the prevention of counterfeiting. Neither would address the additional illicit trade-related concerns raised above, namely:

- (a) **removal of key cost constraints for counterfeiters.** Once a counterfeiter has mastered the UK plain packaging design for an individual cigarette pack, very few design alterations are needed – even those with “*sophisticated markings*” and “*colour picture warnings*” – to this master design to produce counterfeit versions of each and every other pack sold in the UK in plain packaging. This reflects the fact that the packaging for each product sold would be essentially the same. The remaining distinction between brands would be the existence of a brand name written in a standard typeface, colour and size, which would not in any way represent a significant challenge to counterfeiters;
- (b) **an increased trade in ‘cheap whites’ and the continued creation of branded packs by counterfeiters.** The imposition of plain packaging, even with “*sophisticated markings*” and “*colour picture warnings*”, could create an opportunity for the counterfeit industry to shift sales volumes away from legitimate manufacturers on the basis that counterfeiters are likely to continue to produce tobacco products’ packs using existing pack designs. Further, “*sophisticated markings*” and “*colour picture warnings*” are unlikely to have any impact on the contraband trade in ‘cheap whites’ that do not attempt to meet UK packaging requirements and are not expected to comply with additional regulatory restrictions;
- (c) **crystallizes pack design.** Even with the use of “*sophisticated markings*” and “*colour picture warnings*”, counterfeiters would only need to meet a mandated pack design. Although the markings and/or the picture warnings would be changed overtime, meeting such changes is far less of a practical burden for counterfeiters than having to keep up with manufacturers’ evolving packaging innovations and developments;
- (d) **complicates regulator investigations/prosecutions and the ability to identify counterfeit product design.** It is unclear from the information

provided in the FTC Document that either of the answers proposed to address illicit trade concerns would actually enhance the ability of consumers, legitimate manufacturers or regulatory enforcement agencies to determine whether a genuine or counterfeit product has been purchased or to carry out efficiently the forensic analysis to determine the source of product; and

- (e) **removes the ability to take enforcement action.** Neither the use of “*sophisticated markings*” nor “*colour picture warnings*” would address the fact that prohibiting JTI’s use of its lawful intellectual property rights, including trade marks on products, will prevent it from taking enforcement action against individuals selling tobacco products in the UK.

17. QUESTION 4 - COLLABORATION BETWEEN REGULATORY AGENCIES

17.1 JTI agrees with the view expressed in the FTC Document that there is much potential for tackling illicit trade through collaborative work between HMRC and other UK agencies at a local level.¹⁷³ We agree also that this needs to be underpinned by a longer-term programme of education and awareness-raising, as well as encouragement for local communities to tackle the issue of illicit trade directly.

17.2 The collaboration between the relevant regulatory agencies referred to in Question 4 of the FTC Document can also be enhanced to contribute against illicit tobacco in the following four ways.

17.3 First, by **increasing both HMRC and the UK Border Agency resource and manpower** for border controls, inland enforcement and intelligence, in particular to follow-up on incidents of criminal behaviour identified by stakeholders such as JTI, and to tackle the increasing prominence of ‘cheap whites’ as a phenomenon in the illegitimate trade in tobacco products:

- (a) JTI recognises that HM Government has made significant progress in reducing the illicit tobacco market, but believes that existing policies and procedures designed to eliminate counterfeit and contraband tobacco products should be improved, in order to minimise the risk of youths accessing illegal tobacco products that would be inaccessible from legal sources;
- (b) in particular, concerns have been expressed over the resources and manpower of HMRC to tackle illicit trade. The Public and Commercial Services Union (the *PCS*), which represents the majority of HMRC staff, has consistently expressed concern about the adequacy of resources to provide Customs cover at ports and airports in the UK. In 2006, the PCS warned that as a result of “*job cuts and efficiency savings...Customs cover is wholly inadequate leaving an open backdoor for smugglers and criminal gangs*”.¹⁷⁴ In January 2007, the PCS submitted a Memorandum to the House of Commons Treasury Sub-Committee looking at the performance of HMRC,¹⁷⁵ which highlighted the severe shortage of frontline staff and the consequential affect on its ability to tackle illicit trade:

“there is no permanent customs cover across hundreds of miles of UK coastline including Devon and Cornwall, where permanent Customs cover was removed in 2003, and along the Welsh coastline, where there are no uniformed frontline Customs officers from Cardiff to Holyhead or from Holyhead to Liverpool. There is clear evidence that this has led

to an increase in smuggling of drugs and firearms as well as people, cigarettes and alcohol. The Department's Annual Report shows that only 21 tobacco gangs were disrupted in 2005-06 as compared to 87 in 2002-03, with lost revenue from tobacco fraud running at over £3 billions.”; and

- (c) as noted above, the newly established UK Border Agency has taken over the responsibilities of HMRC for detecting tobacco smuggling at the UK border since April 2008.¹⁷⁶ It is essential that illicit trade issues are addressed effectively and that both HMRC and the UK Border Agency are given sufficient financial resources and manpower to effectively tackle the influx of illicit tobacco products, particularly ‘cheap whites’, coming into the UK to prevent such products from getting into the hands of children and young people. HM Government needs to increase the amount of permanent frontline staff focused on tackling illicit trade and to place a greater emphasise on training to increase efficiency and detection rates.

17.4 Secondly, by ensuring the **effective and rapid information exchange** between the UK's inland enforcement agencies and - where relevant - JTI, about trends in illicit trade activities and seizures. There is undoubtedly a need for better monitoring, collection and exchange of data between HMRC, the UK Border Agency, TSOs and the police, on the legitimate cigarette trade and the estimated illicit cigarette trade. An open data exchange process would allow more transparency and create a better overall picture for all parties. A serious effort to collate information on cigarette seizures, destruction of machinery used to manufacture counterfeits, the breakup of criminal organizations and arrest/conviction of the criminals themselves, will provide a better understanding of the problem on a regional and global scale and enable governments to focus on real solutions.

17.5 Thirdly, by exploring the **possibility of ‘fixed’ rather than minimum indicative limits** for quantities of tobacco being brought into the UK for personal use and the powers to enforce them.

17.6 Fourthly, by making **better use of existing penalties** for those trading in illicit products. If there is an overriding message that needs to emanate from the FCTC Protocol, it should be that the best of government intentions will not succeed until enforcement efforts are backed by strong laws with a commensurate strict penalty regime. A hard line must be taken against those caught dealing in illicit tobacco to change these views.

17.7 JTI welcomes the increasing use of tough sentences as a means of deterring large scale illicit trade activity.¹⁷⁷ The use of the Proceeds of Crime Act 2000 to force those convicted to hand back money made through illicit trade is also a positive development. JTI is, however, concerned that a deterrent is necessary for those individual retailers knowingly selling illicit trade products to consumers. Recent experience suggests that where such sales are identified, the tendency has been to seize product from the shop without taking further enforcement action. To be an effective deterrent to other retailers, prosecutions are appropriate in such cases, accompanied by publicity which makes clear that such enforcement is the norm even where a relatively small volume of illicit trade is involved.

17.8 These four specific recommendations build on the position adopted by JTI in the context of the FCTC Protocol, that the following elements are necessary to address illicit trade effectively on a global basis:

- (a) government policies to address the illicit tobacco trade;
- (b) specific measures to fight the counterfeit trade based upon the “*WCO Action Plan dedicated to the fight against Counterfeiting and Piracy*” and the WCO IPR Group’s ‘kit of measures’ to enable Members to fight counterfeiting more effectively; and
- (c) international cooperation and information exchange.

These measures should be complemented by manufacturer policies to secure the supply chain of the type discussed above.

Question 4: How can collaboration between agencies be enhanced to contribute to the inland enforcement against illicit tobacco?

JTI’s response: JTI has four recommendations:

- § *increase both HMRC and UK Border Agencies resource and manpower;*
- § *more effective and rapid information exchange;*
- § *explore the possibility of ‘fixed’ rather than minimum indicative limits for quantities of tobacco being brought into the UK for personal use; and*
- § *better use of existing penalties.*

ALTERNATIVE REGULATORY SOLUTIONS

18. INTRODUCTION

18.1 Protecting young people from smoking is the primary objective of the FTC Document. JTI agrees with this objective and supports the Department of Health in seeking to achieve this goal. As stated at the very beginning of this document, JTI believes that children and young people should not smoke, and should not have access to tobacco products. This is one of our core beliefs. It is central to our Code of Conduct, marketing standards, operational policies and the way we do business.

18.2 Clearly, it is for the Department of Health to determine how best to communicate to children and young people important messages about smoking. However, JTI sees itself as being able to play a role in contributing to effective means of preventing the access by children and young people to tobacco products. We set out below the alternative regulatory solutions that have the potential to be more effective and successful means of addressing this specific concern than plain packaging, minimum pack sizes, restrictions on the use of vending machines and a display ban:

- (a) more effective and targeted enforcement of the current regulatory regime (the commencement of negative licensing provisions and introduction of a similar negative licensing regime in Scotland and Northern Ireland);
- (b) alternative legislative measures to tackle youth access to tobacco products (criminalising the proxy purchase of tobacco and the purchase, or attempted purchase, of tobacco products by under 18s);
- (c) more effective resources and training for TSOs;
- (d) reinforcing retail access prevention;
- (e) adult identification functions for vending machines; and
- (f) use of renewed public information campaigns.

18.3 These measures are in addition to the provision of greater resources and increased manpower for HMRC and the UK Border Agency to help them tackle more effectively the problem of contraband and counterfeit cigarettes, given that such products pose a serious threat to efforts to restrict youth access to tobacco products, as described above.

18.4 The FTC Document identifies other public policy objectives which a ban on the display of tobacco products seeks to achieve.¹⁷⁸ To the extent that we consider the objectives to be legitimate public policy goals, JTI believes that the better way of achieving these aims, and supplementing the primary goal of reducing youth smoking, is additional government led public information campaigns explaining the aims and effects of the current and proposed legislation in relation to tobacco products and “*to provide an environment that supports smokers who are trying to quit*”.

19. PROPOSED SOLUTIONS

More effective and targeted enforcement of the current regulatory regime

Commencement of the negative licensing provisions

19.1 The Criminal Justice and Immigration Act 2008 introduces a new negative licensing scheme in England and Wales whereby retailers face orders prohibiting the sale of tobacco if they persistently sell tobacco products to those under the age of 18.

19.2 The scheme is not yet in force and it is noted that the FTC Document fails to examine negative licensing, which is remarkable given that the legislation is clearly relevant to the issue of youth smoking and HM Government has indicated that it will bring the scheme into effect in April 2009. The effectiveness of the scheme has yet to be determined.

19.3 JTI recommends that HM Government takes the steps necessary to commence the relevant negative licensing provisions. The scheme has the potential to limit young people's access to tobacco as it may provide a clearer deterrent to retailers considering selling to those who are under-age than the current threat of a fine, which is rarely used in practice. In almost 80% of cases a written or verbal warning is used and when fines are imposed they tend to be relatively small – the average fine being just £350, compared to a maximum fine of £2,500 that could be levied.¹⁷⁹

19.4 To support these efforts, JTI will be communicating with retailers about the new negative licensing scheme so as to reinforce its importance in terms of preventing the access of young people to tobacco products and from a retailer compliance perspective. JTI's communications strategy will use a number of routes that have been previously employed with other changes to legislation, such as the minimum age for sale of tobacco products in October 2007 and the latest changes as a result of the introduction of photographic health warnings on tobacco products in the UK. The strategy will focus on key trade magazines that are circulated to tobacco buyers on a regular basis. JTI will be advising retailers of the timetable for change, the detail of the new system and retailers' responsibilities. In addition to this, JTI will brief its UK sales teams, who will inform the trade during their sales visits, and our Customer Care Line, who operate our dedicated trade support line. This should ensure that around 40,000 retailers receive relevant information about the new scheme.

The introduction of a similar negative licensing regime in Scotland and Northern Ireland

19.5 JTI notes that in the Scottish Parliament's Smoking Prevention Action Plan published in May 2008, the Scottish Government proposed to review, at the earliest legislative opportunity, the statutory controls on the sale of tobacco products. This was expressly stated to include the introduction of a system of licensing. JTI supports and encourages the introduction in Scotland, and also in Northern Ireland, of negative licensing provisions in similar terms to those adopted in England and Wales for the reasons outlined above.

Alternative legislative measures to tackle youth access to tobacco products

19.6 In addition to better enforcement of existing laws, alternative legislative measures should be considered, if necessary, after the current regulatory regime is

evaluated. JTI believes that criminalising the proxy purchase of tobacco and the purchase, or attempted purchase, of tobacco products by under 18s could make a significant contribution to reducing young people's access to tobacco.

19.7 The introduction of such offences has recently been considered by the House of Commons Public Bill Committee and the House of Lords when the following, ultimately unsuccessful, amendment to the Criminal Justice and Immigration Bill was proposed:

“(1) The Children and Young Persons Act 1933 is amended as follows.

(2) After section 12D insert -

Purchase of tobacco by or on behalf of children

(1) An individual aged under 18 commits an offence if he buys or attempts to buy tobacco or cigarette papers.

(2) But subsection (1) does not apply where the individual buys or attempts to buy the tobacco or cigarette papers at the request of—

(a) a constable, or

(b) a weights and measures inspector who is acting in the course of his duty.

(3) A person commits an offence if he buys or attempts to buy tobacco on behalf of an individual aged under 18.

(4) Where a person is charged with an offence under subsection (3) it is a defence that he had no reason to suspect that the individual was aged under 18.

(5) A person guilty of an offence under this section is liable on summary conviction -

(a) in the case of an offence under subsection (1), to a fine not exceeding level 3 on the standard scale,¹⁸⁰ and

(b) in the case of an offence under subsection (3), to a fine not exceeding level 5 on the standard scale.”¹⁸¹

19.8 JTI believes that this type of provision should be enacted. JTI considers below the rationale for this and why it does not accept the position previously adopted on this issue by HM Government.

Criminalising the proxy purchase of tobacco

19.9 In relation to the proxy purchase of tobacco, HM Government has previously given the following reasons as to why it was not prepared to make such action a criminal offence:

- (a) an offence of proxy purchasing “*would be extremely difficult to enforce and therefore be of limited value in the Government’s efforts to reduce smoking among young people*”;¹⁸² and
- (b) “*new laws should generally be grounded on a solid evidence base*” and HM Government was “*not aware of any hard evidence that the proxy purchasing of tobacco is a common practice*”.¹⁸³

19.10 In relation to the extent to which proxy purchasing occurs, Lord Bach, when speaking for HM Government, stated that surveys appear to show that most regular smokers under the minimum age usually obtain tobacco themselves by buying it from shops.¹⁸⁴ However, no information was provided as to the survey evidence relied upon.

19.11 By contrast, an NHS survey conducted in 2006 found that 63% of 11 to 15 year old “*pupils who smoked*” had been given cigarettes.¹⁸⁵ Of these, 57% were given them by friends, 12% by siblings and 7% by their parents. Breaking down the figures to those young people classified as regular smokers, 40% regularly bought cigarettes from older people. This suggests strongly that proxy purchasing is an issue that needs to be tackled. In addition, another survey found that only 4.7% of 12 to 17 year olds who had smoked at least 1 cigarette but less than 100, purchase cigarettes from shops, with the majority obtaining them from friends or family.¹⁸⁶

19.12 Providing sufficient resources and training to those charged with enforcing the law, such as TSOs, would significantly address HM Government’s concern that the offence of proxy purchasing would be too difficult to enforce. It is also to be noted that such concerns did not prevent an offence of proxy purchasing of alcohol from being created in England and Wales in 2000.¹⁸⁷

19.13 HM Government has undertaken to review its position on the proxy purchasing of tobacco in 2009.¹⁸⁸ JTI welcomes this step as an offence of proxy purchasing would eliminate a significant loophole in the current UK legislative arrangements since it is clear that negative licensing provisions can easily be overcome by adults purchasing as proxies for youths.

19.14 Criminalising proxy purchasing would find support from retailers, as reflected by the ACS in its 18 August 2008 response to the FTC Document. A large majority of the British public also back the criminalisation of proxy purchasing, with recent polls demonstrating that 87% to 92% of people surveyed supported such a measure.¹⁸⁹

Criminalising the under-age purchase of tobacco

19.15 HM Government has declined to support legislation that would make it an offence for under 18s to purchase tobacco on the basis that the creation of such an offence would not be in line with its efforts to keep young people outside the criminal justice system.¹⁹⁰

19.16 Concerns about criminalising young people are entirely legitimate. However, such concerns should, in our view, be weighed carefully against its importance in tackling youth smoking. It is recognised that, although only certain youth smokers obtain tobacco products directly from retailers (see paragraph 19.11 above), a small proportion continue to do so and existing regulation has failed to prevent this conduct.

19.17 Further, HM Government has previously recognised that there are circumstances in which criminalising the actions of young people can be justified, particularly where such offences are punishable – as would be the case here – by non-custodial measures. This is reflected in the recent proposals put forward by the Secretaries of State for Children, the Home Office and the Department of Health to take stronger enforcement action in relation to alcohol, including making it an offence for under 18s to persistently possess alcohol in public places.¹⁹¹

19.18 As noted above, action in this area would bring the law on tobacco purchase into line with the law on alcohol, with both proxy purchasing of alcohol and the purchase of alcohol by under 18s already being illegal in England and Wales,¹⁹² as well as in Scotland¹⁹³ and Northern Ireland.¹⁹⁴

19.19 The burden of preventing youths from getting access to tobacco products should not rest on retailers alone. A proxy purchase offence would help deliver the message that the responsibility for tackling youth smoking also lies with those adults who buy tobacco for young people. At the same time, criminalising the under-age purchase of tobacco would encourage young people to take responsibility for their own actions.

More effective resources and training for TSOs

19.20 The success of the measures discussed above relies heavily upon TSOs to identify incidences of underage sales/purchase and to take action where non-compliance occurs. Effective enforcement by TSOs is particularly important in the context of the negative licensing scheme. Its provisions operate on a ‘three strikes and out’ approach. If a retailer is convicted of selling tobacco to under 18s three times within two years he may be issued with an order prohibiting him from selling tobacco products either personally or on his premises. Proper systems should be in place to enforce these provisions and minimum age laws in general.

19.21 TSOs currently carry out ‘test purchasing’ operations, whereby under 18s are encouraged to attempt to buy tobacco products to identify whether a retailer is selling tobacco to youths. As noted in the tobacco enforcement protocol, published by the Departments of Health and Trade and Industry in 2000 (the *Protocol*), ‘test purchasing’ can and should be “*used to inform reviews of enforcement action or aid prosecution*”.¹⁹⁵ Enforcement action also needs to be measured on a regular basis with rapid information exchange between enforcement officers to determine the most effective means of achieving the goals of the new licensing scheme. Additionally, as recommended in the Protocol,¹⁹⁶ any enforcement action taken, including prosecutions and fines, should be publicised to act as a deterrent to others.

19.22 It is recognised that TSOs are funded by local rather than central taxation and each local authority in England and Wales is generally responsible for deciding its regulatory enforcement priorities and how to distribute its resources. However, given that the under-age sale of tobacco is an issue of national concern, HM Government should consider providing TSOs with greater resources and training. This should be consistent throughout England and Wales. As noted below, JTI considers that – in support of this approach – the refusals register system could be utilised to enable TSOs to collect data about attempts by young people to purchase product so as to better identify the areas where TSOs should be focusing regulatory attention.

Reinforce retail access prevention

19.23 Retail access prevention programmes have proven to be an effective way of limiting young people's access to cigarettes. 90% of retailers surveyed after the introduction of CitizenCard, the government-approved proof-of-age scheme, believed there to have been a reduction in under-age sales, and 95% were more confident in asking for ID as a result of the campaign.¹⁹⁷ JTI contributes financially to this programme and over 1.8 million CitizenCards have now been issued.

19.24 CitizenCard also operate the 'No ID No Sale' campaign which was launched in January 2004 to promote and publicise all government-approved proof-of-age schemes. More than 220,000 'No ID No Sale' information packs, which include age display posters and guidance on how to respond when faced with customers who are unable to provide proof of age, have been distributed to retailers. Young people can expect to be asked to prove their age, and retailers should accept only the correct ID. JTI suggests that HM Government takes steps to support such efforts to further build upon their success.

19.25 The 'No ID No Sale' campaign also aims to help retailers record attempted under-age purchases in a refusals register. Every time a retailer refuses to serve someone with an age-restricted product it is suggested that a brief description of the incident and the attempted purchaser is recorded in a register. The maintenance of such registers is likely to increase in importance for retailers after the introduction of the new negative licensing scheme. In a 'three strikes and out' environment, the register will enable a retailer to demonstrate to TSOs the extent to which they have refused attempts at purchase by young people.

19.26 JTI recommends that HM Government work with the retail community so that attempted under-age purchases are recorded in a manner which enables local TSOs to collect data so as to better identify the areas where they should be focusing their attention. To support such efforts, JTI is in the process of commissioning third party analysis to identify where JTI can further improve the 'No ID No Sale' scheme.

19.27 As part of our long term commitment to providing retailers with youth access prevention materials, JTI has commenced a programme to enhance communication of the 'No ID No Sale' retailer campaign. JTI is seeking to display on the gantry header the 'No ID No Sale' logo, where JTI has direct control of the gantry unit.

19.28 In order to assist retailers with the minimum sale age change from 16 to 18, which took effect in Northern Ireland on 1 September 2008, JTI is commencing this initiative there first. 1,500 gantry headers in retail outlets across Northern Ireland are identified for change. JTI intends to roll this out across the UK, utilising the 220 people in its salesforce, with the aim of displaying this message in the gantry header of a further 26,500 retail outlets, including multiple grocers, convenience stores, forecourts and independents retailers. The 'No ID No Sale' message should be prominently displayed in 28,000 retailers across the UK. With regards to those retail outlets where JTI does not have direct control over the gantry, our salesforce will continue to visit those retailers to promote the use of the 'No ID No Sale' materials and the practice of maintaining a refusals register.

Adult identification functions for vending machines

19.29 As stated above, while we support the NACMO Code of Practice on the siting of vending machines, we believe it could be further enhanced by requiring vending machine operators to introduce adult identification functions in their machines. This would significantly reduce the likelihood that those under the age of 18 do not get access to tobacco products. JTI has experience of introducing such systems in other countries around the world, including Austria and Japan, and would be willing to share further information on the costs, timings and technicalities of the different types of adult identification functions available.

Renewed public information campaign

19.30 We believe that the primary goal stated in the FTC Document of protecting children and young people from smoking should be supported by renewed government led public information campaigns, explaining the changes that have recently been made to tobacco control laws and the effect of such measures. If JTI's proposed solutions identified above as regards the negative licensing scheme and proxy/under-age purchase are adopted, the impact of such measures would also need to be communicated in this way. This is particularly important in light of concerns that recent changes in UK tobacco regulation, such as the increased minimum age of sale for tobacco, have not been effectively communicated to retailers or the public at large. A May 2008 survey found that only 56% of the public know the minimum age for the sale of tobacco is 18 years.¹⁹⁸

19.31 JTI acknowledges that extensive public information campaigns have been carried out in the UK successfully. Clearly, it is for the Department of Health to determine how to conduct supplementary public information initiatives and the benchmarks by which the success of such campaigns should be measured. However, the Department of Health may wish to consider how previous public information campaigns could be renewed or adapted to achieve its stated objective of reaching out to the sections of UK society identified within the FTC Document as being "*high smoking prevalence groups*".

19.32 Such campaigns also represent an alternative means of giving effect to the Department of Health's legitimate objective – identified in the context of potential display restrictions – of "*providing an environment that supports smokers who are trying to quit*". Although extensive public information campaigns have been conducted in the UK regarding cessation services, there is further scope for publicising free NHS support services, including one-to-one or group support sessions, nicotine replacement therapies available on the NHS and the availability of 'quit tools', such as free support packs, downloads of stop smoking guides, means for calculating the cost benefits of quitting, and the existence of the NHS smoking helpline.

JTI
5 September 2008

SCHEDULE ONE: THE RIAS

20. THE IMPORTANCE OF A MEANINGFUL RIA

20.1 RIAs are a widely-used policy tool, heavily promoted in the UK and by OECD countries. RIA is designed to provide those considering regulatory action with the framework in which they can assess options for action, as well as empirical data in order to inform that assessment. As described by the Better Regulation Executive as follows: “*The purpose of Regulatory Impact Assessments is to place analytical rigour at the heart of policy making, ensuring that the costs and benefits are clearly set out for decision makers so that the Government only regulates where the benefits clearly exceed the costs.*”¹⁹⁹

20.2 The Better Regulation Executive has published *Impact Assessment Guidance (BRE Guidance)*, to assist policy-makers to prepare RIAs.

20.3 The RIAs attached to the FTC Document are at consultation stage. RIAs should be updated throughout the lifecycle of a regulatory measure.

21. THE INSUFFICIENCY OF THE RIAS IN THE FTC DOCUMENT

21.1 The FTC Document contains two RIAs – the first directed at further restrictions on the display of tobacco products (*Display RIA*) and the second directed at limiting young people’s access to vending machines (*Vending RIA*).

21.2 The Display RIA, in particular, is inadequate: it does not meet the assessment burden set by the BRE, failing to assess all costs and benefits, and neglects to undertake a vigorous interrogation of various options. As was the case with the RIAs that have accompanied previous regulation directed at tobacco products (and most notably that relating to point of sale advertising), the lack of rigorous analysis suggests that a political decision to introduce a ban on the display of tobacco products has already been made. It cannot be claimed that the Display RIA provides a sound platform for choosing the regulatory response which is the most appropriate. Rather, it is a cursory, incomplete assessment designed to facilitate the conversion of political will into regulation.

Contextual failures

21.3 JTI is extremely concerned that the FTC Document, and consequently the RIAs, fail to give adequate consideration to the interrelationship between the measures considered in the FTC Document and recent regulatory initiatives. As a result, the environment in which the various proposals are considered is artificial and any resulting assessment inaccurate. Any meaningful assessment of the Options in the FTC Document cannot be made without considering the changes likely to be effected by negative licensing, for example.

21.4 In addition, alternatives to further regulation – such as self regulation, education and voluntary initiatives – have been given no consideration. This is particularly troubling in the context of tobacco products, which are already so heavily regulated. Indeed, attempts by the tobacco sector to work with the Department of Health, for example following the LACORS Report in 2006, have been ignored.

Failure to take into account important considerations

21.5 The Display RIA is incomplete. JTI sets out below a non-exhaustive list of the Display RIA's flaws.

21.6 First, the Display RIA purports to consider the impacts of a complete display ban only, and does not consider the relative costs and benefits of restrictions on display but not a complete prohibition. In relation to restrictions on display, the Display RIA states that an impact assessment will be considered "*once this option has been further developed*". No decision about whether to pursue any of the three options can be made until the outstanding assessments are performed and put out to further consultation. To do so would demonstrate a clear predetermination of the issues. Oddly, the Display RIA claims to assess the option of retaining the status quo but contains no mention and no assessment of (a) its costs, or (b) the benefits or comparison with the relative costs and benefits of a display ban.

21.7 Secondly, the Display RIA "*Evidence Base*" – being the empirical evidence needed to measure and weigh the costs and benefits of the proposal – is poor. Whilst an attempt has been made to consider the economic impacts of Option Two (a display ban), the analysis of costs and benefits is dedicated to two types of quantitative impact only (a) direct costs to retailers (principally refurbishment costs); and (b) monetised lifetime health benefits. There is absolutely no consideration of the potential impacts on manufacturers of tobacco products. Nor is there any assessment of the costs associated with likely impacts in relation to illicit trade. The Display RIA is incomplete and perfunctory.

21.8 Importantly, the FTC Document, at paragraph 3.44, invokes the Display RIA to state that: "*In the long run, based on the Department of Health's analysis within the attached consultation-stage impact assessment, any losses incurred by retailers or the tobacco industry would be more than off-set by the benefits accruing from the numbers of lives saved, reduced levels of smoking related disease and the wider "denormalisation" of tobacco use in our communities*" (emphasis added). Given that the Display RIA does not acknowledge any effects – financial or otherwise – on tobacco manufacturers, this statement is misleading, as is the suggestion, at paragraph 3.52, that the costs and benefits of the three options are set out in the Display RIA.²⁰⁰

21.9 Thirdly, even in relation to the one cost of a display ban which is quantified – the likely costs to retailers – the analysis is cursory, dismissing important impacts such as retail outlet closures ("*There are likely to be few, if any, such closures, given the availability of low-cost means of complying with the regulation*").

21.10 Fourthly, as Section 8 of the report of Dr Lilico illustrates, the competition assessment is flawed. The Display RIA in no meaningful way meets the 'competition' test: "*to identify whether the impact of a proposal is pro- or anti-competitive and to assess whether this impact is significant*".²⁰¹

21.11 Lastly, the Vending RIA claims, without establishing any evidential foundation, that a ban on vending machines will give rise to a reduction in cigarette sales to adults, resulting in a loss of revenue to the Exchequer. Assuming, despite the lack of evidence, that this claim is correct, it is remarkable that the Vending RIA ignores any attendant loss of revenue to vending operators or tobacco manufacturers.

Taking into account irrelevant or illusory considerations

21.12 The Display RIA benefits analysis claims a benefit that is not contemplated elsewhere in the FTC Document, namely “*increased compliance with the law on underage sales*”. The causal link between a display ban and increased legal compliance is not explained and there is no substantiation given to support it.

21.13 Similarly, the Vending RIA claims a public policy benefit that is not elsewhere contemplated, namely that there may be a reduction in cigarette consumption by those over 18 as a result of a ban on vending machines. Neither the FTC Document nor the Vending RIA contains any evidence to support this claim.

21.14 Importantly, the FTC Document couches the measures directed at vending machines in terms of “*Limiting young people’s access to tobacco products*”²⁰² (emphasis added), and not “*Further action to reduce smoking uptake by young people*”. However, the Vending RIA claims that “[t]he policy objective is to reduce smoking take-up, prevalence and/or the number of cigarettes smoked **by under 18’s...**” (emphasis added). This statement is not supported by any evidence and it is difficult to countenance how the Department of Health could legitimately argue that the presence of tobacco products in vending machines influences smoking initiation by children and young people.

Significant ramifications of a flawed RIA

21.15 There are serious ramifications of making any decisions about future regulatory measures, in particular measures directed at an industry sector as heavily regulated as tobacco, on the basis of a flawed RIA. These are clearly articulated by the BRE in their 2006 consultation, *The Tools to Deliver Better Regulation*:

*“Regulatory Impact Assessments can potentially play a key role in helping minimise the burdens of new regulation. By clearly identifying the social, economic, environmental and technical costs of all new proposals, stakeholders should be able to easily identify whether the benefits justify the costs. **If the costs and benefits are obscured, or not considered, the regulatory burden on business, both in total and by size of organisation, the public sector and the third sector, can grow unchecked.**”*²⁰³ (Emphasis added.)

21.16 The cumulative effect on the tobacco sector of the flawed RIAs which have accompanied successive legislative measures directed at tobacco products underscores the importance of ensuring that a comprehensive assessment of all costs and benefits of all options, including maintaining the status quo, is undertaken.

ENDNOTES

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- ¹ <http://www.berr.gov.uk/bre>.
- ² Department for Business, Enterprise and Regulatory Reform, “*Impact Assessment Guidance*”, paragraph 3: <http://www.berr.gov.uk/files/file44544.pdf>.
- ³ Fast moving consumer goods.
- ⁴ The Tobacco Products (Manufacture, Presentation and Sale) (Safety) (Amendment) Regulations 2007: http://www.opsi.gov.uk/si/si2007/uksi_20072473_en_1.
- ⁵ See paragraph 3.4 of the FTC Document.
- ⁶ See paragraph 3.4 of the FTC Document.
- ⁷ See tables 3.1 to 3.3 of *Drug use, smoking and drinking among young people in England in 2007*, Edited by Elizabeth Fuller (a survey carried out for the NHS Information Centre by the National Centre for Social Research and the National Foundation for Educational Research).
- ⁸ HMRC (Her Majesty’s Revenue and Customs) was formerly known as Her Majesty’s Customs and Excise or HMCE. For consistency reasons, the abbreviation HMRC is used throughout this document.
- ⁹ JTI reserves its position as regards the factors alluded to by the Department of Health in paragraphs 3.70 to 3.74 of the FTC Document as perceived “[P]ositive effects of plain packaging”.
- ¹⁰ Expert Panel Report for Health Canada (1995). “*National Survey of Teens: Knowledge, Attitudes, Beliefs and Smoking Behaviours*”, *When Packages Can’t Speak: Possible impacts of plain and generic packaging of tobacco products*. Health Canada, Ottawa.
- ¹¹ Report of the Senate Community Affairs References Committee. “*The tobacco industry and the costs of tobacco related illness*,” (December 1995).
- ¹² Inter-brand is used in this document to refer to navigation and competition between different brands of tobacco product (i.e. Benson & Hedges and Marlboro) whereas intra-brand refers to navigation and competition between members of the same brand family (i.e. Benson & Hedges Gold or Benson & Hedges Silver).
- ¹³ Unregistered marks in the UK are protected by way of an action for passing off.
- ¹⁴ The law relating to UK registered trade marks is governed by the Trade Marks Act 1994 (the **1994 Act**), which is intended to give effect to Council Directive 89/104/EEC of 21 December 1989 (the **Trade Marks Directive**). The law in relation to Community trade marks is governed by Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark (OJ L.11 14.1.1994 p.1) as last amended by Regulation (EC) No. 422/2004 (OJ L.70 9.3.2004 p.1) (the **CTMR**).
- ¹⁵ See section 1(1) of the 1994 Act, Article 2 of the Trade Marks Directive and Article 4 of the CTMR.
- ¹⁶ See paragraph 2.1 of the FTC Document.
- ¹⁷ These graphs use RAL data prepared by AC Nielsen. The premium and value price segments of the market (as defined by AC Nielsen) have been used as illustrations. This RAL data divides the UK cigarette market into premium; sub premium; mid price and value. The abbreviation D&G refers to the brand Dickens & Grant. JP SK refers to John Player Special Superkings.
- ¹⁸ This right has been expressly recognised by the European Court of Justice (**ECJ**) and the Canadian Supreme Court. In case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, the ECJ expressly recognised, whilst upholding Article 7 of the Tobacco Products Directive 2001/37/EC: “*the fact remains that a manufacturer of tobacco products may continue...to distinguish its product by using...distinctive signs.*” In *RJR-MacDonald Inc. v Canada (Attorney-General)* [1995], 3 S.C.R. 199, the Canadian Supreme Court referred to ‘brand loyalty advertising’ (which is aimed solely at promoting one brand over another based on the colour, design and appearance of the packaging), and distinguished it from ‘lifestyle advertising’, which the Court concluded creates an image by associating the product’s consumption with a particular lifestyle and was considered to increase the consumption of tobacco products.
- ¹⁹ Schecter (1927) 40 Harv LR 813.
- ²⁰ See further paragraph 6.7.
- ²¹ Paragraph 3.75 of the FTC Document.
- ²² Tobacco Control (Reports on Industry Activity from Outside UCSF (University of California, San Francisco)), “*The case for the plain packaging of tobacco products*”, Becky Freeman, Simon Chapman, Matthew Rimmer, <http://repositories.cdlib.org/tc/reports/generic>.
- ²³ See pages 40 and 41 of the Expert Panel Report for Health Canada (1995).
- ²⁴ Department of Health (1998). *Smoking Kills - A White Paper on Tobacco* at paragraph 3.1.
- ²⁵ National Institute for Health and Clinical Excellence (2008). “*Public Health Draft Guidance Mass-media and point-of-sales measure to prevent the uptake of smoking by children and young people.*” NICE, London at page 11.
- ²⁶ Expert Panel Report for Health Canada (1995), supra, p.58.
- ²⁷ See paragraph 3.77 of the FTC Document.
- ²⁸ See in this regard *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35; *R (o.a.o. Nicholds & Ors) v Security Industry Authority* [2006] EWHC 1792 (Admin); *James v UK* (1986) 8 EHRR 123; *Allard v Sweden* (2004) 39

EHRR 14; *Hentrich v France* (1994) 18 EHRR 440; and *Lallement v France*, application no. 46044/99, available in French only.

²⁹ See *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, at para 63.

³⁰ See *Anheuser-Busch Inc v. Portugal* [2007] ETMR 24, p. 343 (ECHR, Grand Chamber) at paragraphs 66 to 72; Case C-479/04 *Laserdisken ApS v. Kulturministeriet* [2006] ECR I-8089 at paragraph 65; Case C-275/06 *Productores de Musica de Espana (Promusicae) v. Telefonica de Espana SAU* (Grand Chamber) (29 January 2008) [2008] ECR I-0000 at paragraph 62; *Smith Kline and French Laboratories Ltd v Netherlands* (1990) 66 DR 70 and *IRC v Muller & Co's Margarine Ltd* [1901] AC 217, 223.

³¹ Case C-89/99 *Schieving-Nijstad VOF v. Groeneveld* [2001] ECR I-5851, paragraph 35; Case C-49/02 *Heidelberger Bauchemie GmbH*, [2004] ECR I-6129, paragraphs 19 to 21; and Case C-245/02 *Anheuser-Busch Inc v. Budejovicky Budvar, narodni podnik* [2004] ECR I-10989, paragraphs 42 and 55 to 57.

³² Sections 9 to 12 of the Trade Marks Act 1994 Act (the **1994 Act**); Articles 5 to 7 of First Council Directive 89/104/EEC of 21 December 1988 (the **Trade Marks Directive**); Article 9, 12 and 13 of Council Regulation (EC) 40/94 of 20 December 1993 (the **CTMR**).

³³ Case C-17/06 *Celine Sarl v. Celine SA* [2007] ECR I-7041 at paragraph 16.

³⁴ Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol Myers Squibb v. Paranova and others* [1996] ECR I-3457 at paragraph 75.

³⁵ Case C-206/01 *Arsenal Football Club plc v. Reed* [2002] ECR I-10273 at paragraphs 48 and 49; Case C-245/02 *Anheuser-Busch Inc v. Budejovicky Budvar, narodni podnik* [2004] ECR I-10989 at paragraph 69; and Case C-17/06 *Celine Sarl v. Celine SA* [2007] ECR I-7041 at paragraph 16.

³⁶ Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol Myers Squibb v. Paranova and others* [1996] ECR I-3457 and C-348/04 *Boehringer Ingelheim KG v. Swingward Ltd* [2008] 2 CMLR 627 at paragraph 43.

³⁷ See paragraph 3.64 of the FTC Document.

³⁸ The deprivation of property brought about as a result of the implementation of national legislation would not only affect the specific subject matter of national trade marks but also the specific subject matter of Community trade mark registrations.

³⁹ See paragraph 3.64 of the FTC Document.

⁴⁰ On the basis of Section 46(1) of the 1994 Act.

⁴¹ On the basis that their registration was prohibited under Section 3(4) of the 1994 Act.

⁴² On the basis that their registration was prohibited under Sections 3(3); Section 3(4) and/or Section 3(6) of the 1994 Act. Applications for such marks could either be refused registration by the Registrar or would be susceptible to opposition by a third party.

⁴³ Article 7(1)(f) of the CTMR states (in accordance with the third paragraph of Article 6quinquies of the Paris Convention) that trade marks shall not be registered to the extent that they are “*contrary to public policy or to accepted principles of morality*”. To the extent that the any prohibition on use may be said to have been based on public policy, this section could found a basis for refusal of an application or subsequent invalidity. Article 7(2) of the CTMR states that “*Paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the Community*”. The fact that the grounds of non-registrability exist in only one Member State is sufficient for an application for registration of a Community trade mark to be refused (and likewise for an application for invalidity to succeed): paragraph 1.3 of Part B of the April 2008 Examination Guidelines concerning proceedings before OHIM, the European Community's Trade Mark Registration Authority.

⁴⁴ On the basis of Sections 10 and 12(2) of the 1994 Act; Articles 5 and 7(2) of the Trade Marks Directive; and Articles 9 and 13(2) of the CTMR.

⁴⁵ On the basis of Section 5 of the 1994 Act, Article 4 of the Trade Marks Directive and Article 8 of the CTMR.

⁴⁶ Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property. HMRC can only take action where goods suspected of infringing IPR are in the process of being introduced into or exported from the Community customs territory. Where, to a large extent, trade mark protection is not available in relation to tobacco products in the UK, HMRC will not be in a position to prevent importation of counterfeit tobacco products (i.e. counterfeit tobacco products in the packaging legally used throughout the rest of the Community). The UK would become the ‘weak link’ in Community wide efforts to tackle illicit trade in this way as, once such products have entered into free circulation within the Community, no other Member State customs authority may detain such goods under this Regulation.

⁴⁷ See Section 10(2) of the 1994 Act; Article 5(1)(b) of the Trade Marks Directive; and Article 9(1)(b) of the CTMR.

⁴⁸ See Section 10(3) of the 1994 Act; Article 5(2) of the Trade Marks Directive; and Article 9(1)(c) of the CTMR.

⁴⁹ See Section 5 of the 1994 Act; Article 4 of the Trade Marks Directive; and Article 8 of the CTMR.

⁵⁰ See Section 5(4)(a) and Section 47(2)(b) of the 1994 Act; Article 8(4) and Article 52(1)(c) of the CTMR.

⁵¹ http://www.wto.org/english/tratop_e/TRIPS_e/TRIPS_e.htm.

⁵² http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html#P19_138.

⁵³ JTI believes that mandatory plain packaging would, accordingly, be contrary to Article 2.2 of TBT (http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm), which provides that: “*Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary*

obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”.

⁵⁴ *Casado Coca v. Spain* (1994) EHRR 1, paragraphs 33 to 37 (ECtHR); Case C-71/02 *Herbert Karner* [2004] ECR I-3025, paragraphs 50 to 52; and Case C-380/03 *Germany v. Parliament and Council* [2006] ECR I-11573, paragraphs 154 to 155; and *Krone Verlag GmbH & Co KG v. Austria* [2006] 42 EHRR 28.

⁵⁵ For the purposes of this paper, JTI is treating the terms “counterfeit” and “contraband” to have the following meanings: (a) Counterfeit cigarettes are cigarettes that bear the trade marks of a genuine cigarette manufacturer (such as JTI or Gallaher) but which are in fact manufactured by a third party without the consent of the genuine manufacturer; and (b) Contraband cigarettes are cigarettes that have been imported into, distributed in, or sold in a market in violation of the applicable tax, duty or other fiscal laws of that market.

⁵⁶ Paragraphs 2.25 to 2.39 of the FTC Document.

⁵⁷ Paragraph 3.79 of the FTC Document.

⁵⁸ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004, see recitals 3 and 9.

⁵⁹ The Tobacco Products Duty Act 1979 (as amended by the Finance Act 2006).

⁶⁰ See paragraph 3.76 of the FTC Document.

⁶¹ <http://www.the-tma.org.uk/tobacco-smuggling.aspx>.

⁶² http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg%2520=EN&numdoc=31989L0552&model=guichett.

⁶³ http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003L0033&model=guichett.

⁶⁴ Paragraph 33 of the Explanatory Notes to Section 8 of TAPA: http://www.opsi.gov.uk/ACTS/acts2002/en/ukpgaen_20020036_en_1.

⁶⁵ JTI believes that the gantry shown on page 4 of the LACORS Report is representative of industry practice prior, rather than subsequent, to the POS Regulations. The LACORS Report erroneously asserts that the gantry image is representative of practice post-regulation.

⁶⁶ Hansard, 2 November 2001, Volume 627: Column 1710: http://www.publications.parliament.uk/pa/ld200102/ldhansrd/vo011102/text/11102-07.htm#11102-07_spnew1.

⁶⁷ http://www.opsi.gov.uk/ACTS/acts2002/en/ukpgaen_20020036_en_1.

⁶⁸ Consultation Paper on the draft Tobacco Advertising and Promotion (Point of Sale) Regulations, 21 August 2002 (POS Consultation Paper), paragraph 37.

⁶⁹ POS Consultation Paper, paragraph 39.

⁷⁰ Hansard, 13 February 2001, Volume 363, Part No. 37, Division No. 118, Column 220: http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010213/debtext/10213-23.htm#10213-23_spnew9.

⁷¹ *R.(on the application of British American Tobacco UK Ltd. and five others) v Secretary of State for Health* [2004] EWHC 2493 (Admin).

⁷² *Ibid.*

⁷³ See for example, Tobacco Advertising and Promotion (Point of Sale) Regulations 2004, Consultation Regulatory Impact Assessment, 2002, at paragraph 40 – “*During debate on the Bill Ministers have made clear that some advertising would be allowed at point of sale but that this should be properly regulated. This can be achieved by allowing limited advertising on the gantries where the products are displayed, but restricting the prominence of this advertising*”.

⁷⁴ Paragraph 10 on page 71 of the FTC Document.

⁷⁵ See the formulation applied by Fennelly AG in the context of the commercial freedom of expression in Joined Cases C-376/98 and C-74/99 *Germany v Parliament and Council* and *R (Imperial Tobacco Ltd and Others) v Secretary of State for Health and Others* [2000] ECR I-8419, Opinion at para 161.

⁷⁶ See page 10 of Dr Keegan’s report.

⁷⁷ See Hoek J., Gifford H., & Edwards, R. “*Effects of tobacco retail displays on exsmokers and lapsed quitters*”, New Zealand: Massey University, New Zealand: University of Otago (undated).

⁷⁸ J. Gottheil Marketing Communications. “*The Influence of Tobacco Powerwall Advertising on Children*” (March 2005).

⁷⁹ See Pierce J. et al. (1991). “*Does tobacco advertising target young people to start smoking? Evidence from California*”, *Journal of the American Medical Association*, 266 (22), pp. 3154-3158; Klitzner M. et al. (1991). “*Cigarette advertising and adolescent experimentation with smoking*”, *British Journal of Addiction*, 6 (3), pp. 287-298; Smee C., Parsonage M., Anderson R. and Duckworth S. (1992). “*Effect of tobacco advertising on tobacco consumption: A discussion document reviewing the evidence*”. Department of Health, London; Pierce J., Choi W., Gilpin E. et al. (1998). “*Tobacco industry promotion of cigarettes and adolescent smoking*”, *Journal of the American Medical Association*, 279 (7), pp.511-515.; Pierce J. (2002). “*Does tobacco marketing undermine the influence of recommended parenting in discouraging adolescents from smoking?*”, *American Journal of Preventative Medicine*, 23 (2), pp.73-81; Lovato C. et al. (2004). “*Cochrane Review: Impact of tobacco advertising and promotion on increasing adolescent smoking behaviours*”, *The Cochrane Library*, Issue 2.

⁸⁰ Henriksen L. et al. (2004). "Association of retail tobacco marketing with adolescent smoking", American Journal of Public Health, 94(12), pp. 2081-2083.

⁸¹ Wakefield M. et al. (2006). "An experimental study of effects on school children of exposure to point-of-sale cigarette advertising and pack displays", Health Education Research, 21(3) pp 338-347.

⁸² The fall among "ever smokers" in the UK was of 3% between 1995 and 1999 whereas it was of 7% between 1999 and 2003. The decline between 1999 and 2003 was thus 2.3 times greater than that seen over the previous period. In Iceland, the fall was of 5% between 1995 and 1999 whereas it was of 10% between 1999 and 2003, twice the decline. Likewise, among those having smoked in the last 30 days, the fall in the UK was of 2% between 1995 and 1999 whereas it was of 5% between 1999 and 2003, a decline 2.5 times greater; in Iceland, the fall was of 4% between 1995 and 1999 whereas it was of 8% between 1999 and 2003: again twice the decline.

⁸³ Health Canada (2006). "A proposal to regulate the display and promotion of tobacco and tobacco-related products at retail: consultation document". Health Canada, Ottawa. It is acknowledged, however, that a number of Canadian provinces have nevertheless introduced prohibitions on the display of tobacco products.

⁸⁴ Ministry of Health and Care Services. "Hearing on Proposed Prohibition of Display of Tobacco Products at Retail Establishments, as well as Various Other Amendments to the Act relating to Prevention of the Harmful Effects of Tobacco and Advertising Regulation", March 2007, at section 2.3.4.

⁸⁵ This is considerably less equivocal than the characterisation of the relevant evidence in the accompanying regulatory impact assessment, where it is claimed that "research ... suggests that retail displays can trigger those trying to quit to continue their habit".

⁸⁶ Corporate Research Associates (2005). National Baseline Survey on Tobacco Retail Environment. Report prepared for Health Canada.

⁸⁷ Populus, *Tobacco Alliance Results Summary*, May 2008 (<http://www.populuslimited.com/tobacco-alliance-smoking-survey-180508.html>). The survey was conducted by Populus, a Member of the British Polling Council. Populus interviewed a random sample of 1,008 adults aged 18+ by telephone between 16 May 2008 and 18 May 2008. Interviews were conducted across Britain and the results have been weighted to be representative of all British adults.

⁸⁸ The situation which was reported in 1% of cases as causing the survey participants to be most tempted to smoke again was "being in a shop where tobacco was sold" not 'seeing tobacco products on display'.

⁸⁹ Paragraph 3.33 of the FTC Document.

⁹⁰ Rogers T., Feighery R. et al. (1995). "Community mobilisation to reduce point of purchase advertising of tobacco products", *Health Education Quarterly*, 22, pp. 427-442.

⁹¹ Englewood, NJ. "Point of Purchase Advertising Institute: The Point-of-Purchase Advertising Industry Fact Book", Point of Purchase Advertising Institute, 1992.

⁹² Paragraph 3.33 of the FTC Document.

⁹³ See, for example, Stern H. (1962). "The Significance of Impulse Buying Today", *Journal of Marketing*, 26, No. 2, pp. 59-62; Cobb C. and Hoyer W. (1986). "'Planned versus impulse purchase behaviour", *Journal of Retailing*, 62, No. 4, pp. 384-409.

⁹⁴ Department of Health, UK, "Excellence in tobacco control: 10 High Impact Changes to achieve tobacco control", May 2008, page 8.

⁹⁵ The authors note: "No effects were observed for most variables measuring the perceived harm from smoking, except the perceived danger of smoking one or two cigarettes per day, which was significantly higher among those in the cigarette advertising condition than those in the cigarette display condition."

⁹⁶ Cited in endnote 44 of the FTC Document as: Annan S. (1995). "Consumer communication at POP", Trade Marketing Solutions, Richmond. In fact, there is no clear author of the document. Under cover of what appears to be an internal memorandum from Scott F. Annan (of Trade Marketing Solutions) is a set of PowerPoint slides sent before "any final editing". The stated objective was to provide a third party "with a framework to obtain the necessary understanding of our target consumers decision making process in order to communicate to them at the point of purchase in the most effective and efficient manner through displays, promotion and on-site advertisements". Third party research outside the UK is mentioned in just two of the 22 slides.

⁹⁷ For example, an OmniTel/H.R. Bruskin study released on 27 March 1984 found that 90% of smokers use only one brand. This leaves the significant figure of 10% of smokers who use more than one brand.

⁹⁸ US Federal Trade Commission and University of Michigan, brand switching graph, 27 February 1998.

⁹⁹ HMRC (2008). *Tobacco Bulletin*, April 2008. National Statistics. This figure is based on the assumption that the 9.1% of smokers who may use the display to navigate between brands purchased 9.1% of the total number of cigarettes purchased in the UK in 2007.

¹⁰⁰ www.ash.org.uk/files/documents/ASH_93.pdf.

¹⁰¹ This figure is based on the assumption that the 9.1% of smokers make 9.1% of cigarette purchases.

¹⁰² In a recent survey published on 18 July 2008 in Independent Retail News (the UK's only fortnightly magazine written exclusively for owners/proprietors of independent grocery outlets who have ten stores or less), 781 retailers were asked "If the ban on display is enforced, do you think that it will further increase the trade in illegal tobacco (i.e. tobacco smuggling and counterfeiting)?" 605 retailers (77.5%) answered "yes" with 176 retailers (22.5%) answering "no".

¹⁰³ "In my view" editorial by David Rees, *Convenience Store*, 13 June 2008.

- ¹⁰⁴ www.burnleycitizen.co.uk/news/burnley/3595376.Nine_million_cigarettes_bound_for_East_Lancashire_seize_d/.
- ¹⁰⁵ http://www.acs.org.uk/en/info/document_summary.cfm/docid/8FAF39E2-93B6-41FF-9CD02CDFE4158428.
- ¹⁰⁶ Endnote 62 refers to “Towards a Future Without Tobacco: The Report of the Smoking Prevention Working Group”, Scottish Executive, Edinburgh.
- ¹⁰⁷ Paragraph 3.20, page 34 of “Towards a Future Without Tobacco: The Report of the Smoking Prevention Working Group.”
- ¹⁰⁸ Paragraph 3.84 of the FTC Document.
- ¹⁰⁹ See paragraph 2.4.4 of Fuller E. (2007). Smoking, Drinking and Drug Use Among Young People in England 2006. NHS Information Centre, Leeds: <http://www.ic.nhs.uk/webfiles/publications/smokedrinkdrug06/Smoking%20Drinking%20and%20Drug%20Use%20among%20Young%20People%20in%20England%20in%202006%20%20full%20report.pdf>.
- ¹¹⁰ *Drug use, smoking and drinking among young people in England in 2007*, Edited by Elizabeth Fuller (a survey carried out for the NHS Information Centre by the National Centre for Social Research and the National Foundation for Educational Research), launched on 17 July 2008: <http://www.ic.nhs.uk/statistics-and-data-collections/health-and-lifestyles-related-surveys/smoking-drinking-and-drug-use-among-young-people-in-england/drug-use-smoking-and-drinking-among-young-people-in-england-2007>.
- ¹¹¹ Paragraphs 3.18 to 3.21 of “Towards a Future Without Tobacco: The Report of the Smoking Prevention Working Group.”
- ¹¹² Paragraph 3.86 of the FTC Document.
- ¹¹³ Paragraph 3.86 of the FTC Document.
- ¹¹⁴ The survey published on 18 July 2008 in Independent Retail News; see further endnote 102 above.
- ¹¹⁵ See page 62 of the FTC Document.
- ¹¹⁶ Paragraphs 2.4 and 2.29 of the FTC Document.
- ¹¹⁷ http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary_ShowContent&propertyType=document&columns=1&id=HMRC_PROD1_025361.
- ¹¹⁸ See further http://ec.europa.eu/anti_fraud/budget/cig_smug/2007_en.html. The Agreement is available from: http://ec.europa.eu/anti_fraud/budget/cig_smug/cooperation_agreement.pdf and <http://www.jti.com/file.axd?pointerid=33745171048747bb92318379cc43e01e&fea4700464604fc8b88976adc1271f86>.
- ¹¹⁹ From the Commission President, José Manuel Barroso: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1927&format=HTML&aged=0&language=EN&guiLanguage=en>; the European Vice-President for Administrative Affairs, Audit and Anti-Fraud, Siim Kallas: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1927&format=HTML&aged=0&language=EN&guiLanguage=en>; and the President and CEO of JTI, Pierre de Labouchère: <http://www.jti.com/file.axd?pointerid=fab8c47e00ac4e19a24a184f9e17eb28&versionid=026e3e3ef0aa4d49ac5100a5f5e478bb>.
- ¹²⁰ *Office Européen de Lutte Anti-Fraude*, the European Union Anti-Fraud Office.
- ¹²¹ See further JTI’s “Sales Integrity Programs” (April 2008) (<http://www.jti.com/file.axd?pointerid=bc7c7f1c814644318b4d95c80e431b92&227f2757b26648e08367c968aa457da7>) (*JTI’s Sales Integrity Programs*).
- ¹²² Described further at page 12 of JTI’s Sales Integrity Programs.
- ¹²³ Described further at pages 13 to 15 of JTI’s Sales Integrity Programs.
- ¹²⁴ Described further at page 16 of JTI’s Sales Integrity Programs.
- ¹²⁵ See <http://www.ftc.org/index.php?item=illicit-trade>. FCTC Article 15(2)(b) considers a practical track and trace regime that would further secure the tobacco supply chain and assist industry and law enforcement agencies in the investigation and prevention of illicit trade, notably by identifying the point of diversion into illegal channels.
- ¹²⁶ Page 41 of <http://www.jti.com/file.axd?pointerid=024893e2aca7414b8c72a2a18fc31c7f>.
- ¹²⁷ http://ec.europa.eu/anti_fraud/budget/cig_smug/agreement_Gallaher.pdf.
- ¹²⁸ It is noted, however, that prior to the Agreement, Gallaher had been operating extensive supply chain controls and Know Your Customer operation control policies.
- ¹²⁹ http://goliath.ecnext.com/coms2/gi_0199-1609084/Gallaher-first-tobacco-manufacturer-to.html.
- ¹³⁰ See, for example, paragraph 3.79 of the FTC Document. See also House of Commons Questions (8 October 2007 [154507]), in which Angela Eagle (Exchequer Secretary to the Treasury in HM Treasury) stated: “Contact with the main UK tobacco manufacturers and exchange of information has been a key part of the success of the tackling tobacco smuggling strategy. Officials of HM Revenue and Customs have met regularly and frequently with UK tobacco manufacturers in each year since 2000 to discuss tobacco smuggling and other issues.”
- ¹³¹ Paragraph 3.9 and 5.6 of the 2006 Report.
- ¹³² Paragraph 4.6 of the 2006 Report.
- ¹³³ As identified in Gallaher’s letter to HMRC (Judith Kelly) on 18 February 2008.
- ¹³⁴ From March 2000, a key element of HM Treasury and HMRC’s Tackling Tobacco Smuggling Strategy has been to introduce fiscal marks on packs to make identification of contraband tobacco product easier: see paragraphs 3.6 and 5.10 of the 2006 Report. Following this, HMRC and UK tobacco manufacturers have jointly

examined a range of practical measures that could be implemented against counterfeit cigarettes, such as covert markings.

¹³⁵ <http://www.ftc.org/index.php?item=illicit-trade>.

¹³⁶ See further paragraphs 2.33 to 2.35 of the FTC Document.

¹³⁷ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004, see recitals 3 and 9.

¹³⁸ This reflects the fact that the plain packaging contemplated in the FTC Document would result in the packaging for each product sold being essentially the same, as: “*Except for the brand name (which would be required to be written in a standard typeface, colour and size), all other trademarks, logos, colour schemes and graphics would be prohibited.*” See Paragraph 3.64 of the FTC Document.

¹³⁹ It has also played an important role in prosecuting criminal gangs for the criminal offence of conspiracy, see further Section 1(1) of the Criminal Law Act 1977.

¹⁴⁰ For example, JTI is aware of over 20 individual incidents of counterfeit product being seized/identified in the UK which is labelled with the health warnings applicable to another EU Member State.

¹⁴¹ As a result, both counterfeiters and contraband operators would assume, correctly, that plain packaging would result in a significant increase in demand for illicit products.

¹⁴² <http://www.expressandstar.com/2008/01/26/cigarettes-seized-in-police-raid>.

¹⁴³ <http://www.independent.ie/national-news/customs-seize-illegal-cigarettes-worth-836431m-1277118.html>.

¹⁴⁴ www.customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ShowContent&id=HMCE_PROD1_026500&propertyType=document.

¹⁴⁵ Neither counterfeiters nor manufacturers of ‘cheap whites’ use tracking and tracing technologies.

¹⁴⁶ After unknowingly smoking a counterfeit product, a consumer might lay fault at the door of the legitimate brand owner, if the cigarette is of lower than expected quality.

¹⁴⁷ Paragraph 2.25 of the FTC Document.

¹⁴⁸ Paragraph 2.26 of the FTC Document.

¹⁴⁹ <http://www.archive.official-documents.co.uk/document/doh/tobacco/annex-k.htm>.

¹⁵⁰ Regulation 12 of the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002 (the **2002 Regulations**).

¹⁵¹ Regulation 12 of the 2002 Regulations.

¹⁵² Regulation 5(2)(b) of the 2002 Regulations.

¹⁵³ Regulation 3 of the 2002 Regulations.

¹⁵⁴ At paragraph 2.32, it is stated that “*There is no conclusive evidence that smoking smuggled tobacco is any more harmful to health than smoking legal, duty-paid tobacco. Research shows that emissions of tar and carbon monoxide from counterfeit tobacco are comparable to those from their legal equivalents*”.

¹⁵⁵ Page 13 of the HMRC’s 2004 Report on Counterfeit Cigarettes (http://www.hm-treasury.gov.uk/media/3/C/counterfeit_cigarettes_2004.pdf).

¹⁵⁶ Paragraph 4.12 of and Box 4.3 on page 14 of the 2006 Report.

¹⁵⁷ Paragraph 2.27 of the FTC Document.

¹⁵⁸ Paragraph 2.33 of the FTC Document.

¹⁵⁹ European Commission Taxation and Customs Union, 2001 “An evolving problem”, available at http://europa.eu.int/comm/taxation_customs/customs/counterfeit_piracy/index_en.htm.

¹⁶⁰ Paragraph 2.26 of the FTC Document, which makes reference to: “*HM Treasury and HMRC (2006). New responses to new challenges: Reinforcing the Tackling Tobacco Smuggling Strategy. HMSO, Norwich*”.

¹⁶¹ Data provided by the TMA to the Minister for Nationality, Citizenship and Immigration on 21 May 2008.

¹⁶² Paragraph 2.26 of the FTC Document.

¹⁶³ <http://www.the-tma.org.uk/tobacco-smuggling.aspx>.

¹⁶⁴ FTE is a ratio that represents the number of hours that an employee works to 40 hours. Full-time employment is generally considered to be 40 hours a week. An FTE is any combination of workers that combines to 40 hours per week and does not necessarily equate to headcount.

¹⁶⁵ <http://www.the-tma.org.uk/tobacco-smuggling.aspx>.

¹⁶⁶ <http://www.the-tma.org.uk/tobacco-smuggling.aspx>.

¹⁶⁷ See further the Independent Retail News magazine’s report of its latest annual ‘Smuggling Forum’, which took place on 22 May 2008. The Forum was attended by, amongst others, Paul Miller (HM Treasury), Judith Kelly (HM Revenue & Customs), Ian Howell (TMA), Katherine Graham (Tobacco Alliance), retail trade representatives and JTI.

¹⁶⁸ See HMRC “*Counterfeit Cigarettes 2004*” at page 24 (http://www.hmtreasury.gov.uk/media/3/C/counterfeit_cigarettes_2004.pdf).

¹⁶⁹ Paragraph 2.7 of the 2006 Report.

¹⁷⁰ Paragraph 2.31 of the FTC Document.

¹⁷¹ Paragraph 3.79 of the FTC Document.

- ¹⁷² The Tobacco Products (Manufacture, Presentation and Sale) (Safety) (Amendment) Regulations 2007, see http://www.opsi.gov.uk/si/si2007/uksi_20072473_en_2.
- ¹⁷³ Paragraph 2.38 of the FTC Document.
- ¹⁷⁴ http://www.pcs.org.uk/en/news_and_events/news_centre/archived_news.cfm/id/D66CF8B9-9046-459B-8D1ED4BE29895B8D.
- ¹⁷⁵ www.parliament.the-stationeryoffice.co.uk/pa/cm200607/cmselect/cmtreasy/192/7012412.htm.
- ¹⁷⁶ www.parliament.the-stationeryoffice.co.uk/pa/cm200607/cmselect/cmtreasy/192/7012412.htm.
- ¹⁷⁷ <http://www.thisisgrimsby.co.uk/displayNode.jsp?nodeId=151901&command=displayContent&sourceNode1151727&contentPK=20945921&folderPk=86530&pNodeId=151458>; <http://nds.coi.gov.uk/content/detail.asp?NewsAreaID=2&ReleaseID=346173>.
- ¹⁷⁸ These additional public policy objectives are set out at paragraph 3.23 of the Consultation.
- ¹⁷⁹ Paragraph 23 of the Department of Health Consultation on under-age sale of tobacco: http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_4139361.
- ¹⁸⁰ The ‘standard scale’ means the standard scale of maximum fines for summary offences as set out in s.37 of the [Criminal Justice Act 1982. Level 3 is set at £1,000](#).
- ¹⁸¹ Level 5 is set at £5,000.
- ¹⁸² Lord Darzi, the Parliament Under Secretary of State to the Department of Health in response to a written question on 7 January 2008.
- ¹⁸³ Lord Bach speaking for the Government in the House of Lords Debate on the Criminal Justice and Immigration Bill.
- ¹⁸⁴ <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80312-0005.htm>.
- ¹⁸⁵ Fuller E. (2007). “Smoking, Drinking and Drug Use Among Young People in England 2006. NHS Information Centre, Leeds”: <http://www.ic.nhs.uk/webfiles/publications/smokedrinkdrug06/Smoking%20Drinking%20and%20Drug%20Use%20among%20Young%20People%20in%20England%20in%202006%20%20full%20report.pdf>.
- ¹⁸⁶ Emery S. et al. 1999. “How adolescents get their cigarettes: implications for policies on access and price”, J. Nat. Cancer Inst. 91(2), 184-186.
- ¹⁸⁷ Licensing (Young Persons) Act 2000 - www.opsi.gov.uk/Acts/acts2000/ukpga_20000030_en_1.
- ¹⁸⁸ www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80312-0002.htm#0803128000005.
- ¹⁸⁹ Populus, Tobacco Alliance Results Summary, May 2008 (<http://www.populuslimited.com/tobacco-alliance-smoking-survey-180508.html>) (further detail about this survey is set out at endnote 87 above)
- ¹⁹⁰ Paragraph 3.93 of the Consultation.
- ¹⁹¹ See “Youth Alcohol Action Plan”, June 2008.
- ¹⁹² Section 149 of the Licensing Act 2003.
- ¹⁹³ Licensing (Scotland) Act 1976, s.68.
- ¹⁹⁴ Licensing (Northern Ireland) Order 1996.
- ¹⁹⁵ www.dh.gov.uk/en/Publicationsandstatistics/Pressrelease/DH_4010429.
- ¹⁹⁶ www.dh.gov.uk/en/Publicationsandstatistics/Pressrelease/DH_4010429.
- ¹⁹⁷ Gallaher Group plc, Corporate Responsibility Review 2004, page 23.
- ¹⁹⁸ Populus, Tobacco Alliance Results Summary, May 2008 (<http://www.populuslimited.com/tobacco-alliance-smoking-survey-180508.html>) (further detail about this survey is set out at endnote 87 above).
- ¹⁹⁹ Better Regulation Executive (2006). “The Tools to Deliver Better Regulation, Revising the Regulatory Impact Assessment: A Consultation”, Cabinet Office, London at page 9.
- ²⁰⁰ Confusingly, the options are given different numbers in the body of the FTC Document (Option One: do nothing; Option Two: regulate point of sale display more strictly; and Option Three: display ban) and the RIA (Option One: do nothing; Option Two: display ban; Option Three: further restrictions but not a complete prohibition).
- ²⁰¹ <http://www.berr.gov.uk/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44260.html>.
- ²⁰² Page 36 of the FTC Document.
- ²⁰³ Better Regulation Executive (2006). “The Tools to Deliver Better Regulation, Revising the Regulatory Impact Assessment: A Consultation”, Cabinet Office, London at page 7.