



JTI's response to the Norwegian Minister of Health and Care Services' consultation on the proposal to introduce standardised tobacco packaging and FCTC Article 5.3

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JTI is part of the Japan Tobacco group of companies, a leading international tobacco product manufacturer. It markets world-renowned brands such as Winston, Mevius and Camel. Its other international brands include Benson and Hedges, Silk Cut, Sobranie of London, Glamour and LD. With headquarters in Geneva, Switzerland, our company has over 27,000 employees, and operations in 120 countries. For more information, visit www.jti.com.

JTI currently manufactures a small number of different brands of tobacco products sold in Norway.

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. These core principles are central to our Code of Conduct, Global Marketing Standard, operational policies and the way JTI does business.
- JTI is categorically opposed to plain packaging of tobacco products.
- There is no reliable evidence that plain packaging is likely to have actual positive public health impacts (despite repeated and sustained attempts to produce this evidence).
- Evidence from Australia, where plain packaging has been in place for 30 months, shows that plain packaging has not changed the rate of decline in smoking.
- 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 the Norwegian Constitution, the European Convention of Human Rights, European Economic Area law and World Trade Organization law.
- While plain packaging will not achieve actual public health benefits, it will cause serious negative impacts in Norway. In particular, it will fuel the unregulated trade in illegal tobacco in Norway, which is already at extremely high levels. It will also cause retailer and consumer confusion, damage competition and market dynamics.
- Alternative options that are less restrictive and more able to achieve legitimate public health objectives are available.
- Article 5.3 of the Framework Convention on Tobacco Control provides an opportunity to improve the transparency, inclusivity and the integrity of the regulatory process, by using principles of good governance and Better Regulation.

PLAIN PACKAGING

1. INTRODUCTION

1.1 JTI has been, and remains, categorically opposed to the plain packaging of tobacco products. Plain packaging is an issue of critical importance to JTI. It deprives us of our most valuable assets and unjustifiably infringes our fundamental legal rights. JTI invests and innovates its packaging design and quality in order to compete with other products available to existing adult smokers.

1.2 The proposed plain packaging regulation is neither appropriate nor necessary. Despite repeated and sustained attempts by tobacco control advocates to create evidence to support plain packaging, it is still the case that there is no credible evidence that plain packaging would change smoking behaviour.

Outline of JTI's Submission

1.3 JTI's submission addresses the following:

- (a) The plain packaging proposal (the Proposal) is inconsistent with Better Regulation principles (Section 2);
- (b) Many of the 'objectives' stated for the proposed policy are not legitimate public policy objectives that can justify plain packaging (Section 3);
- (c) There is no reliable evidence that plain packaging changes smoking behaviour (Section 4);
- (d) The consultation relies upon flawed evidence (Section 5);
- (e) Plain packaging will have negative consequences, including facilitating illegal activities (Section 6);
- (f) Plain packaging would be unlawful and would put Norway in breach of various international legal obligations (Section 7);
- (g) Plain packaging deprives JTI of its most valuable assets infringing fundamental legal rights (Section 8);
- (h) Alternative regulatory solutions that would better achieve the public health objectives whilst avoiding the serious negative consequences of plain packaging are available (Section 9); and
- (i) The Consultation misinterprets the FCTC (Section 10).

1.4 The scope of the Norwegian Minister of Health and Care Services' consultation on the proposal to introduce standardised tobacco packaging and FCTC Article 5.3 (the Consultation) is very broad. JTI does not accept that the Consultation is a fair or accurate reflection of a number of complex issues it refers to supposedly to justify the introduction of such a measure. In particular, the Consultation is not consistent with a

credible and scientifically rigorous understanding of smoking behaviour. Given the limited timeframe provided to respond to the Consultation, JTI has sought to focus its response to certain of the issues raised in the Consultation. Where JTI does not comment on an issue, this should not be taken to mean that JTI agrees with the position set out in the Consultation. JTI's views on a number of key issues, including the core principles that define JTI's attitude to smoking, can be found at www.jti.com.

2. BETTER REGULATION

2.1 Tobacco products carry risks to health. Appropriate and proportionate regulation is necessary and right. JTI supports regulatory solutions which contribute to achieving legitimate public policy objectives and meet the Better Regulation principles of the Organization for Economic Co-operation and Development (OECD), of which Norway is a Member. The principles have also been endorsed by numerous organisations such as the World Bank and the Asia Pacific Economic Cooperation (APEC), and can be summarized as openness, participation, accountability, effectiveness, coherence and proportionality. The principles promote high-quality regulation which is consistent, promotes innovation and is compatible with competition, trade and investment principles. However, JTI will question, and where necessary challenge, regulation that is flawed, unreasonable, disproportionate or without evidential foundation.

2.2 As will be shown through this submission, the plain packaging proposal contravenes numerous Better Regulation principles, for example:

- (a) The supplementary objectives such as increasing the effect of health warnings are not legitimate public policy objectives;
- (b) There is no reliable evidence that plain packaging will achieve public health objectives;
- (c) More proportionate alternative solutions have not been considered; and
- (d) There has been an inadequate consideration of unintended consequences.

Layering of regulations

2.3 Furthermore, there has been a notable lack of assessment of the efficacy of the numerous other tobacco control measures in place in Norway, for example:

- (a) Prohibition of all advertising for tobacco products (Tobacco Act § 4);
- (b) Ban on the display of tobacco products (Tobacco Act § 5);
- (c) Prohibition of self-service of tobacco products in retail outlets for consumers (Tobacco Act § 18);
- (d) Labelling requirements and design of tobacco products (Chapter 6 Tobacco Act); and
- (e) Health warning requirements (Chapter 6 Tobacco Act).

2.4 In addition to the existing legislation, the revised EU Tobacco Products Directive (TPD2) has yet to be implemented and, if lawful, will enter into force in May 2016. Amongst a plethora of measures, TPD2 will require that health warnings cover 65% of the front and back of tobacco packs. While JTI believes that many of the proposed measures are unnecessary and unjustified, it is only right for Norway to wait until the full extent of any changes envisaged by TPD2 are known before taking further steps. Further, introducing plain packaging when TPD2 itself is subject to legal challenge by an EU Member State and, separately, manufacturers is inappropriate.

2.5 In line with Better Regulation principles, the Minister of Health and Care Services should seek to avoid this layering (on top of the existing, multiple layers of tobacco legislation in Norway) for a number of reasons:

- (a) Layering makes it almost impossible to analyse effectively the impact of individual measures. Worse, it leaves the Norwegian Ministry of Health and Care Services open to criticism that it is deliberately frustrating the requirement that policy impacts are assessed so that their potential effectiveness can properly be understood.
- (b) A constant churn of new regulations increases the overall regulatory costs of industries impacted by regulatory change relative to a situation in which they are permitted to adapt to one regulatory measure before its impact is properly evaluated and, if required, the next is introduced.
- (c) Professor Martin Cave OBE¹ (an expert in regulatory economics who has specialized knowledge in the design of regulatory policies to achieve economic and also social objectives), has previously, in an expert report for JTI, identified the OECD Checklist for Regulatory Decision-making's requirement that: "*...regulators must review and evaluate existing legislation (including whether it is being effectively enforced) and other options before regulating further*".²
- (d) Regulation often raises barriers to entry (e.g. by raising the costs of building compliance systems and training staff to use such systems). A small increase in barriers to entry from any one regulation might not materially damage the effectiveness of competition in a market. However, successive small increases in barriers to entry caused by the layering of regulatory measures may do so. Where barriers to entry are large, competition can be impaired.

Two or more regulations that attempt to address the same issue might not produce benefits equal to the sum of the benefits each would produce in isolation.

3. OBJECTIVES

3.1 The consultation outlines in section 3.2 that the main objective of the plain packaging proposal (the Objective) is "*to reduce the number of children and young persons who start using cigarettes and snuff, in order to protect them from the harmful effects of tobacco use*".

3.2 The Consultation supplements the Objective with mechanisms relied upon in an attempt to achieve the Objective, namely (a) to “*reduce the attractiveness of tobacco products*”; and (b) “*limiting the advertising effects of packaging, increasing the effect of health warnings and minimizing the risk that package design could provide misleading information about the dangers to health of tobacco consumption*”.

3.3 These mechanisms are not objectives. None of the mechanisms justify plain packaging, whether considered individually or taken as a whole. The Minister of Health and Care Services appears to be proceeding on the assumption that the mechanisms will drive behaviour. The mechanisms are insufficiently articulated and evidenced, and insufficiently capable of changing smoker behaviour. The Minister of Health and Care Services fundamentally misunderstands the role of packaging in smoking behaviour and decision-making.

Reducing attractiveness is not a proper policy objective

3.4 Reducing the appeal or attractiveness of a product is not a proper policy objective and cannot be a self-standing justification for tobacco regulation. “*Attractiveness*” is an amorphous and vague concept. It lacks any evidential foundation and is inherently uncertain and arbitrary. It simply acts as an umbrella term, and the Minister of Health and Care Services must identify, articulate clearly and assess the evidence against the underlying public policy objective(s). The mechanisms cannot advance the plain packaging debate or justify its introduction.

Tobacco packaging does not mislead consumers

3.5 As discussed under section 4, plain packaging proposals mischaracterize the role of packaging. Branded packaging does not act as an advertisement and tobacco packaging does not mislead consumers about the health risks of smoking. Further, existing legislation in Norway already prevents the misleading use of packaging for tobacco products.

- (a) The Tobacco Act Section 30 sets out the requirements concerning labelling of tobacco products, including the prohibition to “*bring into Norway, sell or distribute tobacco products which by their text, name, trademark, illustrations or other sign or symbol suggest that a particular tobacco product is less damaging to health than other tobacco products.*”
- (b) The Labelling Regulations Section 17 prohibits the misleading use of descriptors: “*To ensure that consumers are not misled with regard to the damage to health caused by using tobacco products, it is prohibited to import into Norway, process, sell or transfer tobacco products which imply by text, name, trade mark, illustrations or other signs that a particular tobacco product is less harmful to health than others.*”
- (c) Article 13 of TPD2 which has yet to be implemented also includes specific regulations regarding a ban on misleading labelling.

3.6 Despite detailed regulations prohibiting the misleading use of packaging and descriptive terms on packs, the Consultation sets the quasi-objective of “*minimizing the*

risk that package design could provide misleading information about the dangers to health of tobacco consumption". However, the Consultation provides no explanation of how current tobacco packaging is said to mislead consumers or why the existing law is inadequate. No basis at all has been put forward to support this quasi-objective.

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

3.7 While there is already a very high level of awareness of the health risks of smoking in Norway, 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. Plain packaging does not enhance the effectiveness of health warnings. "Noticing" something, particularly something one knows already - such as a health warning on a tobacco product - does not make it more effective and translate into a change in actual smoking behaviour.

3.8 The purported key objective of the plain packaging proposal is to reduce the number of children and young persons who start smoking or using snuff. A leading expert in the area of adolescent judgment, decision-making, and risk-taking has stated³ that 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, this would "*have no influence on adolescent experimentation with or use of tobacco products*".⁴

4. ROLE OF PACKAGING

4.1 The packaging of fast moving consumer goods, including tobacco products, is designed in line with the brand positioning and generally includes elements of the brand image in the pack design. At its most effective, branded packaging will reinforce branding (and brand equity) with existing users (i.e. those who handle the package when using the product). In this way, branded packaging is an important tool for tobacco product manufacturers competing amongst themselves for share of the market. In recommending plain packaging, the Consultation mischaracterizes the role of packaging and wrongly assumes that branded packaging causes people to start to smoke or to smoke more. The relevant marketing theory and evidence shows that branded packaging does not affect consumption or initiation, as set out below.

4.2 Distinctive branded packaging distinguishes brands⁵ and enables existing adult consumers to identify and differentiate brands quickly, assisting consumers to navigate their options⁶. Brands provide consumers with confidence about what they will experience because branding assigns responsibility for the product to a particular manufacturer, so a credible brand signals a certain level of quality and performance.⁷ Consumer trust leads to repeat purchasing of the brand and brand loyalty. Branded packaging can help to reinforce brand loyalty, through distinctive features of the brand image (such as logo, package shape, package graphics and colours) which are seen by existing users when the product is used.^{8 9} Branding can consequently result in the willingness of consumers to pay a higher price for the brand (i.e. it adds value to a product).¹⁰ Branded packaging allows manufacturers to reinforce this brand value with consumers.

4.3 The legitimate use of branding and trade marks on packaging also serves to maintain quality standards, as the use of colour and ‘stylized elements’ makes the production of counterfeit product packaging more difficult (as discussed further in Section 6). The techniques used in producing branded packaging can be implemented effectively by legitimate manufacturers on an industrial scale, but are far less economical and more complex to implement on a smaller scale in a clandestine environment.

4.4 The Consultation mischaracterises the role of branded packaging, by failing to acknowledge the well-established functions described above and instead describing packaging throughout as a “*form of advertising*”, contrary to established marketing theory. Advertising and branded packaging have distinct (but complementary) roles in respect of consumer behaviour; whereas advertising’s role is to communicate with target consumers, packaging has both functional and informative roles, with brand image communication necessarily limited in both content and reach by the medium.

4.5 Packaging is considered by marketers to be an aspect of the product itself, but advertising is a pure promotional tool.¹¹ Unlike advertising, which appears in targeted media that the seller has paid for, a seller cannot ensure that packaging will be seen outside of its display in a store, other than by consumers who purchase the product. Packaging’s practical function severely limits the scope of the promotional communication which can be made on the packaging. Design features can be used to reinforce aspects of the brand imagery (and the package can be designed to be consistent with an established brand image), but there are limits on the extent to which brand identity or promotional messaging can be built and communicated through packaging. Other promotional marketing tools, such as advertising, can more easily communicate complex and sophisticated messages to consumers about the brand compared to branded packaging.¹² For this reason, advertising is the primary marketing vehicle to develop a brand image and packaging can be used, in part, to reinforce that image with the consumer.

4.6 The ability of branded packaging to transmit messages to tobacco consumers in Norway has been further reduced over the years by regulatory restrictions. The branded area of tobacco packaging is limited (e.g. by the inclusion of mandatory health warnings) and the reach of tobacco packaging is limited by the ban on displaying tobacco products at the point of sale and the ban on smoking in enclosed public places. These restrictions further amplify the differences between branded tobacco packaging and traditional advertising.

Tobacco packaging does not influence smoking behaviour

4.7 The Consultation’s conflation of branded packaging and advertising demonstrate fundamental flaws in the way that it has assessed the role and effect of packaging. Moreover, this is a key basis for the Consultation’s conclusion that branded packaging must increase tobacco consumption and initiation, since the Consultation assumes (wrongly) that tobacco advertising affects consumption. However, not only is it wrong to equate packaging to advertising (for the reasons set out above), marketing theory and supporting evidence show that marketing (including both branded packaging and advertising) does not affect tobacco consumption in a market such as the

Norwegian tobacco market, for the reasons set out below. This evidence (and a lack of contrary evidence in support of the Consultation's proposal) showing that branded packaging does not affect smoking behaviour (i.e. whether someone starts smoking, continues smoking or quits) also concurs with relevant psychology theory, which explains why branded packaging does not affect the decision to smoke.

4.8 Fundamental marketing theory shows that marketing performs different functions at different stages of a category's "life cycle".¹³ It is well established that the role of marketing in a mature market (such as the Norwegian tobacco market) is not to persuade non-users to try the product, but to persuade existing users to choose a particular brand and to support price.¹⁴ This is an accepted and fundamental pillar of marketing theory. This is because in a mature market the population at large is already aware of the product and its characteristics, so a decision to use the product is not influenced by marketing, but by the circumstances, lifestyle and personal preferences of the consumer. In a mature or declining market, the role of marketing is to differentiate brands, reinforce brand loyalty, limit price erosion and encourage switching behaviour, in order to maintain market share.¹⁵ These functions of branding are entirely irrelevant to non-smokers; branding promotes brands, not the act of smoking.

4.9 In this regard, the statement in the Consultation that, "*it is well documented that tobacco advertising does affect consumption*"¹⁶ is incorrect and conflicts with well-established marketing theory and significant evidence. The majority of studies on the effect of tobacco advertising on smoking prevalence suggest that the effect is non-existent or insignificant.¹⁷ For example, a 2003 study of the impact of tobacco advertising bans on youth smoking in 42 countries, using WHO data, found that advertising bans (full and partial) had no effect on smoking prevalence.¹⁸ Therefore, to the extent that there is a degree of overlap in the roles played by branded packaging and advertising (e.g. in the broad sense of communicating aspects of the brand image), both the relevant theory and evidence show that this marketing role has no effect on consumption or initiation.

4.10 Expert analysis of adolescent decision-making, commissioned by JTI, demonstrates that tobacco packaging is not relevant to adolescent decisions to experiment with smoking.¹⁹ Expert evidence explains that the decision to start smoking is a complex one, engaging the decision-making processes regarding risky products.²⁰ A decision to begin smoking is influenced by a well-documented set of factors, such as the smoking behaviour of peers - not branded packaging.²¹

4.11 Efforts to reduce smoking among minors, who are not legally entitled to purchase tobacco products, will only be effective if they control the ability of those minors who want to smoke to obtain tobacco products and remove those products from their social networks.²² Conversely, measures directed at adult smoking behaviour need to be targeted at the adult decision-making process at the point of consumption in order to be effective, taking due account of the analysis that they employ when making decisions about risk.²³

5. EVIDENCE

The evidence relied upon is flawed

5.1 Supporters of plain packaging often rely on consumer surveys that seek to demonstrate what the reactions of people to plain packaging might be, rather than their actual behaviour in a real life setting. Expert review demonstrates that these consumer survey studies fail to account for the actual smoking behaviour of adults and minors.²⁴

5.2 The Consultation fails to establish any link between the introduction of plain packaging and any change to actual smoking behaviour as a result. Nor does the evidence considered provide any real indication that plain packaging would ultimately lead to such a change. The consumer surveys relied on are based on a hypothesis. It does not constitute reliable research that could ever show that plain packaging would be effective in achieving the public policy goal of changing actual smoking behaviour.²⁵ This is because it does not follow that any reduction in the “*attractiveness*” of tobacco products would result in smoking behaviour change.

5.3 Studies in support of plain packaging frequently conclude that when asked a direct question, respondents generally say they find plain packaging less attractive (or appealing) than branded packaging. Such reported reductions in “*appeal*” are only an indication of the respondents’ perceptions. They are subjective and often self-reports of future intentions (i.e. what the respondent says he would do rather than evidence of what he actually did) in response to a direct question. As the “*Standardised packaging of tobacco products. Report of the independent review undertaken by Sir Cyril Chantler*” (Chantler Report) concedes: “...*stated intentions are generally weak predictors of behaviour*”.²⁶ These studies do not address whether reported reductions in “*attractiveness*” have any relevance to the actual decision to start (or continue) smoking. Without such evidence, it is wrong to simply assume that reducing the attractiveness of tobacco products will change an individual’s attitude to smoking.

5.4 Despite repeated and sustained attempts by tobacco control advocates, it is still the case that there remains no reliable evidence that plain packaging would change smoking behaviour in Norway. Enthusiastic support for a policy is no substitute for reliable evidence.

5.5 The Consultation makes reference to a number of individual studies and systematic reviews to support the plain packaging proposal. In particular, in section 3.4, the Consultation refers to the principal European knowledge summaries and reports performed by the countries that have decided to introduce plain packaging, including the UK, Ireland and Norway.

5.6 A leading expert²⁷ has reviewed on behalf of JTI the systematic reviews commissioned in the UK. He has explained that these reviews are insufficient to justify the conclusion that plain packaging is likely to have any impact on actual smoking behaviour and that “*a systematic review of fundamentally invalidly conducted research will amount to little more than “garbage in, garbage out”*”.²⁸ One of the authors of the systematic review has herself accepted that: “... *the systematic review had not, in fact, drawn firm conclusions about behaviour*”.²⁹

5.7 Also, Associate Professor David Hammond’s paper “*Standardized packaging of tobacco products: evidence review*” does not provide any direct evidence of the actual effects of plain packaging. The paper merely reviews materials like the consumer surveys prepared by David Hammond and his fellow tobacco control advocates.³⁰

The conclusions of the Chantler Report

5.8 The Consultation refers to the Chantler Report³¹ on a number of occasions. JTI’s key observations on the Chantler Report are outlined below³²:

- (a) The Chantler Report accepts that there are “*limitations*” to the evidence base (an evidence base which Sir Cyril Chantler describes as “*modest*”). This is a serious understatement. There remains no credible evidence that plain packaging would lead to positive behavioural change. Such change has not occurred in Australia, and the Chantler Report’s findings spring from the fact that, despite the lack of actual evidence on this fundamental point, Sir Cyril Chantler’s opinion is that there is a “...***plausible link to behaviour***...” (emphasis added).
- (b) Much of the Chantler Report is spent considering the “*likely impact*” of plain packaging by reference to surveys of views as to perceptions of future behaviour. “*Likely impact*”, however, is not cause and effect. It is speculation at best and establishing such a conclusion, which cannot be evidenced, requires a huge leap of faith.
- (c) In the absence of any evidence to support the notion that plain packaging would have any impact at all on actual smoking behaviour, the Chantler Report assumes that “*a reduction in appeal*” of the packaging will cause changes in behaviour. However, this is a false assumption, unsupported by fact or evidence. Only by making this leap of faith is Sir Cyril Chantler able to conclude that plain packaging is likely to affect actual smoking behaviour.
- (d) The “*independent academic review*” of the evidence base, acknowledged by Sir Cyril Chantler as “*central to the debate*”, is not independent, particularly as it merely assumes that the Systematic Review, and the studies underlying it, are themselves reliable and independent, which expert analysis has found is not the case.

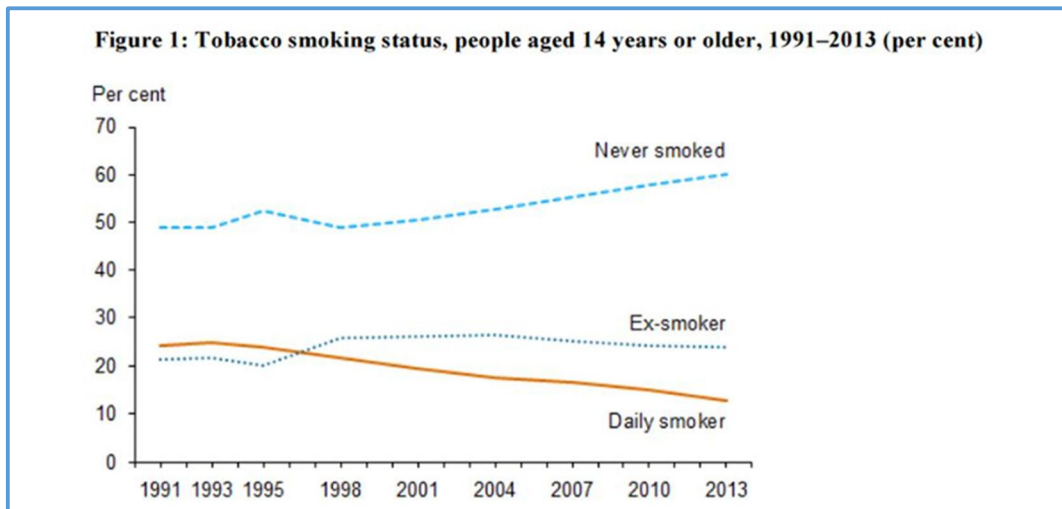
Plain packaging has not worked in Australia

5.9 Claims have been made about the health-related impacts of plain packaging in Australia, the only country in the world to have introduced such legislation. Plain packaging in Australia came into force in December 2012. At 30 months since the implementation, the actual evidence emerging from Australia reinforces the fact that plain packaging does not work:

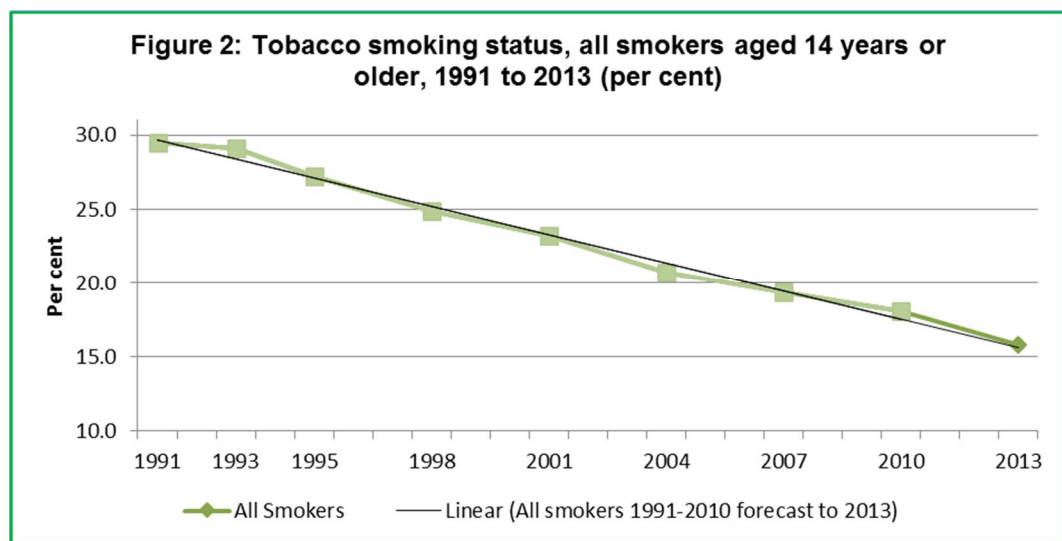
- (a) Studies by the Universities of Zurich and Saarland have found that plain packaging has had **no effect on smoking prevalence**, either among minors or adults.³³

- (b) A study by London Economics found that: “*the data **does not demonstrate that there has been a change in smoking prevalence** following the introduction of plain packaging and larger health warnings, despite an increase in the noticeability of the new health warnings*” (emphasis added).³⁴
- (c) Contrary to misleading claims by the tobacco control lobby, **Australian government data further reinforces the fact that plain packaging has not had a positive impact.**³⁵ The overall decline in smoking prevalence between 2010 and 2013 is **consistent with the continuation of the pre-existing trend**, despite the introduction of plain packaging.

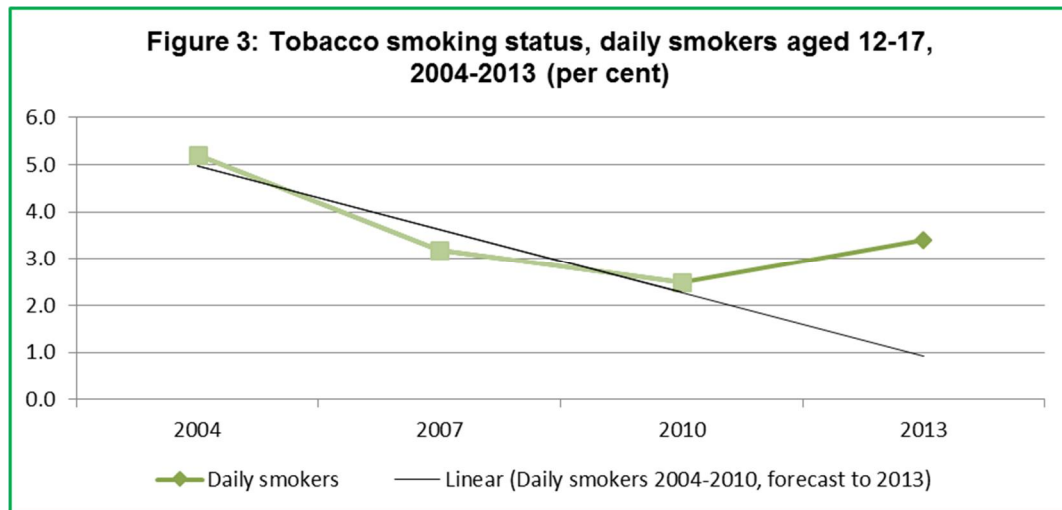
5.10 Data published by the Australian Government confirms this, as illustrated in Figure 1 below.³⁶



5.11 The pattern of the data observed in Figure 1 is consistent with a declining linear trend over the period 1991 to 2013. The decline in smoking prevalence between 2010 and 2013 is consistent with the pre-existing linear trend, as illustrated in Figure 2 below.³⁷ It shows prevalence for all smokers (daily and occasional) from 1991 to 2013, with the linear trend from 1991 to 2010 showing what prevalence would have been expected to be in 2013 had the pre-existing linear trend continued.



5.12 The same data set shows that daily smoking prevalence among 12 to 17 year olds increased in the period 2010 to 2013, reversing previous declines, as illustrated in Figure 3 below.³⁸ The point in time at which plain packaging was introduced in Australia (December 2012) falls in this period; although the data cannot determine whether plain packaging was causative. The upturn in underage smoking is often deliberately excluded by the tobacco control lobby when seeking to misrepresent the data.



More recently, a 2015 paper funded by the Australian Department of Health found further evidence in support of these trends. It concluded that “[a]mong smokers, reported number of cigarettes smoked did not change after [plain packaging] introduction”.³⁹

6. NEGATIVE CONSEQUENCES

Plain packaging impedes and restricts lawful activity, whilst facilitating illegal activities

6.1 The illegal trade in tobacco products is already at extremely high levels in Norway. Non-Norwegian duty paid tobacco products account for 47.2% of all tobacco consumed in Norway.⁴⁰ The illegal trade in tobacco costs the Norwegian government millions of kroner annually. Illegal traders are not regulated, do not comply with legislation regarding tobacco specifications and will sell to anyone regardless of age.

6.2 JTI’s view that plain packaging will worsen this illegal tobacco trade in Norway is based on JTI’s own industry expertise and on expert opinions,⁴¹ and supported by Australian data.⁴²

6.3 The Consultation states that as branded tobacco products are already easy to copy, plain packs will make no difference to the level of difficulty involved in copying packs. JTI disagrees. The reality is that counterfeiters will have less to duplicate when counterfeiting a plain pack and plain packaging opens up opportunities for counterfeiters and illegal traders in numerous ways as explained below.

- (a) **Plain packaging will facilitate the manufacture of counterfeit products.** Sophisticated printing technologies deter counterfeiting. In a plain packaging environment, counterfeiters will be effectively given a blueprint of how to make every pack, with the specifications being effectively identical for all packs. Once a counterfeiter has mastered the Norwegian plain packaging design for one brand, very few design alterations are needed to produce counterfeit plain packaging versions of each and every other pack sold in the Norwegian market.
- (b) **Plain packaging will crystallise pack design, which will benefit counterfeiters.** Legitimate manufacturers would be denied the opportunity to innovate and compete through plain packaging, something that is a standard industry practice for all manufacturers of FMCG, including JTI. In a plain packaging environment, counterfeiters would only need to meet a government-mandated design, rather than having to keep up with manufacturers' evolving packaging innovation and developments. No additional investment would be necessary until further change in law. In this way, plain packaging would, again, effectively reduce the burden on counterfeiters and open the market to new ones.
- (c) **Plain packaging will result in the continued creation of branded packs by counterfeiters.** Nimble counterfeiters will adapt to the changing regulatory environment and recalibrate their product offerings to include a whole portfolio of products. For example, counterfeiters will 'adopt' the brand imagery that legitimate manufacturers can no longer use. Indeed some smokers may seek to buy the branded packs familiar to them, regardless of the plain packaging measure. Her Majesty's Revenue and Customs in the UK (HMRC) has acknowledged this risk: "*With branding all but removed, smokers, already motivated largely by price, may be more open to trying unfamiliar brands and driven towards the illicit market*". HMRC also notes that counterfeiting of branded packs will become easier in a plain packaging environment as consumers will "*almost certainly become less familiar with the exact appearance of genuine branded packaging*".

6.4 The experience from Australia further demonstrates that there has been an increase in illicit trade. Indeed, data from Australia demonstrates that the illegal tobacco trade (which includes counterfeit and contraband cigarettes, and unbranded tobacco products found in Australia ('chop chop')) appears to have benefitted from plain packaging. KPMG's 2014 full-year report "*Illicit Tobacco in Australia*", which was published in March 2015,⁴³ shows, amongst other things, an increase in the size of the illegal tobacco market since the measure has been in place. According to this report, from the full year 2013 to 2014, the level of illegal tobacco consumption in Australia grew from 13.5% to 14.5% of the total consumption. This followed a period of decline from 2010, when illicit tobacco consumption in Australia represented 12.8% of overall consumption, falling to 11.5% in 2012.⁴⁴

6.5 This is consistent with other information available from Australia.⁴⁵ New illicit brands which look like they are legitimate 'plain packs' have been found since the introduction of plain packaging and a counterfeit of one of JTI's brands in Australia, Old Holborn, has appeared in plain packaging. Old Holborn is a brand with a small market share and its counterfeiting demonstrates that even brands with smaller market

shares are being counterfeited. Further increases in the consumption of non-Australian duty paid product, at the expense of the duty paid product, will lead to further loss of tax revenues for the Australian Government without there being any public health benefit.

6.6 In any plain packaging environment, it seems inevitable that with fewer tools available to identify counterfeit products and to link products to their origin, regulatory investigations could be made more difficult.

6.7 It is unclear whether security measures will still be available on plain packs (for example, the UK Department of Health has recently accepted that the UK plain packaging measure will stop manufacturers being able to use one such measure on packs). Even if legal plain packs were to carry built-in security features (as is the case for branded packs), these features can only go so far in the global fight against the illegal trade in light of the ways in which plain packaging helps counterfeiters (described in paragraphs 6.3 to 6.6 above). Further, while security markings may provide useful means of verifying whether, for instance, a pack is genuine and/or is intended for that particular market, it is unlikely to act as a meaningful disincentive to counterfeiters unless the cost of copying the marking outweighs the cost of savings resulting from the plain pack design.

6.8 Lastly, JTI welcomes the proposal of the Minister of Health and Care Services in section 3.10 of the consultation to introduce a new provision in the Tobacco Act §41A “*providing a legal basis to seize and destroy illegally imported tobacco products, smoking accessories and tobacco surrogates without having to report a crime to the police*” in order to simplify the seizure and destruction of these products for customs. However, as shown above, this measure will not address the opportunities for the illegal trade that will flow from the introduction of plain packaging.

Plain packaging will lead to other serious negative consequences

6.9 In addition to being ineffective in achieving its goals, plain packaging would have serious and widespread negative impacts including:

- (a) **Negative impact on governments and tax payers.** Governments lose significant tax revenue to the illegal tobacco trade each year. The loss of tax smokers shift from legal to illicit products has multiplier effect since governments will have less funding for healthcare, education and other public services. There are also broader indirect losses to the state. The lawful sale of tobacco products benefits all those in the legitimate supply chain in the market including the retailer, distributor and manufacturer, all of whom pay tax. Further, increased sales of fake products shift revenues from legitimate manufacturers, affecting jobs from the legitimate workforce at all levels of the supply chain.
- (b) **Damaging competition and market dynamics, and raising barriers to entry.** Plain packaging would lead to downtrading and will eliminate pack innovation. Where price becomes an even more important product differentiator, barriers for new brands and products are created other than at the cheapest price point. Particularly given the retail display ban in Norway, existing adult smokers

are going to be even more likely to request and purchase only those brands and products familiar to them.⁴⁶

- (c) **Creating consumer and retailer confusion.** Consumers and retailers 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.
- (d) **Tobacco products become more accessible to minors and low income groups.** Illegal tobacco products are often more accessible to minors and low-income groups. Plain packaging is likely to increase the supply of illegal tobacco products to minors and low income groups, worsening the social inequalities caused by the illegal tobacco trade.
- (e) **Creating a precedent for other consumer products.** Concerns have been raised by brand owners regarding the potential extension of the policy to other products such as food, confectionary, pharmaceutical products and alcohol. Indeed, a representative from the food company Mars has stated that the “*million dollar question facing brand owners is whether the plain packaging laws that have been introduced for tobacco will extend to confectionery products*”.⁴⁷

7. NORWAY’S INTERNATIONAL OBLIGATIONS

TPD2

7.1 Recital 53 of TPD2, which refers to Member States introducing “... *further standardisation of the packaging of tobacco products...*”, implies that the purpose of Article 24(2) is, at least in part, to allow for the introduction of plain packaging on a unilateral basis. However, the recitals of TPD2 also clarify that any proposed plain packaging would have to be “*compatible with the Treaty, with WTO obligations and [must] not affect the full application of this Directive*” (recital 53).⁴⁸

7.2 TPD2, including Article 24(2), is currently undergoing legal challenges which are to be determined by the CJEU. In those proceedings, JTI contends that a Member State which introduced plain packaging would, by doing so, erect a complete barrier to the marketing within its boundaries of tobacco products that were compliant in all respects with TPD2 – including its packaging and presentation requirements.

7.3 It is not appropriate for an EEA country to take active steps to pursue the introduction of plain packaging in circumstances where the power to lawfully do so is in doubt.

7.4 The relevance of the CJEU’s future ruling as to whether a country is able to introduce plain packaging is clear and undisputed.⁴⁹ If the CJEU finds Article 24(2) to be invalid, it will be struck down and cannot serve as a basis for an EU Member State or EEA country to introduce plain packaging. Even if the challenge to Article 24(2) is unsuccessful, it still has to show that plain packaging does not breach EU law or its World Trade Organization (WTO) obligations – something which JTI strongly considers it would be unable to do.

7.5 TPD2, even if held by the CJEU to be valid as a matter of EU law, requires a Member State to justify the need for plain packaging: “...on grounds of public health, taking into account the high level of protection of human health achieved through this Directive...” and to demonstrate that plain packaging is: “...proportionate and [does] not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.” As described above, the recitals also clarify that plain packaging must be “compatible with the Treaty, with WTO obligations and [must] not affect the full application of this Directive” (recital 53). In addition to these substantive conditions, which cannot be fulfilled, TPD2 would require the measures to be notified to the European Commission: “...together with the grounds for maintaining or introducing them.”

7.6 As a matter of EU law, plain packaging also clearly falls within the prohibition contained in Article 34 of the Treaty of the Functioning of the European Union (*TFEU*). Measures infringing the free movement of goods are unlawful as a matter of EU law unless they can be justified. JTI notes that three EU Member States have notified their plain packaging proposals under the EU Technical Standards Directive. The standstill period has closed for the UK and Ireland notifications and detailed opinions were issued by eleven Member States for the UK and ten for Ireland.⁵⁰ JTI assumes that these opinions raise issues about the compatibility of such a proposal with free movement principles.

7.7 It should be noted that Norway has notified its Draft amendments to Act No. 14 of 9 March 1973 relating to Prevention of the Harmful Effects of Tobacco (Standardised packaging) and draft amendment to Regulations no 141 of 6 February 2003 on the contents and labelling of Tobacco products under the EU Technical Standards Directive, which it did on 5 May 2015.⁵¹ The notification of Norway’s intention to introduce plain packaging is both surprising and concerning given that the public consultation on the proposed draft amendments is still ongoing.

The Agreement on the European Economic Area (EEA)

7.8 As stated by the Minister of Health and Care Services in section 3.7.1 of the Consultation, the EEA Agreement prohibits measures that prevent or restrict the free movement of goods. Norway’s obligations under the EEA Agreement imply that national legislation cannot be adopted if it goes against the provisions of the EEA Agreement. Plain packaging constitutes a trade barrier in contravention to the principles of the EEA Agreement.

7.9 Article 11 of the EEA Agreement prohibits quantitative restrictions on imports and all measures of equal effect between the contracting parties. As correctly interpreted by the Minister of Health and Care Services, plain packaging falls under the scope of article 11 of the EEA Agreement as it constitutes an import restriction.

7.10 Nonetheless, according to the practice of the CJEU, certain measures that go against Article 11 may still be introduced if the measure is aimed at protecting legitimate interests under the EEA Agreement as stated under Article 13, as long as such restrictions are proportionate, that is, the measure must be suitable and necessary to achieve its purpose.

7.11 Throughout section 3.7.1 of the Consultation, there is an assessment of whether plain packaging is both suitable and necessary to achieve the stated public health objectives under the scope of Article 13 of the EEA Agreement. The Minister of Health and Care Services thus has the burden to demonstrate that plain packaging is effective in achieving the public policy objectives and that these objectives cannot be met by less intrusive measures.

7.12 JTI believes plain packaging does not fulfil the conditions for applying Article 13 of the EEA Agreement. As discussed throughout the submission, plain packaging represents an extraordinary deprivation of and unjust attack on JTI's brands and trade marks. It is manifestly disproportionate, unjustified and unnecessary and will not achieve the public policy objective of changing smoking behaviour.

7.13 The basic principle of proportionality (built into Article 1 of Protocol 1 of the ECHR and Articles 10 and 13 of the EEA Agreement) requires that the proportionality assessment of plain packaging should also take into consideration that, in addition to being ineffective in achieving its goals, plain packaging would have serious and widespread negative impacts as have been highlighted in the submission in section [6].

7.14 Furthermore, the Minister of Health and Care Services has not given any consideration nor assessed other less restrictive, alternative measures that could achieve the public health objectives. Section 9 of this submission highlights alternative solutions that are less restrictive, more targeted and proportionate to meet the Minister of Health and Care Services' objective of preventing minors from smoking.

7.15 Consequently, it is JTI's view that the introduction of plain packaging would constitute a barrier to trade in conflict with Article 11 of the EEA Agreement which does not fulfil the requirements of Article 13 of the EEA Agreement.

WTO obligations

7.16 Plain packaging risks infringing a number of international treaties such as the WTO Agreements on Trade-related Aspects of Intellectual Property Rights (TRIPS), the WTO Agreement on Technical Barriers to Trade (TBT) and the World Intellectual Property Organization's Paris Convention for the Protection of Intellectual Property (Paris Convention).

7.17 A number of countries have brought challenges to be settled by the WTO Dispute Settlement Body against the Australian plain packaging legislation. Over 30 other WTO members have also joined the process as third parties. The challenges will proceed on the basis of a harmonised procedure, and five panels consisting of the same three panellists were established on 5 May 2014. A final ruling is expected in 2016.

7.18 If the Australian plain packaging legislation is found to be incompatible with WTO obligations, Australia must amend its legislation or face possible sanctions. It is vital that this process is properly respected and there are no efforts by Norway or any other WTO members to pre-empt the panel by proceeding with plain packaging before the ruling is given.

7.19 Norway should wait for the outcome of the WTO's ruling. It is inappropriate for Norway to push ahead with plain packaging, pre-empting what its actual impact might be and to conclude that "*plain packaging proposal is not in conflict with the WTO legislation*" (as stated in point 3.7.2 of the Consultation) until the WTO panel has reached its own decision.

7.20 JTI believes that the adoption of a plain packaging measure in Norway would violate these international obligations.⁵² This view is based on, among other things, the expert opinion of Professor Gervais,⁵³ a leading expert on international intellectual property law, on the interpretation of TRIPS and the Paris Convention.⁵⁴

7.21 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 trademark, 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".

7.22 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*".

7.23 JTI acknowledges that WTO members may, in certain limited circumstances take advantage of flexibilities within TRIPS to address public health concerns.⁵⁵ 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. JTI believes that Norway 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.

7.24 JTI is not alone in its view. A significant number of countries that 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.⁵⁶ 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 TBT). 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 WTO members questioned the efficacy of the measure to achieve the stated objective.

7.25 Despite the fact that Australia's plain packaging legislation is subject to challenge at the WTO, the Norwegian government, on 18 May 2015, notified the

Committee on Technical Barriers to Trade of its intention to introduce plain packaging.⁵⁷ This appears to be a worrying attempt to pre-empt the work of the WTO's Panel by attempting to proceed before the ruling is delivered. A number of WTO members have, in fact, urged countries that are in the process of considering the introduction of plain packaging, such as the UK and Ireland, to wait until the WTO dispute has been settled:

- (a) “Cuba expresses great concern over the UK Parliament's decision to move ahead with the process of implementation of plain packaging of tobacco products, without waiting for a settlement of the complaint against Australia before the WTO Dispute Settlement Body”;⁵⁸
- (b) Honduras explained to Sir Cyril Chantler that: “the WTO dispute settlement proceeding presents the best opportunity to review and weigh the evidence developed by all the parties.” Accordingly, Honduras requested that the UK delay its final decision on plain packaging until: “...it has had an opportunity to review and assess the legal arguments and evidence submitted by all parties in the WTO dispute settlement proceedings...”;⁵⁹ and
- (c) the Dominican Republic has urged Ireland to withdraw its plan to introduce plain packaging until the WTO challenge is settled. This comment was supported by Cuba, Honduras and Nicaragua.⁶⁰

7.26 In addition to the WTO challenge, Australian plain packaging legislation is also the subject of an international arbitration, on the basis that it breaches the bilateral investment treaty between Australia and Hong Kong and therefore compensation is due. The dispute is ongoing and a resolution could be expected in 2017.

Framework Convention on Tobacco Control (FCTC)

7.27 There is no requirement for plain packaging within the FCTC. Even the non-binding guidelines to the Convention only propose that parties consider it.⁶¹

7.28 The consultation inappropriately mentions that “*The proposals provided in this consultation paper will contribute toward enabling Norway to fulfil the obligations of the FCTC*”.⁶² JTI reiterates that there is no mention of plain packaging in the text of the FCTC and that the non-binding guidelines to the FCTC do not recommend plain packaging, but merely its consideration.

7.29 The reference to “*obligations of the FCTC*” is therefore a misrepresentation of Norway's actual obligations under the FCTC. Norway is under no international obligation to consider, recommend or introduce plain packaging. Indeed, as explained under this section, we believe that international obligations, under the WTO treaties, should actually deter Norway from introducing plain packaging.

7.30 The FCTC deals separately with (a) the advertising and promotion of tobacco products (Article 13); and (b) the labelling and packaging (Article 11).⁶³ As explained in Section 4, there are significant differences between advertising and promotion of products and the labelling and design of the pack itself, and their separate treatment reflects these distinctions.

7.31 For the reasons set out in detail in Section 4, JTI disagrees with the Minister of Health and Care Services assessment that “*promotion through the product packaging is the only remaining legal form of advertising*”.⁶⁴ JTI does not accept the contention that the pack or the use of trademarks, IP or branding on the pack itself constitutes a form of promotional advertising and strongly believes that it should not be regulated as if this was the case.

7.32 It would therefore be illegitimate and unjustified to introduce plain packaging on the basis of an exaggerated definition of “*advertising*” and the misapplication of evidence, unrelated to tobacco packaging itself.

8. DEPRIVATION AND/OR IMPAIRMENT OF FUNDAMENTAL LEGAL RIGHTS

The legality of plain packaging and the fundamental importance of intellectual property rights (IPRs)

8.1 Plain packaging represents an extraordinary deprivation of JTI’s most valuable assets. It infringes JTI’s fundamental legal rights regarding trade marks, property, freedom of expression and freedom of trade that are protected by the Norwegian Constitution, intellectual property laws and international trade treaties. Forcing brand names to be written in a standard typeface, colour and size is also a fundamental and entirely unjustified restriction on the normal and fair use of word trade marks.

8.2 Mandating plain packaging would destroy the substance of JTI’s property in relation to its IPRs (the fundamental right to which is recognised in the European Convention on Human Rights and EU law) to such a degree that it would constitute a deprivation of that property. Such a deprivation of property is assumed to be unlawful, unless JTI is compensated at the full value of its property.

8.3 Moreover, the importance of the essential function of a trade mark to guarantee the origin and quality of goods (and services) is also well established in the case law of the CJEU. A number of expert bodies consistently raise the importance of the origin function of a trade mark. For example, in July 2013 a number of respected experts in the IP field emphasised that:

*“Trademarks and trade dress... are relied upon by consumers as signposts for genuine goods and services. This is true for both word trademarks and figurative (graphic) trademarks... trademarks also indicate the source of goods and services to assure consumers of the quality of the products that they purchase or that they would consider purchasing. This fundamental function cannot be fulfilled if trademarks are not noticeable, or unavailable, to consumers when selecting a product... In fact, the inability to recognise a brand also takes away consumers’ freedom of choice”.*⁶⁵

8.4 Plain packaging conflicts with core principles of trade mark ownership, and Norwegian and EU law more generally. It is not just JTI that holds these views; they are strongly supported by a number of expert bodies. For example:

- (a) MARQUES has stated that: “*Plain packaging legislation will preclude trademark owners from the ability of making legitimate use of their trademarks,*

and in this sense, it would amount to an indirect legislative expropriation of lawful proprietary rights... ” (June 2014).⁶⁶

- (b) In relation to the proposed Irish plain packaging legislation,⁶⁷ the Law Society of Ireland has stated that: *“The Charter of Fundamental Rights of the European Union is binding on Member States under the Lisbon Treaty and Article 17 of the Charter guarantees rights to property, expressly including intellectual property rights... Consequently, the State runs a risk – and it is that, a risk – of going beyond regulation and restricting rights which affect the substance of a trademark, in contravention of our international obligations...” (February 2014).⁶⁸*

Right to Property is protected by the European Convention on Human Rights (ECHR) and the Norwegian Constitution

8.5 The fundamental right to property is recognised in the Norwegian Constitution § 105. Trade marks and other intellectual property rights are regarded as property on an equal basis as movable and immovable property pursuant to the Norwegian Constitution § 105.

8.6 Further, the fundamental right to property is recognised in Article 1 of Protocol 1 of the ECHR, and is one of the rights scheduled to the Norwegian Human Rights Act of 21 May 1999 no. 30 (the "Human Rights Act"). The ECHR guarantees that every person is *“entitled to the peaceful enjoyment of his possessions”* and that property rights are *“practical and effective”*.⁶⁹

8.7 The ECHR is internalized as Norwegian law through the Human Rights Act. This implies that, in case of conflict, Norway’s obligations under the ECHR prevail over domestic legislation. Hence, both the Norwegian Constitution § 105 and the ECHR constitute limitations on the measures that may be adopted to meet public health objectives.

8.8 Use by JTI of its trade marks is recognised in EU and international law⁷⁰ as being a central and essential element of trade mark ownership. The prevention of JTI’s use of its trade marks would constitute an infringement of our right of ownership, since a plain packaging measure would leave JTI unable to exploit its IPRs commercially. This would render them, for all practical purposes, valueless in Norway and therefore we would be effectively deprived of using our trade marks in Norway.

8.9 As soon as it came into effect, a plain packaging measure would be a complete prohibition on the fundamental, consumer-facing, use of a substantial part of JTI’s trade mark portfolio, and would also have significant adverse effects on JTI’s other IPRs. Such measures would involve the suppression of the origin, quality, information, communication and goodwill functions of registered trade marks to a degree that undermines the commercial rationale for trade marks to be recognised by the CJEU, and as protected under Norway’s Trademarks Act and EU trade mark registration.

8.10 In order to be justified under the Norwegian Constitution § 105 and ECHR, any restriction of JTI's trade mark ownership must be both appropriate and proportionate.

The measure must strike a reasonable balance between society's legitimate interests and the rights protected by the ECHR.

8.11 The European Court of Human Rights (ECtHR) has held on numerous occasions that, in order to be lawful, a deprivation of property must be accompanied by compensation, save in exceptional circumstances. This dates back to the case of *Lithgow v the United Kingdom* (App. No. 9006/80, judgment of 8 July 1986) in which the ECtHR held that:

“under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances.... As far as [A1P1] is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle” (para 120).

8.12 The bar for “*exceptional circumstances*” is set very high. Thus:

- (a) In *Jahn v Germany* (App. No. 46720/99, judgment of 30 June 2005) the Grand Chamber held that “*the unique context of German reunification*” (para 117) qualified.
- (b) In *Vistins v Latvia* (App. No. 71243/01, judgment of 25 October 2012), the Grand Chamber further emphasised that in *Jahn*: “*it was the unique nature of the general political and legal context – and not simply the exceptional nature of the circumstances – that secured its acceptance of expropriation without compensation*” (para 123).

8.13 Very few cases have met this extremely high standard. To JTI’s knowledge, apart from the situation of German reunification, the only other circumstances to have cleared this hurdle are “*the dissolution of the [Socialist Former Republic of Yugoslavia] and the wars in the region*” (*Case Mago v Bosnia and Herzegovina* (Application Nos. 12959/05 and others, Judgment of May 2012), para 104).

8.14 The Consultation’s reliance on public health interests falls far short of the standard of exceptionality needed. Accordingly, in the absence of any compensation, the deprivation effected by the proposed Norwegian measure is unlawful.

8.15 Even if this was not the case, the Norwegian government would be left with the burden of seeking to demonstrate that the measure is suitable and proportionate. It is JTI’s view that the Norwegian government would not be able to fulfil this requirement.

8.16 Further, there are less restrictive, more targeted and proportionate alternative measures to achieve the Minister of Health and Care Services’ key rationale for plain packaging, namely preventing children and young people from smoking. These alternative measures should be considered when performing the necessity and proportionality assessment.

8.17 Finally, JTI notes that the Norwegian Constitution § 105 requires the Norwegian Government to pay full compensation for infringement of JTI’s fundamental right to its property.

Freedom of expression is protected by the ECHR and the Norwegian Constitution

8.18 Plain packaging would unjustifiably and disproportionately infringe JTI's right to freedom of expression, which is protected by the Norwegian Constitution § 100 and ECHR Article 10 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.

8.19 Freedom of expression, both to impart and receive communication, is commonly recognised as a cornerstone of democratic society. This fundamental right undoubtedly extends to commercial communications.⁷¹ It is protected in Norway by virtue of both Article 10 of the ECHR and §100 of the Norwegian constitution.

8.20 JTI acknowledges that this freedom is not an absolute right but that the burden is on the Norwegian Government to justify any restriction. The Norwegian Government must demonstrate that: (a) the measure is rationally connected to the objectives; (b) there is no less restrictive alternative measures that achieve the same ends; and that (c) the deleterious effect of the measure and its salutary effects are proportionate.

8.21 Plain packaging meets none of these tests: there is no reliable evidence of a rational connection with the objectives; it does not represent a minimal impairment of JTI's freedom of expression given that alternative, substantially less restrictive solutions are available; other regulatory measures have yet to be commenced (i.e. TPD2); and it is disproportionate.

9. ALTERNATIVE SOLUTIONS

9.1 As mentioned under section 3, legislation already exists in Norway dealing with misleading labelling and descriptors for tobacco products. As highlighted under Section 2, and in accordance to the principles of Better Regulation, the Minister of Health and Care Services should seek to enforce the existing provisions and assess their efficacy before introducing additional regulation.

9.2 In addition, there are less restrictive, more targeted and proportionate alternative solutions to the Minister of Health and Care Services' key rationale for plain packaging, namely preventing children and young people from smoking. These solutions have been adopted by other jurisdictions with the goal of reducing the prevalence of smoking by minors and address the key methods by which minors access tobacco products. They are likely to be effective when evaluated against Better Regulation principles and studies exist which support their efficacy.

Greater resources and man power to tackle illegal tobacco trade

9.3 As referenced earlier in paragraph 6.1 current industry estimates are that non-Norwegian duty paid tobacco products account for 47.2% of all tobacco products consumed in Norway. Criminals who sell these illegal products do not conform to the legal age restrictions on sales to minors which legitimate retailers are bound by. It is imperative that greater resources and man power are dedicated to ensure minors do not have access to these illegal tobacco products and to reduce and eliminate this illegal trade.

Given the important loss to the Norwegian Customs caused by the illegal trade in tobacco products, further resources and greater man power to tackle illegal trade are likely to be fiscally positive, as increased tax revenues more than compensate for increased enforcement costs.

Implementation of the licensing scheme for retailers

9.4 JTI understands that new amendments to the Tobacco Act implementing a municipal tobacco licensing system have been adopted. These amendments include provisions which entitle the municipality to revoke the license if the licensee no longer fulfils the criteria for obtaining a license or if the licensee violates any of the provisions set out in the Tobacco Act. These amendments will enter into force in January 1, 2016.

9.5 The Minister of Health and Care Services should wait for the implementation of the amendments to the Tobacco Act before proceeding with further regulations. It is important that these amendments are enforced adequately 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.⁷²

Criminalization of proxy purchasing by adults for minors

9.6 JTI notes that Sections 11 and 17 of the Tobacco Act prohibit the sale of tobacco products to persons under the age of 18, including the proxy purchase of tobacco products by adults on behalf of minors. Any violation of the provisions in the Tobacco Act is punishable by fines, as stated under Section 42 of the same Act.

9.7 JTI believes that a better enforcement of the penalization of proxy purchase of tobacco by adults for minors could make a significant contribution to reducing minors' access to tobacco in Norway.

9.8 A number of studies exist which suggest that proxy purchasing and other social sources are important sources of tobacco for minors: (a) a UK survey conducted in 2010 found that 69% of 11 to 15 year old "*pupils who smoked*" had been given cigarettes.⁷³ Of those young people classified as regular smokers, 50% regularly bought cigarettes from other people and 89% had asked someone to buy cigarettes on their behalf; and (b) a recent mixed-method systematic review - the "*Young People's Access to Tobacco*" report - suggests that interventions targeting visibility and complicity will be most effective in tackling youth access through proxy purchasing, including through a legal ban on proxy-purchasing such as that introduced in Scotland.⁷⁴

9.9 The burden of preventing minors from getting access to tobacco products should not rest on retailers alone. A reinforced enforcement of penalization of proxy purchase would help deliver the message that the responsibility for tackling youth smoking also lies with those adults who buy tobacco for minors.

10. IMPLEMENTATION OF ARTICLE 5.3 OF THE FCTC

10.1 Section 4.8 notes that “*The Ministry considers that there is a need for several different types of measures*” in relation to Norway’s obligations under article 5.3. These include:

- (a) cross-sectorial legislation in the Tobacco Act;
- (b) precautions and safeguards appropriate to Norway (examples from other jurisdictions include guidelines for public authorities and employees’ contact with the tobacco industry and lobby registers);
- (c) an extended duty of disclosure on the tobacco industry in line with Canada to include, for example, information on turnover and market share, marketing budget, expenses and other information related to lobbying, total revenues and research; and
- (d) mandatory registration of industry players and products in order to get permission to sell tobacco products, potentially alongside a licensing system for those who produce, import and distribute tobacco (under the Protocol against Illicit Trade).

10.2 In respect of these proposals, the Minister of Health and Care Services does not set out specific proposals, and notes that the extension to the duty of disclosure will be aligned with necessary legislative changes associated with the implementation of TPD2 and, therefore, will be revisited at a later date. The Consultation also explains that the Ministry’s proposal for mandatory registration/licensing will be considered in conjunction with an evaluation of ratification of the protocol against illicit trade. Nevertheless, as a catch-all, the Consultation “*requests input from the heard parties of the need for such measures as exemplified above, and if any of the aforementioned measures may be appropriate in a Norwegian context*”.

10.3 Accordingly, it would be appropriate for JTI to comment on these specific proposals. In particular, we suggest that the implementation in national legislation of a paragraph much like Article 5.3 should be resisted.

10.4 JTI notes that the Consultation makes significant reference to Article 5.3 of the FCTC and highlights the need to implement it in law, whilst falling short of proposing specific measures. Nonetheless, general proposals are made under section 4.8 and, at the conclusion of section 4, the Ministry asks two questions:

- (a) Is there a need for Norway to adopt additional measures to comply with its obligations under Article 5.3?
- (b) Are the proposed additional measures appropriate in a Norwegian context?

JTI will respond to these requests below and, additionally, will set out the objectives of Article 5.3 and its proposals as to how Norway can better meet its obligations under Article 5.3.

Is there a need for Norway to adopt additional measures to comply with its obligations under Article 5.3?

10.5 Article 5.3 states:

*“In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry **in accordance with national law**”* (emphasis added).

10.6 Article 5.3 of the FCTC does not suggest that the tobacco industry or anybody affiliated with it should be excluded from the regulatory decision-making process. Article 5.3 leaves it to signatories to determine what, if any, implementing measures to introduce. Any steps taken to give effect to Article 5.3 must be in accordance with national laws.

10.7 The obligation imposed by Article 5.3 is one of result. Parties must ensure that their public health policies with respect to tobacco control are not subverted or undermined by the tobacco industry.

10.8 Article 5.3 seeks to protect public health policies by protecting the regulatory/legislative process from undue influence. Article 5.3 articulates in a tobacco context a general principle of good regulation, namely that regulators should not allow their policies in a particular field to be subverted by the actors (economic or otherwise) in that field. It is a subset of the more general principle of good regulation: that regulators should be independent and impartial in their processes and decision making. The Consultation is wrong to suggest (at section 4.1) that the tobacco industry “*has a special position; no other industries are regulated in this way*”. In fact, no party should exercise undue influence over the regulatory/legislative process.

10.9 The Consultation also makes reference to the Guidelines on Article 5.3. It is important to reiterate that these Guidelines are *non-binding* and create no obligations for Parties to the FCTC. Any steps taken to give effect to Article 5.3 must be in accordance with national laws. This is emphasised by the guidelines on Article 5.3, which state in the Introduction that, “*without prejudice to the sovereign right of the Parties to determine and establish their tobacco control policies, Parties are encouraged to implement these Guidelines to the extent possible in accordance national law*”.

10.10 JTI notes that measures are already in place in Norway that are aimed to protect the integrity of the decision-making process and to ensure transparency. Accordingly, there is no legal need for Norway to adopt additional measures to comply with its obligations under Article 5.3.

10.11 In addition, the European Commission, in its letter dated 7 February 2013 clarified the nature of Article 5.3 and its guidelines as follows: “*First and foremost, it is important to underline that the WHO Guidelines for the implementation of Article 5.3 of the FCTC are not binding. Parties are encouraged to follow them to the extent possible, in accordance with their national law. Those Guidelines contain no specific*

*compulsory requirements on holding meetings or on the publicity of such meetings. The Commission's ethical framework, the existing rules and tools concerning transparency and lobbying, and the policy in terms of stakeholder consultations are fully compatible with these non-binding guidelines".*⁷⁵

10.12 The statement in the European Commission's letter is particularly apt because it recognises that, like Norway, the European Commission already possess the legislative and regulatory tools required to ensure that decision-making processes are carried out transparently and with integrity.

10.13 Further, JTI notes that measures are already in place in Norway, that are aimed to protect the integrity of the decision-making process and to ensure transparency, which are fully compatible with Article 5.3 and its guidelines, for example:

- (a) With regard to contact between the tobacco industry and public authorities, item 2 of the Guidelines propose a requirement of "*transparency about the meetings and their content*". However, a general existing administrative principle under Norwegian law already requires the activities of a public authority to be open and transparent. This principle is for instance expressed in the Freedom of Information Act. Hence, public access to information about contact between the tobacco industry and public authorities is to a large extent already ensured under the general administrative principle.
- (b) The Public Administration Act determines on what basis a public servant shall be deemed disqualified to handle public administrative matters. For instance, a public servant may not prepare for or decide on matters if he or she has a leading position in a company which is a party to the specific case. Further, a public servant may be regarded as disqualified if there are any other special circumstances which may influence the public's confidence in his impartiality. Another general administrative principle under Norwegian law prohibits public servants from exercising abuse of authority, including taking into account irrelevant considerations when deciding on a matter. Therefore, the Public Administration Act and general administrative principles already contain provisions to prevent impartial public servants from influencing tobacco politics and as such already covers the recommendations as for instant covered by item 4 of the guidelines.
- (c) The Norwegian Civil Service Act applies to all employees of the Norwegian civil service and covers money, gifts, and profit, among others, from all type of natural and legal persons. Further, receiving money, gifts or services may easily be construed as corruption under the Norwegian Civil Penal Code. Thus, the recommendation in item 4 of the guidelines not to "*allow any public positions or offices to receive money, gifts or services from the tobacco industry*" is already covered by existing Norwegian legislation.
- (d) Further, the Ministry of Modernisation's "*Ethical Guidelines for the Public Service*" from 2005 seek to ensure that all state employees perform their role with a high ethical standard. The Ethical Guidelines aim to preserve and enhance the general public's confidence in the public services, and contains general provisions on; (i) transparency (including provisions on freedom of information, active duty to disclose information and freedom of expression), (ii) confidence in the public service (including provisions on impartiality and acceptance and offering of gifts

and other perquisites) and (iii) professional independence and objectivity. Hence, ethical guidelines governing the public sectors' contact with the tobacco industry already exist making the recommendation in item 4 of the guidelines to "*develop, adopt and implement ethical guidelines for people with different positions and offices in the public sector, about how they should handle their contact with the tobacco industry*" superfluous.

Are the proposed additional measures appropriate in a Norwegian context?

10.14 JTI notes that the Norwegian Constitution § 100 and ECHR Article 10 place limits on any additional measures that could be implemented. An element of the fundamental right to freedom of speech of the Norwegian Constitution § 100 and ECHR Article 10 is the possibility for stakeholders to engage in the policy-making process. Hence, implementation of a policy that openly aims to limit a certain industry's right and ability to engage in the policy-making process is questionable.

10.15 Another limitation on the measures that could be implemented is the general right to gain access to, and express ones view on, proposed amendments or new legislation in Norway pursuant to the Norwegian Freedom of Information Act and the Norwegian Public Administration Act.

10.16 Given the above, JTI believes that the legal and regulatory framework in Norway which is already in place is compatible with Article 5.3 of the FCTC; and that any additional measures would be superfluous and unnecessary, and would go counter to the widely accepted principles of transparency, accountability and integrity of the regulatory process in accordance with the OECD's principles of Better Regulation.

10.17 Although there is no need for Norway to adopt additional measures to comply with Article 5.3, the Ministry's assessment does provide an opportunity to consider how Norway's existing measures can be strengthened in accordance with accepted international principles of good governance and constitutional principles, and/or to ensure that such existing measures are properly applied.

10.18 Article 5.3 provides an opportunity to improve the transparency, inclusivity and the integrity of the regulatory process, by using principles of good governance and Better Regulation as defined by the OECD and endorsed by numerous organizations such as the World Bank and APEC.

10.19 As noted above, Norway is a member of the OECD. The OECD has consistently advocated for countries to "*Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory*". Its guiding principle 3, under that heading, states: "*Consult with all significantly affected and potentially interested parties, whether domestic or foreign, where appropriate at the earliest possible stage while developing or reviewing regulations, ensuring that the consultation itself is timely and transparent, and that its scope is clearly understood.*"⁷⁶

10.20 Similarly, in its communication, "*General principles and minimum standards for the consultation of interested parties*", the European Commission identifies the first of its guiding principles as "*participation*":

*“The Commission is committed to an inclusive approach when developing and implementing EU policies, which means consulting as widely as possible on major policy initiatives. This applies, in particular, in the context of legislative proposals”.*⁷⁷

10.21 JTI believes that interactions between stakeholders and regulators should be conducted transparently and in accordance with national law, and that if this is done, there should be no reason to limit engagement. Full stakeholder participation:

- (a) brings the expertise, perspective and ideas of those affected by the problem into the policy-making process;
- (b) promotes balance, ensuring that the views of one group are not given disproportionate weight; and
- (c) ensures that regulators gain a practical understanding of how a measure will operate once implemented, avoiding unintended consequences and raising alternative solutions.

DECLARATION OF INTEREST

As a tobacco products manufacturer, JTI comes under the definition of “*Tobacco Industry*” as set out in the WHO Framework Convention on Tobacco Control.

JTI
5 June 2015

ENDNOTES

¹ Professor Martin Cave is a Visiting Professor at Imperial College Business School and, from January 2012, Deputy Chair of the Competition Commission. His 2010 report, “*Better Regulation and Certain Tobacco Control Measures*” is available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>. Professor Cave notes that the process of deciding how to regulate tobacco requires a careful and thorough specification of objectives, identification of alternatives and weighing up of evidence. Because plain packaging is untried, the evidence basis for introducing it 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. In Professor Cave’s opinion, there appear to be a number of alternative targeted measures available.

² See page 15 of the report “*Better Regulation and Certain Tobacco Control Measures*”, which was prepared by Professor Martin Cave OBE, in 2010 at the request of JTI. Available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

³ Professor Laurence Steinberg, Distinguished University Professor and Laura H. Carnell Professor of Psychology at Temple University, Philadelphia, United States of America, is a leading authority on adolescent judgment, decision making and risk-taking. His 2010 report, entitled “*Adolescent Decision Making and the Prevention of Underage Smoking*” is available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>. Professor Steinberg explains that because minors are naturally more prone to risk-taking behaviour than adults, only measures that control minors’ ability to obtain tobacco products and remove cigarettes from their social network will be effective in reducing smoking among minors.

⁴ See JTI’s Submission to the Chantler Review into the public health impacts of standardised packaging for tobacco products, 10 January 2014, page 6. Available at: <http://www.jti.com/how-we-do-business/key-regulatory-submissions> and Professor Steinberg’s 7 January 2014 letter to Sir Cyril Chantler in the UK, available at: <http://webarchive.nationalarchives.gov.uk/20140911094224/http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/submittedevidence/Steinberg.-Professor-L-Submission.doc>

⁵ Kotler and Keller, *Marketing Management (14th edition)*, 2012, p. 368-369.

⁶ Silayoi and Spence “*Packaging and purchase decisions: An exploratory study on the impact of involvement level and time pressure.*” *European Journal of Marketing* 2004, 106: 607–628.

⁷ Kotler and Keller, *Marketing Management (14th edition)*, 2012, p.264

⁸ Meyers and Lubliner, *The Marketer’s Guide to Successful Package Design*, 1998, p.25

⁹ The Chantler Report acknowledges at paragraph 3.13 that branded packaging is seen by the tobacco industry as “*an important way to communicate the quality and product characteristics to consumers, to encourage smokers to maintain their identification with their chosen brand.*”

¹⁰ Baines and Fill *Marketing (3rd edition)* (2014) p.458 – Brands “enable premium pricing”

¹¹ Kotler and Keller, *Marketing Management (14th edition)*, 2012, p.368.

¹² See for example Meyers and Lubliner, *The Marketer’s Guide to Successful Package Design*, 1998, p.62 – “Packages are not ads.”

¹³ Baines and Fill *Marketing (3rd edition)* (2014) p.287; Brassington and Pettitt *Essentials of Marketing (3rd edition)* (2013) pp.234 – 238. The life cycle is typically divided into 4 stages: introduction, growth, maturity and decline.

¹⁴ Kotler and Keller, *Marketing Management (14th edition)*, 2012, pp.332-342.

¹⁵ Brassington and Pettitt *Essentials of Marketing (3rd edition)* (2013) p.237.

¹⁶ Norwegian Ministry of Health and Care Services, “Consultation on the proposal for standardised tobacco packaging and the implementation of Article 5.3 of the Framework Convention on Tobacco Control”, Section 3.2.

¹⁷ For example, there is an extensive body of literature showing that tobacco advertising bans have no effect on tobacco consumption: Lancaster & Lancaster (2003), Lancaster and Gotthoffer (1999), Duffy (1996), and Stewart (1993) are all examples.

¹⁸ Nelson et al (2003).

¹⁹ See Professor Laurence Steinberg’s report entitled “*Adolescent Decision Making and the Prevention of Underage Smoking*”. Available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

²⁰ *Idem*.

²¹ *Idem*.

²² *Ibid*, page 4.

²³ In respect of this issue of adult decision making, see further Professors Ravi Dhar and Stephen Nowlis’s report entitled “*Report on Adult Consumer Behavior and Decision-Making of Cigarette Smokers*”, dated 2 December 2010. Available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>. Professors 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. Professors Dhar and Nowlis conclude that plain packaging is unlikely to be effective as a means to reduce smoking and encourage quitting by adults.

²⁴ See Dr Warren Keagan’s reports entitled: i) “Analysis of Consumer Survey Evidence Relevant to the UK Department of Health’s Consultation on the Future of Tobacco Control”, dated 2 September 2008; and b) “Analysis of Consumer Survey Evidence Relevant to the UK Department of Health’s Consultation on the Future of Tobacco Control – a supplemental report”, dated 18 June 2009. Available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>. Dr Warren J. Keagan 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. In particular, he is an expert in consumer survey research and analysis.

²⁵ See Professor Timothy M. Devinney's reports entitled: a) "Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products (Updated to 2014)" dated January 2014; b) "Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products (Updated to 2012)" dated June 2012, and c) "Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products", dated November 2010. Available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

²⁶ See *Standardised packaging of tobacco products. Report of the independent review undertaken by Sir Cyril Chantler*, paragraph 14, page 5. Available at: http://www.kcl.ac.uk/health/10035-TSO-2901853-Chantler-Review-ACCESSIBLE.PDF?utm_source=rss&utm_medium=rss&utm_campaign=standardised-packaging-of-tobacco-report-of-the-independent-review-undertaken-by-sir-cyril-chantler-pdf

²⁷ Professor Timothy M. Devinney is Professor of Strategy at the University of Technology, Sydney, Australia; Co-joint Professor in the Faculty of Medicine at the University of New South Wales, Australia and a Visiting Professor at the Institute of Management at Humboldt University, Berlin, Germany. He is an expert in consumer survey research, experimental methods and associated statistical analysis. See Professor Devinney report "Analysis of Consumer Research Evidence on the Impact of Plain Packaging for Tobacco Products" dated 3 January 2014. Available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

²⁸ See Professor Devinney's 2014 report, paragraph 4.10, page 27. Available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions>.

²⁹ See Statement attributed to Professor Linda Bauld, Note of meeting between Professor Linda Bauld, Dr Crawford Moodie and Ms Kathryn Angus, UK Centre for Tobacco Control Studies, University of Stirling, 15 January 2014. Available via: <http://webarchive.nationalarchives.gov.uk/20140911094224/http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx> (page 4).

³⁰ The debate as to the status of the evidence is in no way advanced by "Hammond D. Standardized packaging of tobacco products: evidence review. Prepared on behalf of the Irish Department of Health. March 2014" (<http://health.gov.ie/wp-content/uploads/2014/06/Standardized-Packaging-of-Tobacco-Products-Evidence-Review.pdf>).

³¹ See *Standardised packaging of tobacco products. Report of the independent review undertaken by Sir Cyril Chantler*. Available at: http://www.kcl.ac.uk/health/10035-TSO-2901853-Chantler-Review-ACCESSIBLE.PDF?utm_source=rss&utm_medium=rss&utm_campaign=standardised-packaging-of-tobacco-report-of-the-independent-review-undertaken-by-sir-cyril-chantler-pdf.

³² JTI's submission to the Chantler review is available at: http://www.jti.com/files/1313/8979/4396/JTI_-_Submission_to_Sir_Cyril_Chantler_Review.pdf.

³³ See "The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis", University of Zurich, Department of Economics, Working Paper No. 149, May 2014. Available via: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414430 and "The "Possible" Effect of Plain Packaging on Smoking Prevalence in Australia: A Trend Analysis", Working Paper No. 165, June 2014. Available via: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460704.

³⁴ See "An analysis of smoking prevalence in Australia", London Economics, November 2013, page 1 (for PMI). Available at: <http://london-economics.co.uk/wp-content/uploads/2013/11/London-Economics-Report-Australian-Prevalence-Final-Report-25-11-2013.pdf>

³⁵ See results from the 2013 National Drug Strategy Household Survey, provided by the Australian Institute of Health and Welfare (AIHW), available via: <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/data-and-references/>.

³⁶ *Idem*.

³⁷ Figure 2 prepared by JTI based on AIHW prevalence figures for "daily smoker", "current – occasional weekly" and "current – occasional less than weekly". The linear trend is based on the period 1991 to 2010 with the addition of 1 forecast period (to 2013).

³⁸ Figure 3 prepared by JTI based on AIHW "smoking trend by age" data for 12-17 year olds. The graph is based on "daily smoker" data only as AIHW warns that the 2013 data for occasional smokers is an estimate with "a relative standard error of 25% to 50%" and so "should be used with caution." The linear trend is based on the period 2004 (the first data point that exists in the series) to 2010 with the addition of 1 forecast period (to 2013).

³⁹ Scollo M, Zacher M, Coomber K, et al. *Tob Control* 2015;24: ii66–ii75, available at http://tobaccocontrol.bmj.com/content/24/Suppl_2/ii66.full.pdf+html.

⁴⁰ MS Intelligence, Norway Empty Pack Survey 2014 Q2, August 2014.

⁴¹ See Professor Alan Zimmerman and Professor Peggy Chaudhry's report entitled "The Impact of Plain Packaging on the Illicit Trade in Tobacco Products" (commissioned by JTI) dated 29 June 2012. Available at <http://www.jti.com/how-we-do-business/key-regulatory-submissions>. 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" and have been involved in an extensive set of research projects examining various aspects of the global trade in illicit products.

⁴² *Ibid*, paragraph 284, pages 106-107.

⁴³ See KPMG, "Illicit tobacco in Australia 2014 Full Year Report" dated 30 March 2015. The report was commissioned by Philip Morris Limited, British American Tobacco Australia and Imperial Tobacco Australia. Available at: https://www.imperial-tobacco.com/files/illicit_trade_h1_2014_report.pdf

⁴⁴ See KPMG, "Illicit tobacco in Australia 2014 Full Year Report", page 7.

⁴⁵ Australian Customs and Border Protection Service, Annual Report 2013/14, page 26 http://www.customs.gov.au/webdata/resources/files/ACBPS_AR_2013-14.pdf.

⁴⁶ 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. Dr Andrew Lilico is an expert in microeconomic analysis and regulatory impact assessment. He is Director and Principal of Europe Economics, London. See, notably, the reports by Dr Lilico prepared at the request of JTI: (i) "Economic Analysis of a Plain Packs Requirement in the UK, A report by Europe Economics" dated 29 June 2012; (ii) "Economic Analysis of Restrictions on the Display of Tobacco Products – 2009 Canadian Annual Smoking Data" dated 30 November 2010; (iii) "The impacts of restrictions on the display of tobacco products – a supplemental report by Europe Economics" dated 8 October 2009 (iv) "Economic Analysis of a Display Ban and/or a Plain Packs Requirement in the UK" dated 2 September 2008. Dr Lilico's reports are available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

⁴⁷ See "INTA 2015: Mars reveals plain packaging fear for confectionery brands", 4 May 2015. Available at: <http://www.worldipreview.com/news/inta-2015-mars-reveals-plain-packaging-fear-for-confectionery-brands-8319>.

⁴⁸ See Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014. Available at: http://ec.europa.eu/health/tobacco/docs/dir_201440_en.pdf.

⁴⁹ In Court papers filed on behalf of the UK Secretary of State for Health on 18 July 2014, it was acknowledged that: "The correct interpretation of Article 24(2) raises a fundamental issue of interpretation which must be determined before the validity of the Directive can be determined, namely, does Article 24(2) permit Member States to adopt more stringent rules in relation to all matters relating to standardization of the packaging of tobacco products, regardless of whether such matters are within the scope of the Directive or not?"

⁵⁰ See TRIS notification 2014/277/IRL, which states: "Issue of a detailed opinion by: Bulgaria, Czech Republic, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, and Spain". Available via: <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2014&num=277>

⁵¹ See TRIS notification 2015/9009/N, which states "Draft amendments to Act No. 14 of 9 March 1973 relating to Prevention of the Harmful Effects of Tobacco (Standardised packaging) and draft amendment to Regulations no 141 of 6 February 2003 on the contents and labelling of Tobacco products." Available at: <http://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year=2015&num=9009&mLang=en&CFID=1283988&CFTOKEN=8a98f70ef917823d-2EA017C1-ADD2-47BC-BCA78C3DA6B83BF4>

⁵² See paragraphs 6.21 to 6.33 of JTI's 2012 Response to the Department of Health's Consultation on the Standardised Packaging of Tobacco Products. Available at: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

⁵³ 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/key-regulatory-submissions/>. 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.

⁵⁴ The expert opinion of Professor Gervais on the interpretation of TRIPS and the Paris Convention, prepared at the request of JTI. Available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

⁵⁵ See Thailand - Restrictions on Importation and Internal Taxes on Cigarettes, Panel Report, DS10/R-375/200, 7 November 1990 (Thailand Cigarettes).

⁵⁶ 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

⁵⁷ Notification of the Government of Norway to the Committee on Technical Barriers to Trade, G/TBT/N/NOR/23, on the 18 May 2015. Available at: https://www.google.de/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=1&ved=0CCIOFjAA&url=https%3A%2F%2Fdocs.wto.org%2Fdoc2fe%2FPages%2FFE_Search%2FDFFDocuments%2F132085%2Fq%2FG%2FTBTN15%2FFNOR23.pdf&ei=7oBcVduFGqGBywPnkIGQCg&usq=AFQjCNERq1BtiKD6xT08RbwAwiiJD5PugA&bvm=bv.93756505.d.bGQ

⁵⁸ See the statement by Cuba to the Committee on Technical Barriers to Trade, 19 and 20 March 2014, available via: https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_S005.aspx?MeetingId=109130&Language=1&StartDate=&EndDate=&SubjejectId=&SearchPage=&CatIds=122285,122596,122861,123036,123123,123310,123394,123416,123411,123412,123426,123570,123571,123607,123606,123605,123618,123617,123619,123634,124767&languageUIChanged=true#

⁵⁹ See the submission made by the Government of Honduras to the Chantler Review, 15 January 2014, available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/submittedevidence/Republic-of-Honduras-Submission.pdf>

⁶⁰ See "Intellectual property meeting mulls Irish tobacco plan, drug tariffs, sport, non-violation", 10 and 11 October 2013, available via: https://www.wto.org/english/news_e/news13_e/trip_10oct13_e.htm

⁶¹ JTI notes that the non-binding "guidelines for implementation of Article 13" and the non-binding "guidelines for implementation of Article 11" only state that Parties "should consider" plain packaging.

⁶² Norwegian Ministry of Health and Care Services, "Consultation on the proposal for standardised tobacco packaging and the implementation of Article 5.3 of the Framework Convention on Tobacco Control", Section 3.1.2.

⁶³ Norway's Tobacco Act makes a similar distinction between advertising and branded packaging, since the former is already prohibited.

⁶⁴ Norwegian Ministry of Health and Care Services, "Consultation on the proposal for standardised tobacco packaging and the implementation of Article 5.3 of the Framework Convention on Tobacco Control", Section 3.2.

⁶⁵ See the joint statement from APRAM, BMM, ECTA, MARQUES and UNION-IP of 3 July 2013 to the ENVI committee, available via: <http://www.marques.org/positionpapers/default.asp>.

⁶⁶ See MARQUES statement "MARQUES expresses concerns on the Irish Government's decision to adopt plain packaging legislation" dated 16 June 2014. Available <http://www.marques.org/PositionPapers/>

⁶⁷ On 17 June 2014, Ireland notified the European Commission of its draft plain packaging legislation under the Technical Standards Directive (98/34/EC).

⁶⁸ See the Law Society President's opening remarks to the Irish Parliament of February 2014, available via: <http://www.lawsociety.ie/Documents/news/2014/Opening%20Statement%20Plain%20Packaging%20%20Law%20Soc.pdf>.

⁶⁹ See *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, at paragraph 63.

⁷⁰ See, for example, Article 15 of TRIPS, which states: "*Members may make registrability depend on use*": https://www.wto.org/english/tratop_e/trips_e/trips_e.htm. Also see Article 19.1 of TRIPS (relating to whether trade marks may be cancelled for non-used), as described in Professor Gervais' Report (*Analysis of Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention*), paragraphs 21 and 27. See also paragraphs 23 to 26, 28, 30, 31, 33, 57(a), 59, 66, 67 and 106 of Professor Gervais' Report. Available at: <http://www.jti.com/files/8513/4122/2680/Gervais.pdf>.

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

⁷² 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.

⁷³ See "Smoking, Drinking and Drug Use Among Young People in England 2010", Fuller E. (2011), NHS Information Centre.

⁷⁴ See "*Young People's Access to Tobacco: A mixed-method systematic review*", Sutcliffe et al (2011), EPPI-Centre report no 1918, EPPI Centre, Institute of Education, University of London. Available at: <http://eppi.ioe.ac.uk/cms/LinkClick.aspx?fileticket=1PIIjvuy3Y%3d&tabid=33011>.

⁷⁵ European Commission Letter, dated 7 February 2013, SG/B.4 CD/dcb Ares(2013). Available at: <http://www.alter-eu.org/sites/default/files/documents/RE%20Alter-EU.pdf>

⁷⁶ See *OECD Guiding Principles for Regulatory Quality and Performance* (2005), Principle 3. The *OECD Regulatory Policy: Towards a New Agenda*, Key Messages, OECD Regulatory Policy Conference, 28-29 October 2010, stresses that businesses need to "*truly participate*" (page 9) and that consultation over new regulation must be "*genuine*" and not "*merely lip service*" (page 4).

⁷⁷ See Commission Communication: "*General principles and minimum standards for the consultation of interested parties*" COM (2002) 704 final. The European Commission, in an answer given by Ms Vassiliou on behalf of the Commission on 14 May 2008 (E-1879/08EN), has confirmed that the guidelines in this Commission Communication will be respected in relation to the FCTC process.