



Response to the Oireachtas Joint  
Committee on Health and Children  
Request for Written Submissions on the  
Outline Heads of the Public Health  
(Standardised Packaging of Tobacco)  
Bill 2013

**JTI IRELAND LIMITED**

*15<sup>th</sup> January, 2014*

## 1. JTI'S EXPERIENCE OF PLAIN PACKAGING

JTI's views on the potential impacts of plain packaging are based on our experience of how competition between branded consumer goods works in Ireland, our review of the evidence base relied upon in support of plain packaging, as well as the independent opinions of leading experts, one of which is annexed to this submission (i.e. Professor Steinberg's 7 January 2014 letter to Sir Cyril Chantler in the UK) while other reports commissioned on behalf of JTI and referenced below have been made publicly available and can be accessed at <http://www.jti.com/how-we-do-business/key-regulatory-submissions/> ((a) the reports of Professors Devinney and Steinberg, (b) Professor Cave's Report, (c) Professors Dhar and Nowlis' Report, (d) Dr Keegan's Reports, (e) Dr Lilico's Reports and (f) Professors Zimmerman and Chaudhry's Report).

JTI explains in this submission the scope of this expert evidence and why it needs to be taken into account by the Committee to have a thorough and comprehensive understanding of materials of potential relevance to the question of plain packaging.

## 2. EXECUTIVE SUMMARY

- Tobacco products carry risks to health and JTI believes that appropriate and proportionate regulation is both necessary and right. Minors should not smoke and should not have access to tobacco products. JTI believes that everyone should be appropriately reminded about the health risks of smoking.
- JTI is categorically opposed to plain packaging.
- There is no evidence that plain packaging is likely to have actual positive public health impacts (despite repeated and sustained attempts to produce this evidence).
- No evidence has emerged from Australia, where plain packaging has been in place for over a year, showing that plain packaging has changed the rate of decline in smoking or has had any positive impact at all on smoking behaviour.
- Dail Reform and Government policy require that a Regulatory Impact Assessment (“RIA”) should be completed and published before this plain packaging proposal progresses any further. This should take account of all relevant factors and be based on credible evidence, before deciding on the measure.
- The European Commission (“Commission”) did not include plain packaging in the revised Tobacco Products Directive (“TPD2”) put forward in 2012. A European Parliament amendment to introduce plain packaging into the Directive was rejected in October, 2013. On 18 December 2013, the EU Council of Ministers stated that any Member State considering the introduction of plain packaging will need to justify such a measure given the high level of public health protection the EU expects to achieve from the proposed Directive.
- Ireland has previously submitted to the Commission “*that the introduction of generic or plain packaging must be based on the basis of robust evidence. If such a measure is to be introduced, it should be mandatory and there should be a harmonized approach across*

*Europe.*” For Ireland to proceed now with plain packaging in isolation and in the absence of evidence flies in the face of this submission.

- Plain packaging represents an extraordinary deprivation of and unjust attack on JTI’s most valuable assets – its brands and its trade marks. Plain packaging would also unjustifiably infringe fundamental legal rights, including those protected under our Constitution, the European Convention of Human Rights and EU law.
- While plain packaging will not achieve actual public health benefits, it will cause serious negative impacts in Ireland. In particular, it will cause retailer and consumer confusion, damage competition and market dynamics and will fuel the unregulated trade in illicit tobacco in Ireland.
- Given these widespread negative effects, it is critical that the Committee does not consider this proposal in isolation. Other relevant Committees such as Foreign Affairs & Trade, Enterprise, Justice and Finance should also hold committee hearings to discuss the areas within their remit which will be significantly impacted by this measure.
- JTI draws to the attention of the Committee alternative regulatory solutions to achieve actual positive public health impacts (as they address the key methods by which minors access tobacco products).
- As JTI is fundamentally opposed to the concept of plain packaging for all of the reasons outlined in this submission, JTI’s submission is made in its entirety and repeated in respect of each Head of Bill which deals in whole or in part with plain packaging.

### **3. RECOMMENDATIONS**

- We recommend that no further steps are taken to advance plain packaging in Ireland for the reasons set out in this submission (primarily, plain packaging will not work). Less restrictive, more targeted and proportionate alternative solutions are available and should be seriously considered given their significant potential to achieve immediate actual public health benefits.
- If this recommendation is not followed, we urge the Committee to call for an independent and objective RIA to be completed and published without further delay. Properly conducted, such an RIA could only reasonably conclude that plain packaging will not work while other more proportionate measures are more likely to be effective.

### **4. PRELIMINARY OBSERVATIONS AND INTRODUCTION**

#### **Preliminary Observations**

- 4.1 On 20 December 2013 the Oireachtas Joint Committee on Health and Children (“the Committee”) invited written submissions from interested parties in respect of its consideration of the Outline Heads of the Public Health (Standardised Packaging of Tobacco) Bill 2013 (the “Bill”) (the “Request for Submissions”).
- 4.2 The Request for Submissions invites submissions on a Head by Head basis. As the aim of the Bill is stated to be to introduce plain packaging for all tobacco products, the Heads of Bill (with the exception of Heads 6 and 9 and part of Head 10) merely

contain the details by which that aim is to be achieved and plain packaging introduced and enforced. As JTI is fundamentally opposed to the concept of plain packaging for all of the reasons outlined in this submission, JTI's submission is made in its entirety and repeated in respect of each Head of Bill which deals, in whole or in part, with plain packaging.

- 4.3 In so far as Heads 6, 9 and 10 (7) are concerned, these are stated in the Bill to be reflective of the Commission's TPD2 proposals and in particular that warnings should cover 65% of packs. JTI considers that the measures proposed by the Commission are unnecessary and unjustified and refers the Committee to JTI's January 2013 submission to the Department of Health and Children ("DoHC") in response to its request for submissions on the proposal for TPD2 and to JTI's Full Response, dated 16 December 2010 to DG SANCO's Consultation on the possible revision of the Tobacco Products Directive 2001/37/EC.
- 4.4 Throughout this submission we refer to various experts' reports and JTI submissions. These are all publicly available on our website [www.jti.com](http://www.jti.com) (with the exception of Professor Steinberg's January 2014 letter to the plain packaging review being conducted by Sir Cyril Chantler in the UK (annexed) and the January 2013 JTI submission, which we would be happy to make available to you on request). If the Committee requires hard copies of any of the material on our website we can arrange for these to be provided to you.
- 4.5 In this submission we have set out a non-exhaustive list of key concerns we have about the Bill. We reserve fully our right to develop these further and/or raise other matters at any time in the future.

## **Introduction**

- 4.6 JTI Ireland Limited is a member of the Japan Tobacco International group of companies, a leading international tobacco product manufacturer. JTI is the leading tobacco company in Ireland. Based in Dublin, JTI directly employs more than 100 people nationwide, directly supplies 3,700 retailers and generated more than €650 million in 2012 in taxation for Ireland's Exchequer. Tobacco continues to be a key revenue generator for the State with approximately 24% of total excise collected in 2012 coming from tobacco.<sup>1</sup>
- 4.7 Tobacco products carry risks to health, and JTI believes that appropriate and proportionate regulation is both necessary and right. JTI believes that everyone should be appropriately reminded about the health risks of smoking. JTI shares a common goal with the Irish Government that minors should not smoke, and should not be able to obtain tobacco products. These core principles are central to our Code of Conduct, Global Marketing Standards, operational policies and the way JTI does business.<sup>2</sup>
- 4.8 Tobacco is a legal product, and manufacturers compete among themselves for their share of the legal tobacco market. JTI acts with openness and transparency about the products adult smokers choose to purchase. Adults who choose to smoke are entitled to be treated fairly, and have the right to choose the product they prefer.
- 4.9 JTI is categorically opposed to plain packaging. No credible evidence whatsoever exists that such a measure would result in a reduction in incidence of smoking in Ireland. This is despite repeated and sustained attempts by those in favour of plain packaging to produce such evidence. No evidence has emerged from Australia, where plain packaging has been in place for over a year, showing that plain packaging has changed the rate of decline in smoking or has had any actual behavioural impact at

all. Some proponents of plain packaging have also conceded that plain packaging will have no positive impact on existing smokers who wish to quit. Most recently (on 8 January 2014), this has been acknowledged (in surprisingly frank terms) by the Head of the British Lung Foundation Scotland: “*It won’t make smokers quit. We know that. Nobody has claimed it will*”.<sup>3</sup>

- 4.10 Given the severity and the significance of the measure proposed, and its disproportionate impact on specific groups, it is particularly important that a thorough analysis takes place of all relevant factors, based on credible evidence, before deciding on the measure. A key principle of Better Regulation is the need for evidence based policy. According to Dail Reform, a full RIA must be completed and published prior to the drafting of any Heads of Bill and before the new pre-legislative consultation phase can be commenced by the relevant Oireachtas Committee.<sup>4</sup> Furthermore, the Programme for Government, March 2011, made a commitment that Government Departments will be required to carry out and publish RIAs before Government decisions are taken. This has not happened in the case of the proposal for standardised packaging of tobacco products. Despite the publication of the Heads of Bill, an RIA has yet to be completed on the proposed Bill.
- 4.11 Plain packaging represents an extraordinary deprivation of and unjust attack on JTI’s most valuable assets – its brands and trade marks. Plain packaging would unjustifiably infringe fundamental legal rights to property, freedom of expression and trade that are protected by: the Irish Constitution, the European Convention on Human Rights, EU Treaties, international trade treaties, intellectual property laws, including the World Trade Organisation Agreements on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), and on Technical Barriers to Trade (“TBT”), and the World Intellectual Property Organisation’s Paris Convention for the Protection of Intellectual Property (“Paris Convention”). Plain packaging would effectively destroy the value of JTI’s very valuable trade marks and branding which would be manifestly disproportionate.
- 4.12 There is no reliable evidence that plain packaging will achieve public health benefits. It will not lead to a change in actual smoking behaviour, either by way of preventing minors, or indeed adults from smoking or increased smoking cessation among minors or adults. This is unsurprising as it is wrong to assume that packaging influences smoking behaviour, particularly of minors. The Minister has referred in response to parliamentary questions on the issue, to one review in particular “Plain Tobacco Packaging: A Systematic Review” (Moodie et al) (the “Systematic Review”), which was commissioned by the UK Department of Health (section 7 of this document refers in more detail to the Systematic Review and the 2013 update to it, together “the Systematic Reviews”)<sup>5</sup>. The Systematic Reviews, which were written by a small number of tobacco control advocates, are not reliable or convincing. The methodology is flawed. Not a single study can be pointed to in the Systematic Reviews which demonstrates that plain packaging is likely to achieve actual public health benefits. Furthermore, the individual surveys underlying the ‘systematic’ reviews test what people say they will do rather than what they actually do.<sup>6</sup>
- 4.13 Only Australia has adopted plain packaging legislation, effective 1 December 2012. This legislation is currently the subject of challenges at the World Trade Organisation (WTO) and in international arbitration proceedings under the Hong Kong-Australia Bilateral Investment Treaty. As mentioned, no evidence has emerged from Australia that this measure has had any impact on reducing smoking incidence or a reduction in minors smoking.

- 4.14 JTI understands that the Australian authorities have not conducted any official review to assess whether plain packaging has had an impact on the Australian illicit tobacco trade since its introduction in December 2012. However, a number of recent developments in Australia reinforce JTI's serious concern that plain packaging will fuel the illicit trade. A report published by KPMG in October 2013, "*Illicit tobacco in Australia*",<sup>7</sup> suggests an increase in consumption of contraband cigarettes has taken place between June 2012 and June 2013. Further, this report suggests that the presence of illicit whites<sup>8</sup> (which was almost non-existent in pre-plain packaging Australia) has grown since plain packaging came into force.<sup>9</sup>
- 4.15 Only last month agreement was reached in principle by Member States of the EU and the European Parliament on TPD2. While JTI believes that many of the proposed measures are unnecessary and unjustified, it is only right for Member States to wait until the full extent of any changes envisaged by TPD2 are known before taking further steps, as this measure, if implemented and valid as a matter of EU law will fundamentally change how packs are labelled and sold in Ireland.
- 4.16 You will also be aware that the Commission did not include plain packaging in TPD2 in 2012. The European Parliament rejected in October, 2013 a proposed amendment to introduce plain packaging in TPD2 and, as recently as 18 December 2013 the European Council of Ministers stated that any Member State considering the introduction of plain packaging is required to satisfy certain conditions and engage with the Commission. It has also been reported that a Commission spokesperson has stated that any such plans would require a Member State "*to put together a file detailing why plain packaging would mean additional impact on health*".<sup>10</sup> The spokesperson also added that the first results from Australia on plain packaging should be published. If Ireland does decide to proceed the Committee will be aware that any proposal will also need to take account of the high level of protection the Commission expects to achieve through TPD2. Indeed in this context it is worth noting that in Ireland's submission to the revision of the Tobacco Products Directive consultation in 2010 the DoHC stated in relation to plain packaging: "*we support option 3 in principle but recommend that the introduction of generic or plain packaging must be on the basis of robust evidence. If such a measure is to be introduced, it should be mandatory and there should be a harmonized approach across Europe.*" It is difficult to reconcile this with the proposal that Ireland now proceed with plain packaging.
- 4.17 Plain packaging would have serious and widespread negative impacts, including:
- Creating consumer and retailer confusion, as they will not be able to differentiate effectively between brands in the supply chain and at point of sale, seriously eroding the legal entitlements of consumers to information about products legally available on the market;
  - Damaging competition and market dynamics, and raising barriers to entry. Plain packaging would lead to down trading and, where price becomes more important as a product differentiator, barriers for new brands and products are created. Particularly given the retail display ban in Ireland, existing adult smokers are going to be even more likely to request and purchase only those brands and products familiar to them. As a result of increased market concentration, smaller players and products would be prevented from entering or driven out of the market;
  - Increasing the availability of non-duty paid tobacco and reducing tax collected: counterfeit and illicit white products will become easier to make,

distribute and sell. Criminals would be able to sell a product in the branded packaging that its legitimate owners can no longer use. The illicit trade in Ireland is already at alarmingly high levels. Revenue estimate it to be 20% and our industry statistics would indicate it is closer to 28% of all tobacco consumed in this country;

- Ending pack innovation: Counterfeiting of tobacco products has effectively been eliminated in Ireland largely due to manufacturers' packaging innovations. Mandating pack specifications will effectively give a blueprint to criminals on how to copy every pack undoing years of work by manufacturers to eliminate this problem. Illicit traders are not regulated, do not comply with legislation regarding tobacco specifications and will sell to anyone regardless of age;
- Leading to significant losses in business and reduction of workforce for tobacco industry suppliers currently involved in designing and making packaging; and
- Creating a precedent for plain packaging across a whole range of consumer products.

4.18 There are less restrictive, more targeted and proportionate alternative solutions available to address the legitimate public health objective of seeking to ensure that minors do not smoke and are not able to obtain tobacco products. Some of these solutions have been adopted by other jurisdictions:

- Administrative sanctions for the purchase or attempted purchase, and the consumption, of tobacco products by minors;
- Reinforcing retail access prevention measures, such as the 'Show Me I.D – Be Age Ok' programme;
- Greater resources and man power for effective, targeted enforcement strategies; and
- Strengthening targeted public information campaigns to quickly and effectively raise awareness of negative licensing scheme and the criminalisation of proxy purchasing by adults for minors.

4.19 The alternative solutions listed above are likely to be effective when evaluated against Better Regulation principles and studies exist to support their efficacy.

4.20 For all of these reasons, the Bill should not be enacted into law.

4.21 JTI would welcome the opportunity to meet to share our views and opinions at the upcoming Committee Hearings on the proposed Bill. Given the many negative consequences of the Bill, we also would urge that relevant committees such as Foreign Affairs & Trade, Enterprise, Justice and Finance also hold similar hearings on this topic as many areas within their remit will be affected by the introduction of plain packaging, some of which we have highlighted below.

## 5. BETTER REGULATION

- 5.1 Evidence-based policy is public policy informed by rigorously established credible evidence. Credible evidence and analysis can play a useful, even decisive, role in informing policy-makers' judgements. Using credible evidence can also condition the political environment in which these judgements can be made. Without evidence, policy makers fall back on intuition, ideology or conventional wisdom. No credible evidence whatsoever has been advanced that plain packaging would lead to any actual positive public health impacts beyond and in addition to pre-existing trends in the decline in smoking consumption and prevalence in Ireland over time.
- 5.2 Evidence based policy, applying the fundamental principles of Better Regulation, has not been respected in the case of this proposed legislation. An RIA is required before the publication of Heads of Bill on any proposed legislation and to date no RIA has been completed and published on plain packaging. The absence of an RIA, which would examine all of the available evidence, creates a significant void in the information available to the Committee in its deliberations. We submit that an objective and evidence based RIA would conclude that there is no evidence that plain packaging will have an actual positive impact on public health. It would highlight for the Committee evidence based, targeted and proportionate alternatives more likely to achieve the legitimate public health objective of seeking to ensure that minors do not smoke and are not able to obtain tobacco products, and which would not carry the many negative side effects and hidden costs of this proposal. JTI questions if it is possible for the Committee or Government to properly assess this proposal in the absence of an objective and thorough RIA.
- 5.3 In this context, JTI notes the stated objectives of the Bill (Head 3) as being, to
- a) *“reduce the appeal of tobacco and tobacco products”;*
  - b) *“increase the effectiveness of health warnings on tobacco products”;* and
  - c) *“reduce the ability of the packaging of tobacco and tobacco products to mislead consumers about the harmful effects of smoking...”.*
- 5.4 As noted above, JTI supports evidence-based policy that is designed to meet appropriate and proportionate public health objectives. The stated objectives of the Bill do not appear to be directly referable to/dependent upon actual changes in smoking behaviour. The objectives of the Bill are not founded upon credible evidence. They cannot, of themselves, be appropriate and/or proportionate objectives.

### **“Appeal” is not a proper policy objective**

- 5.5 In order for legislative measures on tobacco control to correspond to the principles of Better Regulation, such measures must be (amongst other things) necessary to achieve a legitimate public policy objective. It is neither appropriate nor legitimate to frame a public health policy objective on such an arbitrary concept such as the “appeal” of tobacco products.
- 5.6 Reducing the “appeal” of tobacco products to consumers per se is not, and cannot be, a self-standing justification for tobacco regulation. It fails established “issue definition” criteria: it is lacking in any evidential foundation and is inherently uncertain and arbitrary<sup>11</sup>. Basing policy on the “appeal” of tobacco products cannot advance the plain packaging debate or justify its introduction.



- 5.7 Furthermore, the DoHC has also failed to explain whether plain packaging may be seen by minors as rebellious, thereby undermining its goals for the Bill. Given the tendency of minors to engage in risk-taking behaviour (as the views of Professor Steinberg, detailed at section 6, explain) and the views previously expressed by other regulators (see in this context, paragraphs 3.12 to 3.13 of JTI's recent submission to the Chantler Review<sup>12</sup> in the UK), this is a serious concern that merits detailed consideration.

#### **No evidence that increasing the prominence of health warnings will affect smoking behaviour**

- 5.8 It is unclear what is actually meant by the purported goal of “*increas[ing] the effectiveness of health warnings on tobacco products*”. However, there is already a very high level of awareness of the health risks of smoking in Ireland amongst those over and under 18. JTI supports the continued provision of information to consumers about the health risks of smoking in order to ensure that smokers continue to be reminded of those risks. That said, increasing the prominence or salience of health warnings on tobacco packaging is not, of itself, a legitimate public policy goal capable of justifying a plain packs measure as it does not relate to behavioural change.

- 5.9 ‘Noticing’ something, particularly something one knows already – such as a health warning on a tobacco product – does not necessarily translate into a change in actual smoking behaviour by consumer survey respondents. In his January 2014 letter to Sir Cyril Chantler (annexed), Professor Steinberg noted the following:

*“A frequently-stated goal of standardized packaging is to make on-package health warnings more salient. However, as already noted, it is abundantly clear that adolescents are aware of and understand the risks of smoking and know that it has harmful long-term health consequences. It is simply that they privilege short-term reward over long-term risk and are more susceptible to making decisions about smoking experimentation “in the moment” and under the influence of their peers. Therefore, even if standardized packaging were shown to increase the prominence of health warnings, this would in my view have no influence on adolescent experimentation with, or use of, tobacco products.”*

- 5.10 The DoHC has not demonstrated that plain packaging would in fact enhance the ‘visibility’, ‘prominence’ or ‘salience’ of health warnings, but, even if it did, the DoHC has not even attempted to demonstrate that, via this mechanism, plain packaging would actually result in changes to smoking behaviour (such as reducing smoking uptake by minors or preventing their progression from experimentation to regular use). Again, it is only that change in actual smoking behaviour by minors which the DoHC can claim as a legitimate public health objective in this context.

#### **Tobacco packaging does not mislead consumers**

- 5.11 Existing law prevents the misleading use of packaging for consumer goods, including tobacco products<sup>13</sup>. Indeed, there are specific rules prohibiting the use of misleading terms on tobacco product packaging<sup>14</sup>.
- 5.12 Despite this, the Bill seeks to “reduce the ability of the packaging of tobacco and tobacco products to mislead consumers about the harmful effects of smoking in the public interest”. However, in disregard of the basic tenets of Better Regulation, there is no explanation of how current tobacco packaging is said to mislead Irish consumers, or indeed why the existing law is not adequate to address such issues. In fact, the DoHC ignores not only the fact that consumer responses to colour are

subjective, so it is meaningless to state that a particular colour signifies one thing or another, but also that regulators and courts faced with this issue have rejected the argument that the use of colours give the impression that a particular tobacco product is less harmful than another<sup>15</sup>. Paragraphs 15.37 to 15.43 of JTI's Full Response dated 16 December 2010 to the EU Consultation on a revision to the Tobacco Products Directive explain in greater detail why it is wrong to assume that tobacco packaging misleads consumers<sup>16</sup>.

## 6. TOBACCO PACKAGING

### Tobacco packaging is not a predictor of smoking behaviour

6.1 Smoking is an adult choice, and JTI believes in openness and transparency about the products adult smokers choose to purchase. Packaging is one of the essential and, in Ireland, one of the few remaining components of brand competition: it is the means by which adult smokers identify, obtain information about and choose tobacco products, easily and without confusion. Further, distinctive product packaging is fundamental to facilitate inter- and intra-brand<sup>17</sup> navigation and competition, and is the primary tool for developing brand equity, innovation and non-price competition. Manufacturers and consumers must be able to identify and distinguish products. This is an essential function of packaging and trade marks.

6.2 Tobacco Packaging:

- a) ***enables consumer choice and information:*** packaging supports branding, facilitates greater product variety and information, and thereby increases consumer choice;
- b) ***reaffirms brand equity and identity:*** in Ireland, packaging is one of the last remaining, and therefore an essential, means by which JTI identifies and differentiates its products. The erosion of the brand equity that JTI has built up and which is currently attributable to JTI's packaging and brands will create a disproportionate impact on JTI as a premium brand owner. Most existing consumers are ready to pay a premium to purchase goods bearing a trade mark that they associate with a guarantee of quality and origin. The introduction of standardised packaging of tobacco products will only serve to reduce the premium value of JTI's brands;
- c) ***supports product innovation:*** JTI innovates its packaging design and conveys information to consumers, on the pack, about product changes and improvements;
- d) ***maintains quality standards:*** packaging serves as a symbol to consumers that JTI stands behind its products. In the case of brands belonging to global companies, the brand also helps provide reassurance to customers that the manufacturer respects international norms, for instance, fair working conditions and respect for the natural environment. It protects consumers as it provides an incentive for manufacturers to preserve the integrity of their products;
- e) ***assists intermediate distributors and retailers:*** distinctive product packaging facilitates the product supply and stocking processes; and

- f) ***inhibits illegal activity***: distinctive packaging complicates the manufacture of counterfeit products.
- 6.3 In understanding why packaging is not a predictor of smoking behaviour, two key points flow from the pre-existing independent research/analysis of leading experts (notably Professors Steinberg<sup>18</sup>, Dhar and Nowlis<sup>19</sup>) as to how the smoking behaviour of adults and minors should best be understood on the basis of contemporary scientific thinking.
- 6.4 First, measures to reduce smoking among minors will only be effective if they control minors' ability to obtain tobacco products and remove cigarettes from the social networks of teenagers. Access-based solutions take due account of the fact that minors are *naturally* more prone to risk-taking behaviour than adults. As Professor Steinberg explains, decision-making during adolescence is characterised by a heightened emphasis on rewards over risks; a tendency to focus on the immediate, rather than longer term, consequences of a decision; a susceptibility to peer influence; and weaker self-regulation. Minors are well aware of the health risks of smoking, but may choose to experiment anyway. Taken together, these factors explain why a psychological profile characterised by sensation-seeking, peer and family influence (i.e., peers and family members who smoke) and the availability of cigarettes are the main risk factors for smoking. Accordingly, measures focused on packaging are unlikely to be effective.
- 6.5 Secondly, measures directed at adult smoking behaviour need to target adults' decision-making at the point of consumption in order to be effective, taking due account of the analysis that adults employ when making decisions about risk. They would also need to be more individualised and positively framed, in the light of the triggers to smoking behaviour. Professors Dhar and Nowlis therefore dismiss the likely effectiveness of interventions that reflect the so-called 'traditional model' of consumer decision-making, which is based on the notion that rational consumers will shift their smoking behaviour based on their evaluation of information on the health risks of smoking.
- 6.6 JTI notes that Professor Steinberg has recently reaffirmed his view that plain packaging is not likely to be an effective means of reducing smoking initiation among minors or their progression from experimentation to regular use. In 2010, Professor Steinberg concluded that "...there is no evidence that changes in cigarette packaging affect adolescents' experimentation with or use of cigarettes...The impact of changes in cigarette packaging on adolescent smoking is, at best, likely to be very small." (Paragraph 75 of Professor Steinberg's 2010 Report). Professor Steinberg's 7 January 2014 letter to the plain packaging review being conducted by Sir Cyril Chantler in the UK (annexed) explains that his view remains unchanged today, despite the further studies published since 2010 (which he has reviewed) and the introduction of plain packaging in Australia. In short, that letter states:
- a) He is aware of "*no scientific evidence that suggests, nor would [his] understanding of the current research on adolescent decision-making suggest, that cigarette packaging is relevant to adolescents' decisions to experiment with or continue smoking*".
  - b) Minors who smoke are more likely to ask someone else to buy cigarettes for them rather than try to buy them in shops, or to obtain them from friends or family. Professor Steinberg considers that "*the ways in which adolescents, who may be experimenters or irregular users, and adults, who are likely to be regular smokers, obtain cigarettes are very different, which diminishes*

*the reach and force of policies aimed at regulating how cigarettes are packaged”.*

- c) It is “*abundantly clear*” that adolescents are aware of and understand the risks of smoking and know that it has harmful long-term health consequences. Therefore, even if plain packaging was shown to increase the prominence of health warnings, Professor Steinberg’s view is that this would “*have no influence on adolescent experimentation with, or use of, tobacco products*”.
  - d) Finally, measures like plain packaging are unlikely to be effective if they are easily undermined by those they seek to protect: “*Those adolescents who may find standardized packaging less appealing are most likely to take measures to personalize their packages similar to the way many adolescents do for their smartphones. There has been a sharp rise in sales of such personalized cases or labels since the introduction of graphic health warnings or standardized packaging (in Australia).*”<sup>20</sup>
- 6.7 Such analysis accords with the UK Department of Health funded research which notes that: “*Current approaches to combat smoking which highlight its health risks may be ineffective for [young people], as health messages are known to have little salience for children and young people ... Approaches that inhibit young people’s ability to obtain tobacco may therefore be more appropriate for preventing smoking in this age group*”.<sup>21</sup>
- 6.8 Smoking-related health messages are available from a variety of different sources and media, including on-pack health warnings, and consumers are well aware of the health risks of smoking. In 2011, JTI created a website, [www.nosafecigarette.com](http://www.nosafecigarette.com), with information to reinforce the message that no cigarette is safe, and to clarify any misconceptions that consumers may have on that basis.
- 6.9 Finally, evidence from UK Government on the predictors of smoking should not be ignored by the Committee. This evidence does not include packaging among the predictors of smoking.<sup>22</sup> The analysis of the Department of Health in the UK therefore corroborates the expert research on which JTI relies.

## **7. NO EVIDENCE PLAIN PACKAGING IS LIKELY TO ACHIEVE ACTUAL PUBLIC HEALTH BENEFITS**

- 7.1 There is no reliable evidence that plain packaging has achieved/is likely to achieve actual public health benefits. Expert research and analysis makes clear that:
- a) the assumption that packaging changes smoking behaviour, particularly of minors, is wrong and is not supported by the research; and
  - b) the survey evidence relied upon by the proponents of plain packaging to suggest that “plain packaging works” (including that in the Systematic Reviews<sup>23</sup>) is incapable of constituting reliable research evidence of the likely impact of plain packaging on actual smoking behaviour.
- 7.2 JTI’s view in this regard is, in particular, based upon the following expert research/analysis:<sup>24</sup>

- a) Professor Devinney's 2014 Report<sup>25</sup> which specifically addresses the evidence base which the Minister for Health referenced in response to parliamentary questions, the Systematic Review. Professor Devinney has concluded that the current evidence base is insufficient to justify the conclusion that plain packaging is likely to have any impact on actual smoking behaviour. He bases this conclusion on the fact that, when considered collectively, the studies examined suffer from serious limitations as a body of scientific research.
- b) Professor Steinberg's 2010 Report<sup>26</sup> (which is reinforced by Professor Steinberg's 7 January 2014 letter to Sir Cyril Chantler), is based upon his considerable expertise in the area of adolescent judgment, decision-making, and risk-taking.<sup>27</sup> In respect of the question whether plain packaging is likely to have any actual positive public health impacts, Professor Steinberg explains that: *"Measures to prevent or reduce youth smoking are only likely to be effective if they are informed by scientific research on risk-taking and decision-making in this age group. I know of no scientific evidence that suggests, nor would my understanding of the current research on adolescent decision-making suggest, that cigarette packaging is relevant to adolescents' decisions to experiment with or continue smoking"*.

7.3 To ensure that the Committee has a thorough and comprehensive analysis of materials of potential relevance to the question of the (potential) impacts of plain packaging it should also take into account the following experts' reports:<sup>28</sup>

- a) Professor Cave's Report,<sup>29</sup> which concludes that the evidence base needed to justify introducing plain packaging should be the best available, reliable and needs to include a careful assessment of whether equally effective and more targeted measures should be applied first.
- b) Professors Dhar and Nowlis' Report, which concludes that plain packaging is unlikely to be effective as a means to reduce smoking and encourage quitting by adults.<sup>30</sup>
- c) Dr Keegan's Reports (between the two of them, Professor Devinney and Dr Keegan have independently as experts reviewed the publicly available consumer survey studies relevant to plain packaging and found that they do not constitute reliable evidence that plain packaging will change actual smoking behaviour, either by preventing minors from smoking or by increasing smoking cessation among minors or adults).<sup>31</sup>
- d) Dr Lilico's 2012 Report which, in respect of the question whether plain packaging is likely to have any negative public health impacts, anticipates that a market reaction to the plain packaging would be large scale down trading into lower price products.<sup>32</sup>
- e) Professors Zimmerman and Chaudhry's Report, which concludes that plain packaging will have negative public health impacts as it will worsen the illicit trade in tobacco products by opening up a number of new opportunities for illicit traders while making it more difficult for consumers, retailers and law enforcement agencies to differentiate between genuine and fake packs.<sup>33</sup>

7.4 A significant number of consumer surveys have been conducted which seek to demonstrate what the reactions of people to plain packaging might be. These surveys are often relied upon by the proponents of plain packaging to suggest that "plain

packaging works”. In the case of the Systematic Reviews, the studies are batched in an attempt to try and compensate for their individual failings. These surveys (individually or collectively) are incapable of constituting reliable research evidence of the likely impact of plain packaging on actual smoking behaviour. That is made clear by expert analysis of what those surveys in fact show and of their methodological reliability.

- 7.5 Expert research makes clear that there is no reliable evidence (whether in the Systematic Reviews or elsewhere) to suggest that banning branded packaging is likely to lead to a change in actual smoking behaviour, either by way of a reduction in smoking uptake by minors or increased smoking cessation among minors or adults.
- 7.6 In this context, in August 2012, a senior US Federal Court of Appeal, when evaluating the evidence in support of the introduction of larger pictorial health warnings on packs in the US, noted that “*it is mere speculation to suggest that respondents who report increased **thoughts** about quitting smoking will actually follow through on their intentions*” (emphasis in original).<sup>34</sup> The US Government did not appeal the ruling which struck down the health warnings and instead restarted the legislative process. Similarly, the Government should not proceed with plans for plain packaging when such a measure is not supported by robust and compelling evidence of what people actually do, rather than merely what they say they will do.

### **The Systematic Reviews**

- 7.7 In 2012, the Systematic Review reported on “*37 studies assessing the potential impacts of plain packaging in relation to appeal, perceptions of harm, and salience and effectiveness of health warnings*” and “*examined what the available literature had found about smoking-related attitudes, beliefs, intentions and behaviour in respect to plain packaging, and facilitators and barriers to plain packaging*”.<sup>35</sup>
- 7.8 The Updated Systematic Review was made available in late 2013 (the precise publication date is unclear, but appears to be at a point later than the “September 2013” reference on the front cover would suggest<sup>36</sup>). This document states: “*...in the period since the systematic review was published, there have been a number of new plain packaging studies. This briefing paper provides an update on the evidence published since the systematic review*” and “[w]e located 17 studies that have been published between August 2011, the cut-off date for study inclusion in the original systematic review, and mid-September 2013”.<sup>37</sup>
- 7.9 Accordingly, the Systematic Reviews together report on 54 consumer survey studies. Each of the 54 studies has been reviewed by Professor Devinney or Dr Keegan. In addition, in their reports, Professor Devinney and Dr Keegan have reviewed further plain packaging-related consumer survey studies which are not included in the Systematic Reviews.

### **Actual smoking behaviour**

- 7.10 No evidence has been put forward in Ireland, Australia or elsewhere that addresses the likely impact on actual smoking **behaviour**. The Systematic Review made this clear as: (a) it reviews evidence on plain packaging in order to “*inform responses to this Consultation and any subsequent policy making*”,<sup>38</sup> and (b) its primary aim is “*to assess the impact of plain tobacco packaging on the:(i) appeal of the packaging or product; (ii) salience and effectiveness of health warnings; and (iii) perceptions of product strength and harm*”.<sup>39</sup>

- 7.11 Further, the authors of the Updated Systematic Review have acknowledged that “*research from the UK is unable to gauge the impact of plain packaging on youth uptake and adult smoking behaviour as it has not been introduced*”.<sup>40</sup> The same logic applies equally in Ireland and is consistent with the finding by the authors of the Systematic Review that the evidence is inconclusive in terms of what – if any – behavioural changes may occur as a result of plain packaging.<sup>41</sup>
- 7.12 In fact, not a single study can be pointed to in the Systematic Reviews which demonstrates that plain packaging is likely to achieve actual public health benefits.
- 7.13 The authors of the Updated Systematic Review seek to mitigate the absence of any such evidence by stating that “*since the [Systematic Review] the evidence base has continued to grow at a considerable pace*”.<sup>42</sup> However, it is Professor Devinney’s expert opinion that “*while there are now a number of studies purporting to determine the potential impact of plain packaging in achieving these goals, a close examination of them reveals that: (i) the body of research has not examined any specific aspect of market related behaviour directly, instead relying exclusively on attitudes, opinions and self reports of possible behaviours; (ii) the body of research has continued to apply the same flawed methodological approaches over and over again; and (iii) the body of research has failed to take into account important related research that could improve and inform both the scientific and policy debate*”.<sup>43</sup>
- 7.14 Two points follow regarding the quality of the evidence relied upon.
- 7.15 First, the Systematic Reviews rely only on **attitudinal** consumer research; but it is well established that people are not particularly reliable at self-assessment. Dr Keegan states that “*recall reliability is an important methodological consideration*” when reviewing the evidence,<sup>44</sup> and that “*observing what people do is a better predictor of behavior than recording how people respond to questions about what they think they will do*” and, moreover, that “*it is well established that consumer recall of past behaviors can be inaccurate, as the time elapsed between the event and the time of reporting can distort respondents’ perceptions*”.<sup>45</sup> Professor Steinberg notes that “*One must be very cautious in attempting to extrapolate the results of studies involving adults to adolescents, given the differences in adults’ and adolescents’ decision-making*” and that “*Demonstrating that, when presented with a particular pack design by a researcher, a person will say that he or she would be more likely to quit smoking, or never to take it up, is not the same as demonstrating that the packaging actually leads to a change in behavior. There is a long tradition of research showing that it is far easier to change what people say they will do than to change their actual behavior*”.<sup>46</sup> This issue was acknowledged in the Systematic Review.<sup>47</sup>
- 7.16 Secondly, good research will seek to try to mitigate the problem of a gap between attitudinal and behavioural data. Professor Devinney speaks to the issue of “*attitude-behaviour gap or the difference between ‘stated’ intentions and ‘revealed’ or actual purchases*” in Section 2 of his reports.
- 7.17 Professor Devinney and Dr Keegan’s research has evaluated the studies forming part of the Systematic Reviews (and others) against international standards and best practice for consumer survey analysis. These criteria include:
- a) examining “the extent to which a study provides valid and generalisable conclusions that align with what an individual would do across a range of contexts”,<sup>48</sup> against which Professor Devinney found that “*It is my conclusion that none of the studies examined meet reasonable incentive compatibility requirements. There is no indication that the studied*

*individuals' attitudes and intentions, as measured, align with their actual or future intentions*";<sup>49</sup>

- b) attempting to *"determine what an individual's decision is via the choices they make"*,<sup>50</sup> against which Professor Devinney found that *"one would take an unjustified "leap of faith" about the importance of various measures used in the studies to relate them to actual behaviours"*,<sup>51</sup> and
- c) seeking to *"understand the degree to which stated intentions align better with actual behaviour"*,<sup>52</sup> on which Professor Devinney states that *"it is my conclusion that, as in my 2010 and 2012 Reports, none of the studies met enough of the criteria whereby one could argue that they would provide potentially valid predictions of actual purchasing behaviour"*.<sup>53</sup>

7.18 Professor Devinney finds that: (a) in the case of all the studies, there are significant limitations in the structuring of questions, which in many cases assumed knowledge or led the respondent; (b) the sampling frame in the studies varies, implying that none can be used to make predictions about either the general population or the population of minors (both smokers and non-smokers); and (c) the analysis in the studies suffers from significant statistical validity issues.<sup>54</sup> To summarise these points, Professor Devinney provides an overview of each of the studies examined in his 2014 report and a summary of their limitations against the above criteria.<sup>55</sup>

7.19 Following Professor Devinney's review of the publicly available consumer survey studies on plain packaging, he concludes that:

- a) *"there is no indication that the studied individuals' attitudes and intentions, as measured, align with their actual or future behaviour" and further that "the studies also fail to provide experimental or situational contexts in which the individual would be applying the decision model that they used when making purchasing decisions"*,<sup>56</sup> and
- b) *"it is my expert opinion based on the publicly available consumer surveys and experiments that I have evaluated in this report that they do not provide reliable evidence that plain packaging would be effective in achieving the public policy goals of changing actual smoking behaviour"*.<sup>57</sup>

7.20 Others have expressed similar concerns. In reviewing a request from prominent tobacco control advocates for a grant relevant to studies considering *"the effects of current and plain cigarette package design on smokers' cigarette evaluation"*,<sup>58</sup> one of the independent assessors of the study design commented that *"the public health benefit of this type of research into differences in packaging strategies must ultimately be predicated on whether there is change in consumption of cigarettes (and of a level which is likely to be clinically significant). The problem I have with the study as it stands is that the link between the 'sensory experience' and behaviour change is not well established. In other words, it may well be the case that one form of packaging may be associated with a more enjoyable experience than another but why will this necessarily lead to differences in smoking levels[?]"*.

7.21 The Systematic Review, however, states that: *"there is strong evidence [...] relating to the role of plain packaging in helping reduce smoking rates"*.<sup>59</sup> The reasons why this statement is deeply flawed include:

- a) Professor Devinney and Dr Keegan show that there is no reliable evidence, as described above.



b) On a closer inspection, the Systematic Review itself suggests that the evidence base reviewed is far from “strong”. Indeed, its authors acknowledge that “*there are a number of limitations with the plain packaging studies found*”.<sup>60</sup> For example, amongst other concerns, the Systematic Review concedes that:

- (i) “*individual studies are limited by elements of study design*”;<sup>61</sup>
- (ii) “*...the evidence in the review is largely drawn from correlational studies, which makes it difficult to draw conclusions about expected outcomes. Many of the studies use hypothetical scenarios, and therefore are not truly able to test how individuals would react or behave if plain packaging was introduced*”;<sup>62</sup> and
- (iii) “*...some of the surveys use samples representative of the general population but most do not, and instead use convenience or probability sampling*” and “*...when comparing new packs (in this case plain packs) with those already in the marketplace, the new packs typically attract a great deal of both favourable and unfavourable attention*”.<sup>63</sup>

7.22 Indeed, of the 54 studies reviewed in the Systematic Reviews, over 30 adopt the methodology of asking respondents to provide their opinions and perceptions on a comparison between a branded pack and a plain pack. Professor Devinney has questioned studies which utilise this experimental design, stating that “*...none actually test only plain packaging alternatives – which is the purchasing reality consumers would face – nor do they consider features and contexts which influence cigarette purchasing, such as price or availability. Hence, in my view, they are making conclusions based on false comparisons*”.<sup>64</sup>

### **Serious methodological flaws in the Systematic Reviews**

7.23 The Systematic Reviews are themselves subject to serious methodological limitations which make reliance on them inappropriate.

7.24 First, the Systematic Reviews are forced, in view of the “*limitations*” of all of the individual studies, to rely upon the consistency demonstrated by the studies. So, while the Systematic Review states that “*there was a consistency in study findings regarding the potential impacts of plain packaging...this consistency can provide confidence about the observed potential effects of plain packaging*”,<sup>65</sup> this defies logic and cannot be correct:

- a) The study designs are systematically and consistently flawed. The Systematic Reviews ignore the fact that the findings are consistent because, in Professor Devinney’s words, they “*apply what are effectively the same, or very fundamentally similar, flawed approaches to the structure of their experiments*”<sup>66</sup> and “*given the fact that many of these studies mimic the same empirical (and incorrect) approach, the consistency of the findings may be revealing very little.*”<sup>67</sup>
- b) The Systematic Review wrongly presupposes that “*consistency*” can be used as a proxy for ‘correct’. The authors assume that because the study findings appear consistent when taken as a whole, the evidence base must be methodologically sound and reliable (despite the recognition of the limitations of the individual studies).

- c) Adding together multiple flawed studies does not make an unreliable study reliable. Nor does it make the studies collectively reliable. By way of analogy, students who fail one exam do not have their position improved if they fail multiple exams. The sum cannot, in this case, be more than its constituent parts.
- 7.25 Secondly, and despite claims to the contrary, the Systematic Reviews are inherently biased and self-interested, and do not account for either author or journal partiality. For example:
- a) The lead author of the Systematic Reviews (Dr Crawford Moodie) is reviewing (i) his own work (he authored or co-authored 8 of the 54 studies reviewed) and (ii) the work of a network of scholars with whom he interacts directly and with whom he has co-authored many works. Moreover, the Systematic Review extends gratitude to “*Dave Hammond for his input into the design and content of the review*” who also authored or co-authored 8 of the 54 studies reviewed.<sup>68</sup>
- b) Six authors are responsible for nearly two-thirds of all of the studies included in the Systematic Reviews, and the studies are repetitive in their (incorrect) methodological approach.
- c) Many of the journals examined are unlikely to publish studies that have findings which are contrary to the overall objective of the journal. For example, the studies are published in a very small number of publication outlets, with *Tobacco Control*, the *BMJ Open*, *Addiction* and *Nicotine and Tobacco Research*, being the dominant outlets for approximately one third of the studies. *Tobacco Control* has the stated aim of “*provid[ing] a forum for research, analysis, commentary, and debate on policies, programmes, and strategies that are likely to further the objectives of a comprehensive tobacco control policy*”,<sup>69</sup> and the BMJ and its affiliates, including the BMJ Open, has recently taken the decision not to publish science which is funded, wholly or in part, by tobacco product manufacturers.<sup>70</sup>
- d) The Systematic Reviews do not appear to have considered the findings set out in the expert reports of Professor Devinney or Dr Keegan,<sup>71</sup> both of which are relevant to the issue of plain packaging and are in the public domain on [www.jti.com](http://www.jti.com). While JTI would not expect these reports to be considered as primary research, their exclusion from the broader search appears to further suggest that the approach adopted in the Systematic Review is at best flawed, and at worst, skewed.
- e) In short, Professor Devinney has concluded that “*a systematic review of fundamentally invalidly conducted research will amount to little more than “garbage in, garbage out.”*”<sup>72</sup>
- 7.26 In summary, the current evidence-base, including the Systematic Reviews referred to by the Minister for Health and others to justify the introduction of plain packaging, is deeply flawed and not credible. There is no evidence that plain packaging will achieve actual public health benefits.

## 8. INTERNATIONAL APPROACH TO PLAIN PACKAGING

- 8.1 Only Australia has adopted plain packaging legislation. No evidence has been advanced by Australia or from anywhere else that plain packaging actually works or that it will have any effect on changing actual smoking behaviour. The DoHC has not been able to table any such evidence because it does not exist.
- 8.2 On 12 July 2013, after a year-long consultation, the UK Government concluded that due to a lack of evidence to date, the UK would not implement such a policy at this stage. A further review of available evidence relating to the public health effects of introducing plain packaging is currently being undertaken by Sir Cyril Chantler. But no new evidence has been presented to demonstrate that a plain packaging measure would have (or is likely to have) an actual impact on smoking behaviour in the UK. JTI has responded to the review on this basis<sup>73</sup>.
- 8.3 Following its public consultation on plain packaging, on 19 February 2013, the New Zealand Government announced its decision to work towards the introduction of a plain packaging regime for all tobacco products in New Zealand. However, in December, 2013 the Prime Minister of New Zealand has publicly stated that similar legislation should not be passed until the outcome of the WTO cases against Australia are resolved<sup>74</sup>.
- 8.4 In December, 2013 agreement was reached in principle between the EU Member States and the European Parliament for on TPD2. While JTI believes that many of the proposed measures are unnecessary and unjustified, it is only right for Member States to wait until the full extent of any changes envisaged by TPD2 are known before taking further steps, as this measure, if implemented and valid as a matter of EU law, will fundamentally change how packs are labelled and sold in Ireland.
- 8.5 Following a public consultation, to which the Commission received more than 85,000 responses from a wide range of stakeholders, the Commission's Impact Assessment (IA) rejected the adoption of plain packaging "*given the current lack of real life legal experience, pending legal disputes regarding plain packaging and serious concerns expressed by some stakeholders.*"<sup>75</sup>
- 8.6 The European Parliament's Committee on International Trade expressed concerns that plain packaging would increase the risk of counterfeiting, resulting in a loss of tax revenues and an increase in the consumption of dangerous counterfeit products. It also notes that there are doubts about the compatibility of plain packaging with international agreements on intellectual property and trademark protection, and that Australia's measure is already the subject of challenges at the WTO and in international arbitration.<sup>76</sup>
- 8.7 Plain packaging was not included in TPD2 as proposed in 2012. The European Parliament in October 2013 rejected a proposed amendment to introduce plain packaging. Furthermore, as recently as 18 December 2013, the Council of Ministers stated that any Member State considering the introduction of plain packaging is required to satisfy certain conditions and engage with the Commission. It has also been reported that a Commission spokesperson has stated that any such plans would require a Member State "*to put together a file detailing why plain packaging would mean additional impact on health*". He also added that the first results from Australia on plain packaging should be published.<sup>77</sup> If Ireland does decide to proceed, the Committee will be aware that the proposal will also need to take account of the high level of protection the EU Commission expects to achieve through TPD2.

- 8.8 This is reflected in the current version of Article 24 of TPD2. As currently drafted, that Directive would force Ireland to justify the need for plain packaging “*on grounds of public health, taking into account the high level of protection achieved through this Directive*” and to demonstrate that plain packaging is “*proportionate [does] not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*” The recitals go further and clarify that plain packaging must be “*compatible with the Treaty, with WTO obligations and [must] not affect the full application of this Directive.*” In addition to these substantive conditions, which cannot be fulfilled, the Directive would require the measures to be notified to the European Commission, “*together with the grounds for maintaining or introducing them*”. This would not of course remove Ireland’s obligations under Article 34 of the Treaty on the Functioning of the European Union. Measures infringing the free movement of goods are unlawful as a matter of EU law unless they can be justified. The burden of justifying the interference with the right of free movement of goods, again, falls on Ireland. The test of justification is a strict one.
- 8.9 It is also worth reminding that in Ireland’s submission to the revision of the Tobacco Products Directive consultation in 2010 the DoHC stated in relation to plain packaging: “*we support [option 3] in principle but recommend that the introduction of generic or plain packaging, must be on the basis of robust evidence. If such a measure is to be introduced, it should be mandatory and there should be a harmonized approach across Europe.*” It is difficult to reconcile this with the proposal for Ireland now to proceed with plain packaging in isolation and in the absence of evidence.

## **9. PLAIN PACKAGING WILL LEAD TO SERIOUS NEGATIVE CONSEQUENCES**

- 9.1 Plain packaging for tobacco products would lead to a series of negative and undesirable consequences. These are summarised in the introduction to this submission. In this section we address in more detail the economic impact of plain packaging, in section 10 its impact on legal rights and in section 11 the issue of illicit trade.

### **Serious and unnecessary damage to the legitimate economic interests of tobacco**

- 9.2 JTI invests and innovates in its packaging design and quality in order to compete with other products available to adult smokers. JTI and other companies, both within the tobacco sector and also in the context of other fast moving consumer goods (“FMCGs”), 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). Pack innovation has also acted as a barrier to trade in counterfeiting.
- 9.3 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.<sup>78</sup> In that context, trade marks guarantee the identity of origin of the marked goods or services to consumers by enabling them, without any possibility of confusion, to distinguish the goods or services from others which have another origin.<sup>79</sup> 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.

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

- 9.4 Central to JTI's business are its brands, including premium brands in Ireland such as Silk Cut and Benson & Hedges (representing the No.1 and No. 2 brands in the market respectively).
- 9.5 JTI has invested very substantially in them, as reflected by the brand awareness and strong positive associations that the brands have engendered amongst adult smokers.
- 9.6 Plain packaging eradicates branding and will erode brand equity, most notably in leading, premium brands. Premium brands will therefore be disproportionately affected as they have most to lose. With in excess of 50% share of the premium market in Ireland, plain packaging will impact JTI to an even greater extent than other tobacco manufacturers.
- 9.7 The discriminatory effect of plain packaging for JTI would be exacerbated if, as JTI believes will happen, plain packaging were to accelerate down trading by consumers. JTI's approach to this issue is informed by the work undertaken by Dr Lilico regarding the impact of plain packaging on competition and the tobacco market.<sup>80</sup> Dr Lilico anticipates, amongst other things, large-scale down trading into lower quality products, including a reduction in market share for the premium segment and an increase in the value for money segment. Further, average prices for tobacco products as a whole fall in a plain packaging scenario. These points are demonstrated through the results of a simulation model designed for the UK market, where his conclusion is borne out robustly and reproduced in all cross-checks.

### **Impacts on legitimate economic interests and competition**

- 9.8 JTI's assessment of impacts on competition is informed by Dr Lilico's expert analysis. Dr Lilico gave his expert opinion in his 2008 report, and subsequently reproduces and expands his theory in 2012 in the light of a simulation model. Dr Lilico's model was prepared using UK market data. While there will be certain differences between the UK and Irish market dynamics, both are mature markets in which tobacco product manufacturers compete for shares in a declining market of adult smokers. For this reason, Dr Lilico's views are important to the Irish plain packaging proposal as they demonstrate generally the likely impact of plain packaging on market dynamics and structure. To the extent that the DoHC considers that the Irish market may, in some senses, differ as to the competitive dynamics at play, it would be appropriate to address this by requesting evidence from stakeholders as to expected impacts, as well as seeking the advice of an independent expert to assess the unintended consequences of plain packaging on competition in Ireland.
- 9.9 The simulation model prepared by Dr Lilico clearly demonstrates that plain packaging would reduce competition and raise barriers to market entry.<sup>81</sup>
- 9.10 Both economic theory and the simulation exercises demonstrate the severe impacts of plain packaging on competition, including:
  - a) ***Increase in market concentration***: many smaller players and products would be driven out of the market as a result of an increase in market concentration. A key reason competition impacts are assessed in regulatory analysis is to

avoid introducing regulations that vest market power and damage competition.

- b) ***Market dynamics will be impaired:*** as brand awareness degrades, competition initially becomes fixated on one or two brands for most price segments (damaging within-price-segment competition) and eventually there is large-scale down trading into lower quality products. This would be particularly detrimental to innovative manufacturers and manufacturers who sell a wide variety of products.
- c) ***Price effects/potential commoditisation:*** plain packaging would lead to down trading and tend towards commoditisation at the value end of the market for extreme levels of brand degradation. For just modest degrees of brand degradation, average prices of tobacco products (and cigarettes in particular) fall.
- d) ***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, as well as reduced incentives to innovate and introduce products containing particularly high quality, or specialised, tobacco.
- e) ***A reduction in consumer choice and a barrier to manufacturers entering the market with new brands*** (other than those reliant on lower prices as a product differentiator).

## 10. DEPRIVATION AND/OR THE IMPAIRMENT OF FUNDAMENTAL LEGAL RIGHTS

- 10.1 Plain packaging would represent an extraordinary deprivation of, and unjust attack on, JTI's most valuable assets – its brands and trade marks. There is no reliable evidence to justify its introduction. It would be manifestly disproportionate, unjustified and unnecessary, and would lead to an infringement of fundamental legal rights, as protected in national and international law. It would effectively destroy JTI's very valuable trade marks and brands.
- 10.2 Intellectual property rights (“IPRs”) are fundamental to tobacco packaging. JTI's portfolio of trade marks at Irish and EU level includes hundreds of applications and registrations in respect of tobacco products. In this context, trade marks may take a variety of forms including word marks (for example, for the name of a brand) and non-word marks (such as device or figurative marks, including logos, designs, stylised characters, combinations of logos and stylised characters, colour marks and the shape of goods or their packaging).
- 10.3 JTI makes extensive efforts to protect these rights by way of a rolling programme of trade mark applications, registrations, oppositions, renewals and enforcement actions. Those enforcement efforts will include, where required, registered trade mark infringement actions and actions to protect its unregistered proprietary rights (e.g., passing off claims) by JTI, in addition to actions taken by regulatory enforcement agencies.
- 10.4 The existence and uniformity of protection of IPRs have been recognised by EU law as being of paramount importance to the functioning of the EU internal market and as necessary incentives for investment in R&D and innovation. The development of brand equity and goodwill is fundamental to market economics, consumer choice,

innovation and product development. It flows, as economic value, through all levels of the supply chain.

- 10.5 JTI's brands are its most valuable asset. Plain packaging would leave JTI unable to exploit its IPRs commercially, making them, for all practical purposes, valueless in Ireland.
- 10.6 Plain packaging would prevent JTI from making the most fundamental use of its non-word trade marks – i.e. on the consumer-facing packaging of the product, and on the product itself, thereby depriving JTI of the benefit and economic value of the specific subject-matter of these marks. Forcing brand names to be written in a standard typeface, colour and size is also an entirely unjustified restriction on the normal and fair use of JTI's word trade marks. Plain packaging would destroy the very substance of these entitlements and constitute an unjust attack on, and deprivation of, JTI's property rights.
- 10.7 As explained above plain packaging would unjustifiably infringe fundamental legal rights to property, freedom of expression and trade that are protected by the Irish Constitution and by intellectual property laws, as well as by a number of international treaties, conventions and free trade agreements such as the European Convention on Human Rights, EU Treaties, international trade treaties, the World Trade Organization Agreements on Trade-related Aspects of Intellectual Property Rights ("TRIPS") and on Technical Barriers to Trade ("TBT"), and the World Intellectual Property Organization's Paris Convention for the Protection of Intellectual Property ("Paris Convention"). In particular, JTI's views on TRIPS are based on the opinion of Professor Daniel Gervais on the interpretation of TRIPS and of the Paris Convention. Professor Gervais, is a leading expert on international intellectual property law.<sup>82</sup>
- 10.8 In particular, Article 20 of TRIPS requires that:
- "The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trade mark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services or one undertaking from those of other undertakings".*
- 10.9 JTI acknowledges that WTO members may, in certain limited circumstances take advantage of flexibilities within TRIPS to address public health concerns.<sup>83</sup> Article 8.1 of TRIPS allows for members to "*adopt measures necessary to protect public health*". However, this Article is not an exception to Article 20, but rather a statement of principle. Indeed the final part of this Article stipulates that such measures have to be consistent with the rest of the provisions of TRIPS. There are, therefore, threshold issues as to whether Article 8 can be used at all to override a breach of Article 20. Plain packaging is clearly inconsistent with the provisions of TRIPS.
- 10.10 Plain packaging would be a special requirement encumbering the ability of JTI (and other manufacturers) to distinguish its goods through its trade marks from those of other entities. It would prohibit the use of non-word marks on packaging and would also require JTI to use its word marks "in a special form".
- 10.11 JTI believes that Ireland would be unable to demonstrate that plain packaging is either "justified" (Article 20 TRIPS) or "necessary" (Article 8 of TRIPS) to achieve a legitimate public policy objective. Having regard to the lack of reliable evidence that plain packaging would influence smoking behaviour, and to the availability of less trade-restrictive alternative measures, JTI considers that plain packaging would breach TRIPS.

- 10.12 Plain packaging would also unjustifiably and disproportionately infringe JTI's right to freedom of expression, which is protected under the Irish Constitution and the European Convention on Human Rights, as it would restrict both JTI's right to communicate with, and impart information to, its consumers, and the right of consumers to receive such communications and information.
- 10.13 JTI is not alone in its view. A number of countries which are members of the WTO have repeatedly raised concerns about Australia's plain packaging proposal, claiming that it infringes, inter alia, TRIPS and TBT requirements. Members have argued that the proposal is incompatible with WTO obligations.<sup>84</sup> In addition, it is argued that Australia's plain packaging legislation creates unnecessary barriers to trade, since the measure is more trade restrictive than necessary to achieve Australia's public health objective (Article 2.2). Some WTO members also argued that Australia had not provided sufficient scientific evidence linking plain packaging to a reduction in tobacco consumption, especially among young people. In other words, the Members questioned the efficacy of the measure to achieve the stated objective. The Australian legislation is being challenged by Ukraine, Honduras, Cuba, the Dominican Republic and Indonesia for breach of WTO rules. If the Australian plain packaging legislation is found to be incompatible with the WTO obligations, Australia must amend its legislation or face possible sanctions, including trade-based retaliation. It would be wrong for Ireland to push ahead with plain packaging, pre-empting what its actual impacts might be, until the WTO law compatibility of the only plain packaging measure to be adopted (in Australia) is known.
- 10.14 Moreover, the International Chamber of Commerce, the US Chamber of Commerce and many other business and intellectual property organisations argue against plain packaging.<sup>85</sup>

## **11. PLAIN PACKAGING IMPEDES AND RESTRICTS LAWFUL ACTIVITY, WHILST FACILITATING ILLEGAL ACTIVITIES**

### **Worsening the Illicit Tobacco Trade in Ireland<sup>86</sup>**

- 11.1 Plain packaging will worsen the trade in illicit tobacco products in Ireland. The illicit trade in tobacco costs both JTI and the Irish exchequer millions of euro annually to the benefit of organised criminals. JTI's views on the illicit tobacco trade are based on JTI's own industry expertise and on the expert opinions contained in Professors Zimmerman and Chaudhry's Report<sup>87</sup>.
- 11.2 Ireland already has a significant illicit trade problem. The Non-Irish Duty Paid tobacco trade in Ireland is amongst the highest in the EU. Revenue estimates it to be 20% excluding roll your own products,<sup>88</sup> while industry data would indicate it is closer to 28% of all tobacco consumed in this country.<sup>89</sup>
- 11.3 With plain packaging illicit traders will be effectively given a blueprint of how to make every pack. Criminals will also use the opportunity to sell a product in the branded packaging that its legitimate owners can no longer use. Criminals who sell illicit tobacco products do not discriminate who they sell to, and often target children or adults from lower socio-economic backgrounds.
- 11.4 The Irish Government has previously recognised the seriousness of the illicit trade problem, with the Minister of Finance, Michael Noonan, recently stating: "*All interested parties are agreed, nevertheless, that illicit trade... and shadow economy activities in general, pose a threat to legitimate and compliant businesses, as well as*



*depriving the Government of tax revenues. Tackling the illegal activities in those sectors, and broader black economy activities, is therefore a key priority”.*<sup>90</sup>

- 11.5 Indeed both Government parties, in their election manifestos, have committed to tackle smuggling in Ireland. Fine Gael stated in its Manifesto that it “*will stop illegal smuggling*” which “*costs the Irish economy €556 million each year*” referring to it as “*a cash cow for criminal gangs*”. Labour committed to reduce losses to the exchequer through smuggling.
- 11.6 A further exacerbating factor for the illicit tobacco trade in Ireland is illegal activity taking place across the border between Ireland and the UK. As Professors Zimmerman and Chaudhry explain, it has long been recognised that Ireland – and the border between Northern Ireland and Ireland – is used as a gateway for smuggling into the UK.<sup>91</sup> HMRC has also noted that the border is used by criminal gangs to conceal their activities and disrupt law enforcement action, with the continuing security situation deliberately exploited to hinder law enforcement efforts.<sup>92</sup>

### **The Impact of Plain Packaging on the Illicit Tobacco Trade**

- 11.7 An RIA has not been commissioned and does not address this issue in any detail. A meaningful evidence based analysis of the impact of plain packaging on the illicit trade in tobacco products has not been undertaken by Government. This is a hugely significant omission in light of the accepted size of the problem in Ireland, and its serious negative impacts and societal consequences, and the recorded commitment of both Government parties to address this. The expert opinion of Professors Zimmerman and Chaudhry is that plain packaging “*will worsen the illicit trade in tobacco products*”.<sup>93</sup> JTI shares this view. In summary, JTI is extremely concerned that mandating plain packaging will have the following negative effects.
- 11.8 **It will facilitate the introduction of counterfeit tobacco products in Ireland.** Counterfeiting of tobacco products has been effectively eliminated in Ireland primarily due to the investment of tobacco companies in sophisticated and complex packaging of tobacco products and collaboration between law enforcement agencies and the legitimate tobacco manufactures. Plain packaging will undo this significant achievement. Sophisticated printing technologies deter counterfeiting. They increase 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).
- 11.9 **It will remove key cost constraints for counterfeiters, as each pack is essentially the same.** Once a counterfeiter has mastered the Irish plain packaging design for, for example, Benson & Hedges Gold King Size, 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 Irish market**. See further paragraph 430 of Professors Zimmerman and Chaudhry’s Report.
- 11.10 **It will crystallise pack design, which will benefit counterfeiters.** Legitimate manufacturers would be denied the opportunity to innovate and compete through packaging, something that is standard industry practice for all manufacturers of *FMCGs*, including JTI. As a result, counterfeiters would only need to meet a government-mandated design, rather than having to keep up with manufacturers’ evolving packaging innovations and developments.<sup>94</sup>

- 11.11 Notwithstanding reductions in the cost of counterfeiting plain packs, **it will result in the continued creation of branded packs by counterfeiters, with branding which the brand owner cannot use.**
- 11.12 In this way, the imposition of plain packaging would create an opportunity for the counterfeit industry to:
- a) expropriate manufacturers' branding;
  - b) charge a premium for this unregulated product; and
  - c) shift sales volumes away from legitimate manufacturers.<sup>95</sup>
- 11.13 **It will increase the trade in 'illicit whites'.** As set out in the JTI Ireland Illicit Tobacco Trade Review 2012, 'illicit whites' make up a significant, and growing, share of the market for illicit tobacco products in Ireland.<sup>96</sup> JTI is concerned that plain packaging would facilitate this trade, a risk identified by Professors Zimmerman and Chaudhry.<sup>97</sup>
- 11.14 **It will increase the trade in contraband tobacco products** (i.e., genuine products smuggled from abroad).<sup>98</sup> As smokers seek out the familiar, JTI considers that it is likely that some of them will turn to contraband products in the same way as they may do toward 'illicit whites' and branded counterfeits (discussed above).<sup>99</sup>
- 11.15 **It will restrict the ability of consumers to identify counterfeit product.** Consumers' ability to identify counterfeit product would be diminished by plain packaging as pack design is one of the means by which consumers can assess whether they have purchased a genuine or counterfeit product.<sup>100</sup>
- 11.16 Consumers' perception of product quality is likely to be negatively influenced where – because they are unable to identify a product is counterfeit from its packaging – they believe they are smoking a genuine product when, in fact, they are smoking a poor quality counterfeit.<sup>101</sup> This could further erode the equity of our brands.
- 11.17 **It will complicate regulator investigations/prosecutions, requiring more resources to be expended on them.** A key investigative tool for Irish enforcement agencies, which will be frustrated by plain packaging, is the ability to carry out forensic analysis of counterfeit tobacco packaging to determine its source. This is explained further in paragraphs 406 to 408 of Professors Zimmerman and Chaudhry's Report.
- 11.18 As Professors Zimmerman and Chaudhry point out, complex health warnings or tax stamps will not be an effective deterrent to counterfeiting these much simpler packs. Such 'anti-counterfeiting markings' are easily faked and counterfeiters generally only do enough to "*fool the consumer*".<sup>102</sup> Nor are 'track and trace' requirements the answer. These apply only to manufacturers of genuine product (and even then, not all of them).<sup>103</sup>
- 11.19 **It may impair the ability of JTI to bring infringement action.** As explained in more detail, in paragraphs 6.18 (c) to 6.18 (f) of JTI's 2012 consultation response in the UK, JTI has serious concerns that plain packaging may reduce its ability to take action in Ireland against third parties trading in illicit tobacco products which use JTI's trade marks without consent.
- 11.20 JTI notes that many other organisations share the views expressed above.<sup>104</sup>

11.21 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, Professors Zimmerman and Chaudhry note that plain packaging is “*highly likely to aggravate the existing negative impacts of the already serious and socially damaging trade in illicit tobacco*”.<sup>105</sup> In particular, JTI believes that, in this way, plain packaging will:

- a) undermine the FCTC’s anti-illicit trade objectives, as well as Ireland’s stated aim of using pricing as a means of tobacco control regulation.<sup>106</sup> Those conducting illicit trade in tobacco products are unlikely to be concerned about who they sell their products to. As black market tobacco products are often more accessible to those underage, and those from low income groups, plain packaging also risks undermining the key objective of reducing smoking by minors and those groups;
- b) facilitate the growth of the underground economy, thus normalising criminal behaviour and undermining sustainable growth;
- c) deprive the Irish Government of tobacco excise revenues that are simply re-directed to windfall profits for organised criminal gangs. According to Retail Ireland, Irish criminal gangs make about €3 million a week from selling illegal cigarettes<sup>107</sup>;
- d) increase the risk to consumers, because of their reduced ability to tell the difference between genuine and illicit product; and
- e) cause significant losses to legitimate business, including retailers (see Section 6).

## **12. ALTERNATIVE REGULATORY SOLUTIONS**

12.1 JTI has demonstrated, through this submission (including reference to leading experts’ independent opinions), its commitment to the development of appropriate and proportionate tobacco regulation in Ireland.

12.2 JTI’s core principles include reducing minors’ uptake of smoking, preventing minors from obtaining tobacco products and ensuring that adult smokers are reminded about the health risks of smoking. JTI supports the DoHC in seeking to achieve these goals through appropriate and proportionate regulatory interventions.

12.3 We set out below alternative regulatory solutions that are less restrictive, more targeted and proportionate ways to achieve these goals. These solutions are likely to be effective when evaluated against Better Regulation principles. They address the key methods by which minors access tobacco products, and studies exist to support their efficacy.<sup>108</sup>

### **Better enforcement to tackle the trade in illicit tobacco products**

12.4 As referenced earlier at paragraph 11.2, current industry estimates are that non-Irish Duty Paid tobacco products account for 28% of all tobacco products consumed in Ireland. Revenue Customs Service would estimate the figure to be 20%. Criminals who sell these illicit products do not conform to the legal age restrictions on sales to minors which legitimate retailers are bound by. It is imperative in order to ensure minors do not have access to these tobacco products that further enforcement resources are dedicated to reduce and eliminate the illicit trade in tobacco products.

JTI sets out in its Illicit Tobacco Trade Review 2012 the many measures that could be implemented to tackle more effectively the illicit tobacco trade in Ireland.<sup>109</sup>

**Support initiatives to tackle minors' access to tobacco products: Support retail access prevention campaign: 'Show Me I.D – Be Age Ok'**

- 12.5 Retail access prevention programmes have proven to be an effective way of limiting minors' access to cigarettes.
- 12.6 Studies suggest that sales staff who fail to ask for ID are 173 times more likely to sell tobacco to minors and account for 89% of tobacco sales to minors.<sup>110</sup> These figures highlight the importance of encouraging and supporting retailers to ask for and check ID.
- 12.7 JTI believes minors should not smoke and should not have access to tobacco products. It is illegal in Ireland for a retailer to sell a tobacco product to a minor. Therefore, certain people seeking to purchase tobacco products can expect to be asked to prove their age, and can expect that retailers will accept only the correct ID. JTI suggests that the Government takes further steps to support such efforts to further build upon their success.
- 12.8 In 2010, JTI launched the 'Show Me I.D – Be Age Ok' youth access prevention campaign in Ireland to assist retailers in preventing minors from accessing tobacco and other age restricted products. The campaign has to date focused on educating retailers and retail staff of the importance of responsible retailing, asking for identification during age restricted sales and finally the laws relating to tobacco sales.
- 12.9 'Show Me I.D – Be Age Ok' is supported by the following trade associations: the Convenience Stores and Newsagents Association (CSNA), the representative organisation for independent family grocers (RGDATA), the National Federation of Retail Newsagents (NFRN), the Vintners Federation of Ireland (VFI), the National Off-Licence Association (NOFFLA), Retail Excellence and the South Dublin Chamber of Commerce. Regrettably, the DoHC in a letter to JTI dated 29 June 2010 refused to meet with JTI to discuss this important child protection initiative which is the only consolidated youth access prevention programme existing in retail outlets in Ireland.
- 12.10 The 'Show Me I.D - Be Age Ok' campaign also aims to help retailers record attempted underage 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.
- 12.11 JTI recommends that the Irish Government works with the retail community so that retailers are supported to ensure that sales of tobacco products to minors are prevented.

**Publicise worldwide consumer initiative: nosafecigarette.com**

- 12.12 Although there is already a very high level of awareness of the health risks of smoking amongst today's public, JTI supports the continued provision of information to consumers about the health risks of smoking in order to ensure that smokers continue to be reminded of those risks. In January 2013, JTI launched its worldwide consumer information initiative, *No Safe Cigarette*, in Ireland. All of JTI's Irish cigarette packs now carry the web address, [www.nosafecigarette.com](http://www.nosafecigarette.com), where consumers can access information on the health risks associated with smoking and to clarify any misconceptions they may have.

### **Renewed public information campaigns**

12.13 JTI believes that the goal of discouraging minors from taking up 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. Studies suggest that public information campaigns of this nature are an important aspect of successfully implementing retail access prevention measures.<sup>111</sup>

### **Enforcement of licensing regime and minimum sale age provisions**

12.14 It is essential that current laws are enforced to prevent the sale of tobacco products to minors. Studies exist which suggest that youth smoking prevalence decreases in communities where strong enforcement measures are consistently applied.<sup>112</sup>

### **Implement sanctions for the proxy purchasing by adults for minors**

12.15 JTI believes that penalising the proxy purchase of tobacco by adults for minors and the purchase, or attempted purchase, of tobacco products by minors could make a significant contribution to reducing minors' access to tobacco in Ireland.

12.16 An offence of proxy purchasing by adults for minors would eliminate a significant loophole in the current Irish legislative arrangements given the fact that negative licensing provisions can easily be overcome by adults purchasing as proxies for minors. As explained in paragraph 7.10 of JTI's response to the UK 2012 consultation on standardised packaging a number of studies exist which suggest that proxy purchasing and other social sources are important sources of tobacco for minors.

12.17 The burden of preventing minors 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 minors. At the same time, penalising the under-age purchase of tobacco would encourage minors to take responsibility for their own actions.

### **DECLARATION OF INTEREST**

As a Tobacco Manufacturer, JTI comes under the definition of "Tobacco Industry" as set out in the WHO Framework Convention on Tobacco Control.

Signed: \_\_\_\_\_

John Freda  
General Manager  
JTI Ireland Limited

Date: 15<sup>th</sup> January, 2014

## **ANNEX**

Professor Steinberg's 7 January, 2014 letter to Sir Cyril Chantler

## ENDNOTES

- 1 Revenue Commissioners. 2012 Headline Results, January 2013.
- 2 See <http://www.jti.com/how-we-do-business/code-conduct/> and  
<http://www.jti.com/how-we-do-business/regulating-tobacco-products/jti-global-marketing-standard/>
- 3 “*Plain packs offer a smoke-free future*”, Dr James Cant, 8 January 2014, The Scotsman,  
<http://www.scotsman.com/news/plain-packs-offer-a-smoke-free-future-1-3259434>.
- 4 Smart Regulation A Driver of Economic Recovery. A Report for JTI Ireland Ltd. Research by EPS Consulting,  
January 2014.  
<http://www.stir.ac.uk/media/schools/management/documents/Plain%20Packaging%20Studies%20Update.pdf>
- 5 Plain Tobacco Packaging: A Systematic Review, page 88.
- 6 “*Illicit tobacco in Australia*”, KPMG, October 2013: [http://www.pmi.com/eng/media\\_center/documents/kpmg%20report%20on%20illicit%20trade%20australia.pdf](http://www.pmi.com/eng/media_center/documents/kpmg%20report%20on%20illicit%20trade%20australia.pdf) (the “*KPMG Report*”). The report was commissioned by British  
American Tobacco Australia, Imperial Tobacco Australia Limited and Philip Morris Limited.
- 7 The KPMG Report defines ‘illicit whites’ as “*brands of manufactured cigarettes that are not legally available in  
the local market. Whilst possibly legal at the point of manufacture, these brands are typically not sold legally  
anywhere, and are often made exclusively for smuggling.*” However, the meaning of the term of ‘illicit whites’  
varies, and determining when this product becomes illicit in its supply chain is controversial. See further  
Professors Zimmerman and Chaudhry’s Report, paragraphs 153 to 159.
- 8 The KPMG Report, p.38.
- 9 Irish Examiner, 19th December, 2013 “EU tobacco laws could scupper plain packaging plan”.
- 10 The OECD’s first principle of good regulation (OECD Guiding Principles) concerns issue identification.  
Furthermore, pages 28 and 29 of the Handbook detail a number of steps that should be taken to clearly “*identify the  
problem*” early in the impact assessment process
- 11 [www.jti.com](http://www.jti.com)
- 12 See in particular the Consumer Protection Act 2007 available at:  
<http://www.irishstatutebook.ie/2007/en/act/pub/0019/> and EU Directive 2006/114 (Misleading and Comparative  
Marketing Communications) implemented in Ireland by SI No. 774/2007 available at  
<http://www.irishstatutebook.ie/2007/en/si/0774.html>
- 13 Article 7 of EU Directive 2001/37, implemented in Ireland by The European Communities (Manufacture,  
Presentation and Sale of Tobacco Products) Regulations 2003, SI 425/2003: available  
at: <http://www.irishstatutebook.ie/2003/en/si/0425.html>
- 14 The Dutch authorities rejected the contention that the use of the colour blue in the background of advertising for a  
tobacco product misleadingly communicated the impression that the product was “clean and healthy” (*D Snel v JT  
International Company Netherlands BV*, decision of the Dutch Advertising Standards Commission (Second  
Chamber), Dossier 01.0570, 11 December 2001). Similarly an Israeli case, in which the court found that the use of  
pack colours was not misleading but rather that it “*assists consumers to identify and buy the cigarettes that they  
wish to smoke*” (Class Action File 1560-08 *Zvi Numborg et al. v. Philip Morris Products et al.*, judgment of 16  
May 2010 (District Court in Tel Aviv-Jaffa, Farago J).
- 15 DG SANCO’s *Consultation on the possible revision of the Tobacco Products Directive 2001/37/EC: JTI’s Full  
Response*, 16 December 2010
- 16 Inter-brand is used in this document to refer to navigation and competition between different brands of  
Tobacco product (i.e., Camel and brands sold by JTI’s competitors) whereas intra-brand refers to navigation and  
competition between members of the same brand family (i.e., between two types of Camel branded product).
- 17 Laurence Steinberg is the Distinguished University Professor and Laura H. Carnell Professor of Psychology at  
Temple University, Philadelphia, United States of America. He is a leading authority on adolescent judgement,  
decision making and risk-taking.
- 18 Ravi Dhar is George Rogers Clark Professor of Management and Marketing and Director of the Centre for  
Customer Insights at the Yale School of Management, New Haven, United States of America. Stephen Nowlis is  
August A. Busch, Jr. Distinguished Professor of Marketing in the Olin School of Business at Washington  
University in St. Louis, United States of America. Both are award-winning marketing professors at leading  
universities in the United States, who have published extensively on the subject of consumer behaviour and  
decision making.
- 19 See, for example, in this context: (a) “*Label printer turns plain cigarette packaging into sticker success*”, 9  
January 2013, Steven Kiernan, [http://www.proprint.com.au/News/328190.label-printer-turns-plain-cigarette-  
packaging-into-sticker-success.aspx](http://www.proprint.com.au/News/328190.label-printer-turns-plain-cigarette-packaging-into-sticker-success.aspx); (b) “*Stickers to cover plain cigarettes packaging go on sale*”, 12 December
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2012, Shannon Willoughby, <http://www.theaustralian.com.au/news/stickers-for-sale-to-cover-plain-packaging-for-cigarette-packets/story-e6frg6n6-1226535061929>; and (c) “*ROXON WRAPPERS DEFIED*”, 4 January 2013, Tim Blair, [http://blogs.news.com.au/dailytelegraph/timblair/index.php/dailytelegraph/comments/roxon\\_wrappers\\_defied/](http://blogs.news.com.au/dailytelegraph/timblair/index.php/dailytelegraph/comments/roxon_wrappers_defied/).

21 Sutcliffe K, Brunton G, Twamley K, Hinds K, O’Mara-Eves AJ, Thomas J (2011) “*Young people’s access to tobacco: a mixed-method systematic review*”. London: EPPi-Centre, Social Science Research Unit, Institute of Education, University of London, which is available at: <http://eppi.ioe.ac.uk/cms/LinkClick.aspx?fileticket=1PIIjivuy3Y%3D&tabid=3301>.

22 UK Department of Health’s Consultation on the Future of Tobacco Control, paragraph 3.8.

23 In this submission, (a) **Systematic Review** means Moodie C, Stead M, Bauld L, McNeill A, Angus K, Hinds K, Kwan I, Thomas J, Hastings G and O’Mara-Eves A (2012). Plain tobacco packaging: A systematic review. Report prepared for the Department of Health. Stirling: Centre for Tobacco Control Research, University of Stirling. [http://phrc.lshtm.ac.uk/papers/PHRC\\_006\\_Final\\_Report.pdf](http://phrc.lshtm.ac.uk/papers/PHRC_006_Final_Report.pdf); (b) **Updated Systematic Review** means Moodie C, Angus K, Stead M and Bauld L (2013). Plain Tobacco Packaging Research: An Update. Stirling, Scotland: Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling. <http://www.stir.ac.uk/management/about/social-marketing/>; and (c) **Systematic Reviews** means the Systematic Review and the Updated Systematic Review.

24 JTI’s views on the evidence-base are summarised in this document. However, it has set out its position in further detail in the following two documents (both of which it considers need to be reviewed by (and JTI would be happy to provide copies to) the DoHC): (a) JTI’s 3 July 2012 Response to the UK Department of Health’s Consultation on the Standardised Packaging of Tobacco Products, notably Section 3 and Schedule 2 (available from <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>); and (b) JTI’s 10 January 2014 Submission to the Chantler Review into the public health impacts in the UK of standardised packaging for tobacco products.

25 Timothy M. Devinney is the Leeds University Business School’s Leadership Chair in International Business and Co-joint Professor in the Faculty of Medicine at the University of New South Wales, Australia. He is an expert in consumer survey research, experimental methods and associated statistical analysis. In respect of the question whether plain packaging is likely to have any actual positive public health impacts, Professor Devinney has prepared three relevant reports: (a) Professor Devinney’s January 2014 report entitled “*Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products (Updated to 2014)*” (which has been submitted to the Chantler Review and addresses specifically the evidence base which the Chantler Review has identified in its Method Statement, including the Systematic Review Update); (b) Professor Devinney’s June 2012 report entitled “*Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products (Updated to 2012)*”; and (c) Professor Devinney’s November 2010 report entitled “*Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products*”. (available from <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>)

26 Prepared at the request of external legal counsel of JTI.

27 **Professor Steinberg’s 2010 Report** means his November 2010 report, entitled “*Adolescent Decision Making and the Prevention of Underage Smoking*”.

28 All of which are available from <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

29 Professor Cave’s November 2010 report entitled “*Better Regulation and Certain Tobacco Control Measures*”.

30 <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>

31 Warren J. Keegan is the Distinguished Professor of Marketing and International Business at the Lubin School of Business, Pace University, New York, United States of America, and a Visiting Professor at ESSEC, Cergy-Pontoise, France. He is Head of Keegan & Company LLC, Rye, New York, United States of America. Professor Devinney concurs with the relevance of Dr Keegan’s evaluation criteria outlined in Dr Keegan’s Report. Professor Devinney’s 2010 Report and his 2012 report therefore build on Dr Keegan’s criteria. See Professor Devinney’s 2010 Report, paragraphs 1.3 to 1.5 and 2.1; and Professor Devinney’s 2012 Report, paragraphs 2.1 and 2.12.

32 Andrew Lilico is Director and Principal of Europe Economics, London. He is an expert in microeconomic analysis and regulatory impact assessment. Dr Andrew Lilico (2012): “*Economic Analysis of a Plain Packs Requirement in the UK, A report by Europe Economics*”

33 Alan Zimmerman is Professor of International Business and leads the International Business Programme at City University of New York, College of Staten Island, New York, United States of America. Peggy Chaudhry is an Associate Professor of International Business at the Villanova School of Business, Villanova, Pennsylvania, United States of America. They are the co-authors of “*The Economics of Counterfeit Trade*”, “*Protecting Your Intellectual Property Rights: Understanding the Role of Management, Governments, Consumers and Pirates (Protecting Your Intellectual Property Rights)*”, published in 2013, and have been involved in an extensive set of research projects examining various aspects of the global trade in illicit products. Professors Zimmerman and Chaudhry’s June 2012 report is entitled “*The Impact of Plain Packaging on the Illicit Trade in Tobacco Products*”.



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34 *R J Reynolds Tobacco Company v Food and Drug Administration*, US Court of Appeals, District of Columbia  
Circuit, 24 August 2012 at p.25 and p.26, available at  
[http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/\\$file/11-5332-1391191.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/$file/11-5332-1391191.pdf).

35 Updated Systematic Review, page 1.

36 The front cover of the document states “September 2013”, but it appears to be the case that the document was at  
least modified subsequent to this (the document properties of the PDF version of the document indicate it was  
modified at 11.29.41 on 24 October 2013). No publication date is identified on  
<http://www.stir.ac.uk/management/about/social-marketing/>, the site from which the document can be accessed.

37 Updated Systematic Review, pages 1 and 2.

38 Consultation, paragraph 6.1.

39 Systematic Review, page 5.

40 Updated Systematic Review, page 50.

41 Systematic Review, page 89.

42 Updated Systematic Review, page 14.

43 Professor Devinney’s 2014 Report, paragraph 1.7.

44 Dr Keegan’s Report, page 9. Analysis of Consumer Survey Evidence Relevant to the UK Department of Health  
Consultation on the Future of Tobacco Control, 2008

45 Dr Keegan’s Report, page 9.

46 See Professor Steinberg’s 7 January 2014 letter to Sir Cyril Chantler.

47 Systematic Review, page 87: “*Some caution is required in interpreting these findings, as expressed smoking-  
related intentions are not always predictive of future smoking behaviour (Ajzen & Madden 1986, Sheeran 2002)  
and perceptions of the impact of a future policy measure on the behaviour of others are of course subjective*”.

48 Professor Devinney’s 2010 Report, paragraph 5.2, Professor Devinney’s 2012 Report, paragraph 5.3 and Professor  
Devinney’s 2014 Report, paragraph 5.4.

49 Professor Devinney’s 2010 Report, paragraph 5.2 (a), Professor Devinney’s 2012 Report, paragraph 5.3(c) and  
Professor Devinney’s 2014 Report, paragraph 5.4.

50 Professor Devinney’s 2012 Report, paragraph 2.9.

51 Professor Devinney’s 2014 Report, paragraph 5.5.

52 Professor Devinney’s 2014 Report, paragraph 5.9.

53 Professor Devinney’s 2012 Report, paragraph 5.8.

54 Professor Devinney’s 2014 Report, paragraph 5.9.

55 Professor Devinney’s 2014 Report, Table 3. Table 3 of Professor Devinney’s 2012 Report summarises the studies  
reviewed in that report.

56 Professor Devinney’s 2014 Report, paragraph 5.4 and 5.5.

57 Professor Devinney’s 2010 Report, paragraph 5.6; Professor Devinney’s 2012 Report, paragraph 5.11 and  
Professor Devinney’s 2014 Report, paragraph 5.17.

58 Grant application in 2009 by Professors Melanie Wakefield, David Hammond, Marvin Goldberg, Simon Chapman  
and Dr Sarah Durkin. Materials made available by way of a Freedom of Information request to the Australian  
National Health and Medical Research Council (*NHMRC*). NHMRC FOI reference number 2012-009.

59 Systematic Review, page v.

60 Systematic Review, page 88.

61 Systematic Review, page v.

62 Systematic Review, page 89.

63 Systematic Review, page 89.

64 Professor Devinney’s 2010 Report, paragraph 5.5(c).

65 Systematic Review, page v.

66 Professor Devinney’s 2010 Report, page 43.

67 Professor Devinney’s 2014 Report, paragraph 4.10(e).

68 Systematic Review, Acknowledgements.

69 See <http://tobaccocontrol.bmj.com/site/about/guidelines.xhtml>.

70 See “*Journal Policy on Research Funded by the Tobacco Industry*”, *BMJ* 2013;347:f5193 <http://www.bmj.com/content/347/bmj.f5193> doi: 10.1136/bmj.f5193. Interestingly, and as noted in the article itself, this new policy overturns the BMJ’s previously stated position that such a ban would be “antiscience”.

71 Professor Devinney’s 2010 Report was mentioned in a protocol to the 2012 Systematic Review, but was not subsequently included in the list of references in either of the Systematic Reviews. See: [http://phrc.lshhtm.ac.uk/papers/PHRC\\_006\\_Protocol.pdf](http://phrc.lshhtm.ac.uk/papers/PHRC_006_Protocol.pdf).

72 Professor Devinney’s 2014 Report, paragraph 4.10(a).

73 <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>

74 <http://www.stuff.co.nz/national/politics/9527389/Key-Let-Australia-go-first>

75 [http://ec.europa.eu/health/tobacco/docs/com\\_2012\\_788\\_ia\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/com_2012_788_ia_en.pdf)

76 See Draft Opinion on the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, dated 17 May 2013, pp. 3-4, available at: <http://www.europarl.europa.eu/committees/en/inta/draft-opinions.html#menuzone>

77 Irish Examiner, 19<sup>th</sup> December, 2013 “EU tobacco laws could scupper plain packaging plan”.

78 Schecter (1927) 40 Harv LR 813.

79 Professor Gervais’ Report, paragraph 44: “Modern trade mark theory has recognized that trade marks protect not only the owners of marks but also consumers, especially by reducing search costs. Trade marks allow consumers to identify lawful products that they wish to purchase. They can normally expect a certain quality that they associate with a given trade mark. By making all packages more or less similar, this function, which is tied to the essential function of a trade mark to guarantee the origin of products bearing the mark, is impaired”.

80 See Dr. Lilico’s 2008 Report and Dr Lilico’s 2012 Report available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>

81 <http://www.jti.com/how-we-do-business/resources/>

82 Professor Daniel Gervais is Professor of Law at Vanderbilt University Law School, United States of America. He is a leading expert on international intellectual property law and author of “*The TRIPS Agreement: Drafting History and Analysis*”. His 2010 report entitled “*Analysis of the Compatibility of Certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention*”, and is available at <http://www.jti.com/how-we-do-business/resources/>. Professor Gervais explains that plain packaging is not compatible with international trade rules and that to the extent that the World Trade Organization (WTO) Member cannot satisfy the burden of showing that plain packaging will achieve its legitimate public policy objectives, the measure can be expected to be found incompatible with WTO obligations.

83 *Thailand - Restrictions on Importation and Internal Taxes on Cigarettes*, Panel Report, DS10/R-375/200, 7 November 1990 (*Thailand Cigarettes*)

84 See, for example the Minutes of the TBT meetings on 15-16 June, 2011, available at [http:// www.smoke-free.ca/trade-and-tobacco/wto-secretariat/TBT\\_M\\_54.pdf](http://www.smoke-free.ca/trade-and-tobacco/wto-secretariat/TBT_M_54.pdf)

85 See, for example, the joint statement by the US Chamber of Commerce, the Emergency Committee for American Trade, the National Association of Manufacturers, the National Foreign Trade Council, the US Council for International Business, the Trans - Atlantic Business Dialogue and the US ASEAN Business Council regarding the Australian Government’s proposal to introduce plain packaging, dated 1 June 2011 (available at: <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=3268&category=All>).

86 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 trademarks of a genuine cigarette manufacturer (such as JTI) 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. The definition of ‘illicit whites’ (or ‘cheap whites’) varies, and determining when this product becomes illicit in its supply chain is controversial – there is no standard agreement among various authorities. See Professors Zimmerman and Chaudhry’s Report, paragraphs 153 to 159 (Annex 3).

87 Available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>

88 Revenue Customs Service. Cigarette Consumption Survey 2011.

89 MSIntelligence. Market Survey Report. Empty Discarded Pack Collection. Ireland Q2 2013.

90 Minister of Finance, Michael Noonan TD, in response to [PQ 21869/13] on 8 May 2013.

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91 Professors Zimmerman and Chaudhry's Report, paragraphs 61 to 64.

92 "Written Evidence from HM Revenue & Customs" (August 31, 2011), HMRC, available at  
<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmniaf/writev/fuel/m3.pdf>.

93 Professors Zimmerman and Chaudhry's Report, paragraph 429.

94 Professors Zimmerman and Chaudhry's Report, Executive Summary and paragraph 381(b).

95 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.

96 JTI. Illicit Tobacco Trade Review 2012. <http://illicittradereview.com/>

97 Professors Zimmerman and Chaudhry's Report, paragraphs 398 to 400.

98 "Defining Illicit Trade", JTI, available at <http://www.jti.com/how-we-do-business/anti-illicit-trade/what-is-it/>.

99 Professors Zimmerman and Chaudhry's Report, paragraph 401.

100 Professors Zimmerman and Chaudhry's Report, paragraph 406.

101 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.

102 Professors Zimmerman and Chaudhry's Report, paragraphs 386 to 395.

103 Professors Zimmerman and Chaudhry's Report, Executive Summary and paragraph 391.

104 Minutes of a meeting between IP Australia and Philip Morris held in Geelong, Victoria, Australia (23 September  
2009). See also the views expressed at paragraphs 366 to 371, 381 to 385 and 404 to 411 of Professors  
Zimmerman and Chaudhry's Report.

105 Professors Zimmerman and Chaudhry's Report, paragraph 432. JTI set out its detailed view on these points in  
JTI's Response to UK Department of Health's Consultation on the Future of Tobacco Control, and notes that  
similar views are shared by Professors Zimmerman and Chaudhry.

106 Towards a tobacco free society: Report of the Tobacco Free policy Review Group. 2000. Pg. 37.

107 Quarterly Economic Outlook. The Irish Business and Employers Confederation.

108 Various studies have been completed to assess the efficacy of the suggested solutions, using a range of  
methodologies. JTI makes no comment on, nor does it endorse the methodology of (or any assertions, statements  
or conclusions made in) any of the studies referred to in this section of the Response.

109 JTI Illicit Tobacco Trade Review 2012. Pg. 34.

110 Klonoff EA and Landrine H, "Predicting youth access to tobacco: The role of youth versus store-clerk behavior  
and issues of ecological validity" (2004) *Health Psychology*, 23:517-524.

111 See, for example, Tutt et al, "Restricting the Supply of Tobacco to Minors", *Journal of Public Health Policy* (2009)  
30, I, 68-82 and Jason et al, "Active Enforcement of Cigarette Control Laws in the Prevention of Cigarette Sales to  
Minors", (1991) *JAMA*, Vol 26, No 22.

112 See, for example, Tutt et al, "Restricting the Supply of Tobacco to Minors", *Journal of Public Health Policy*  
(2009) 30, I, 68-82 and Jason et al, "Effects of Enforcement of Youth Access Laws on Smoking Prevalence" (1999),  
*American Journal of Community Psychology*, 27(2): 143-160.