



JTI's response to the UK Department of Health's consultation on the introduction of regulations for standardised packaging of tobacco products

6 August 2014

Japan Tobacco International (**JTI**) is part of the Japan Tobacco group of companies, a leading international tobacco product manufacturer.

JTI has its UK headquarters in Weybridge, Surrey, and has a long-standing and significant presence in the UK. Its cigarette brand portfolio includes Benson & Hedges, Silk Cut, Mayfair, Sovereign and Sterling, as well as a number of other tobacco products including roll-your-own tobacco (**RYO**), also known as hand-rolling tobacco (such as Amber Leaf), cigars (such as Hamlet) and pipe tobacco (such as Condor). JTI manufactures product for the UK market at sites in the UK (in Northern Ireland) and other EU Member States (Germany, Romania and Poland). In the UK alone, JTI employs over 1,800 people. JTI's excise contributions on its tobacco products amounted to around £3.96 billion in 2013. Gallaher Limited is the registered trading company of JTI in the UK.

EXECUTIVE SUMMARY

Plain packaging is an issue of critical importance to JTI. As the 2014 Impact Assessment (IA) recognises, it would deprive us of the value of our brands – our most valuable assets. It would unjustifiably damage our ability to compete, worsen the illicit trade in tobacco and be unlawful. It infringes our fundamental legal rights without reducing smoking.

This third DH consultation on plain packaging in six years:

- gets no closer to identifying the evidence which would be needed to justify the introduction of such an extreme measure; and
- again fails to consider alternative options that would be more able to reduce underage smoking. For example, better enforcement of the current regulatory regime and tackling further the illicit tobacco trade, reinforcing youth access prevention measures at retail level, and targeted public information campaigns to reinforce messages about tobacco control measures and the health risks of smoking.

Instead, the DH has once again sought to lower the evidential threshold and move the goalposts to try and make the policy fit the weak evidence.

Moving the goalposts

HM Government's Better Regulation principles demand "**robust and compelling**" evidence before regulating.¹ Successive governments have recognised that no such evidence exists for plain packaging:

- Following the 2008 consultation, the Health Secretary (Alan Johnson MP) commented that there was "... **no evidence** base that it actually reduces the number of young children smoking."²
- In 2009, the new Health Secretary (Andy Burnham MP) recognised the evidence would need to be "**strong and convincing**". Not only did the evidence not meet this threshold, he reiterated that "... **no studies** have shown that introducing plain packaging of tobacco would cut the number of young people smoking or enable people who want to quit to do so."³
- In July 2013, the Health Minister (Anna Soubry MP) said she was: "*quite surprised that even after about three or four months, [one of the "leading experts" who had been involved in the legislation in Australia] could not give [her] a picture of **any emerging evidence***" and reiterated that "*all good legislation should be based on **firm, good strong evidence***."⁴
- At the same time, the Prime Minister repeated the statements made by Mr Burnham and said: "*The decision not to go ahead, for the time being, with plain paper packaging for cigarettes is a decision taken by me with the health secretary **for the very simple reason that there isn't yet sufficient evidence for it and there is considerable legal uncertainty about it***."⁵

Even the 2014 Chantler Report, on the basis of which this consultation was launched, recognises that "*there are **limitations** to the evidence currently available*",⁶ the evidence base "*is relatively **modest***",⁷ the evidence was insufficient to "*quantify the size of the likely impact*"⁸ and "*changes in consumption since the introduction of plain packaging [in Australia] are **not yet clear***."⁹

Almost **two thirds of over 668,000 respondents to the 2012 consultation opposed plain packaging**. The DH chose to focus on the fact that a small majority (53%) of the 2,424 "*detailed responses*" that answered the question were in favour. But it is now clear that these "*detailed responses*" included one-line or one-page emails, and the majority of the published responses in favour of plain packaging appear to be based on "*template documents*" of the kind the DH said it had relegated to the status of "*campaign responses*".¹⁰

Lowering the bar

Rather than accept that perhaps plain packaging is not the answer, the DH - under intense pressure from well-coordinated lobbyists, many of whom are DH funded - has repeatedly sought to lower the bar:

- In the 2012 Consultation the DH tried to make the weak evidence base suffice by identifying a series of “mechanisms by which standardised packaging **might** work”, including “reducing the appeal and attractiveness of tobacco...”¹¹. At that point the DH appeared to accept these could only be relevant in the context of whether or not this would change smoking behaviour – in the current consultation it tries to portray these mechanisms as stand-alone objectives.
- Despite HM Government deciding (in July 2013) “to wait until the emerging impact of the decision in Australia can be measured before making a final decision”,¹² the DH made a U-turn in November. It would no longer wait to see what evidence emerged from Australia. Instead the Chantler Review was commissioned. Realising the evidence was not ‘robust and compelling’, ‘strong and convincing’ or ‘firm, good and strong’, the DH only asked “whether or not the introduction of standardised packaging of tobacco is **likely** to have an effect on public health.”¹³
- Even before Sir Cyril Chantler had reported, the DH did not want to take any chances. A Bill was rushed through Parliament giving the Secretary of State power to introduce plain packaging even if he were merely satisfied that some of the regulations “**may** contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18”, and not all of them even needed to be “capable” of having that effect.¹⁴
- A crucial opportunity to ensure a more meaningful evidential threshold was then ignored: an amendment to the Bill was proposed to change “may” to “**will**”.¹⁵ Revealing a lack of confidence in the evidence said to support plain packaging, the Health Minister rejected this common-sense amendment. She admitted it would “probably have the effect of stopping the use of the powers altogether.”¹⁶
- Now, in the face of the Health Minister admitting that she is already “minded”¹⁷ to introduce plain packaging, the DH is conducting a “short”¹⁸ 6-week consultation – the shortest period recommended by the Cabinet Office.¹⁹ This is an attempt to do the bare minimum to give the appearance that the DH has examined the ‘evidence’ before making its decision.

No evidence of any positive impact

The Chantler Report suggests that it is “**too early to draw definitive conclusions**” from Australia.²⁰ Some lobbyists (including an executive agency of the DH) have even tried to suggest that it will take “many years” to discern the impact of plain packaging.²¹ Nevertheless, the DH now seeks to justify regulating based on the results it expects the measure to “generate **after two years**.”²²

After 18 months, the evidence actually emerging from Australia reinforces the fact that plain packaging does not work:

- 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;²³
- 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”;²⁴
- contrary to misleading claims by the tobacco control lobby, **recent Australian government data further reinforces the fact that plain packaging has not had a positive impact**. The overall decline in smoking prevalence between 2010 and 2013 is **consistent with the continuation of the pre-existing trend**, whilst the rate of **underage smoking increased** in the same period, despite the introduction of plain packaging in December 2012,²⁵ and
- conversely, **illicit trade appears to have benefitted**: KPMG reported that the illicit market grew by 2.1% in the year following the introduction of plain packaging,²⁶ Australian Customs and Border Protection Service (ACBPS) figures show that the number of cigarettes seized increased by over 41% between

2011/2012 and 2012/2013,²⁷ and new illicit brands, which look like they are legitimate ‘plain packs’, have now been found in Australia.²⁸

Layering of regulations

In addition, and contrary to Better Regulation principles, this consultation is taking place when:

- the tobacco **display ban** is yet to be implemented in around 80% of tobacco retailers;
- the revised **EU Tobacco Products Directive** (TPD2), which includes a ban on smaller pack sizes (which accounted for 45% of cigarette and 93% of RYO pack sales in the UK in 2013 and are often favoured by consumers who are trying to manage their consumption), has yet to come into effect; and
- an unrelated tobacco control measure (**smoking in private vehicles carrying children**) is being consulted on whilst another is expected to be introduced shortly (a **ban on proxy purchasing**).

This regulatory layering (on top of the existing, multiple layers of UK tobacco legislation) makes it almost impossible to analyse effectively the impact of individual measures. Worse, it leaves the DH open to criticism that it is deliberately frustrating the requirement that policy impacts are assessed so that their potential effectiveness can properly be understood.

A failure to assess properly the true impacts

This Consultation’s IA cannot properly be considered sufficient. Indeed, by failing adequately to address all the points set out in the Regulatory Policy Committee’s (RPC’s) ‘**amber**’ opinion, the IA is **not fit for purpose**.²⁹ Notably:

- TPD2 will change the baseline dramatically. As pointed out by the RPC, plain packaging would, contrary to Government policy, ‘gold plate’ TPD2.³⁰ This is even more inappropriate when the EU law being ‘gold plated’ is itself subject to legal challenge by an EU Member State and, separately, manufacturers.
- The IA accepts that the policy risks increasing the size of the illegal tobacco products market. Applying its own illustration that plain packaging would boost non-duty paid cigarette sales, depriving the Exchequer of **£2 billion**,³¹ this would mean over **8 billion more non-duty paid cigarettes** being smoked in the UK over a decade. This concern is then unjustifiably dismissed altogether.
- The IA accepts that this policy would damage the interests of foreign investors in the UK, but then excludes their losses from its calculations,³² undermining the Prime Minister’s assurance that “*Britain is firmly and clearly open for business.*”³³
- The IA tries to justify not quantifying branding losses as premium brands “*inspire embarrassment and hostility in others not being able to afford such self-branding.*”³⁴ Embarrassingly for the DH, this ignores the critical importance of branding to consumers and to economic prosperity (or in the case of the UK, its present economic recovery).³⁵

Plain packaging would be unlawful

As recognised by the IA, “*tobacco manufacturers ... would be **deprived** of the value of their brands.*” These brands are our most **valuable assets** and are **worth billions of pounds**. As property rights, these assets are **protected by UK, EU and international law**. Such a deprivation of these property rights will be **unlawful**³⁶ unless JTI is compensated at the full value of its property.

Australia’s plain packaging law is being challenged in the WTO. TPD2 is being challenged in the courts (with the DH not disputing the relevance of the outcome to the UK’s ability to introduce plain packaging).

With these matters remaining unresolved and plain packaging having failed to have any positive impact in Australia, the only rational decision HM Government could now make is **not** to introduce it in the UK.

1. INTRODUCTION

1.1 JTI has been, and remains, categorically opposed to the plain packaging³⁷ 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 in its packaging design and quality in order to compete with other products available to existing adult smokers.

1.2 Tobacco products carry risks to health. Appropriate and proportionate regulation is necessary and right. In the UK, those under 18 should not smoke and should not be able to obtain tobacco products. Everyone should be appropriately informed 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.

1.3 Further UK packaging regulation, however, is neither appropriate nor necessary. JTI has set out alternative options which it considers should have formed part of the Consultation and the 2014 IA, and which JTI supports. Indeed, JTI supports legislative and regulatory measures on tobacco control which meet internationally and nationally accepted principles of Better Regulation, as explained in Section 2 of JTI's 2012 consultation response on plain packaging.³⁸

1.4 By contrast, JTI will question, and where necessary challenge (including in the courts), regulation which, like the UK's plain packaging proposal, is flawed, unreasonable, disproportionate and/or without evidential foundation.³⁹

1.5 There is still work which can be done to prevent youth smoking. In JTI's 2012 consultation response, JTI suggested five alternative means of achieving the goals it shares with the DH of reducing minors' uptake of smoking, preventing minors from obtaining tobacco products and ensuring that adult smokers are reminded of the health risks of smoking.

1.6 Tobacco is a legal product, and manufacturers compete among themselves for their share of the legal tobacco market. Adults who choose to smoke are entitled to be treated fairly, and have the right to choose the product they prefer. The ability of manufacturers to distinguish their products through packaging provides a key means by which consumers are able to exercise freely economic rights of purchase.

1.7 Since 2008, when the UK first consulted on plain packaging, successive governments have rightly repeatedly rejected the need for it given the lack of evidence that it actually changes smoking behaviour.⁴⁰

1.8 Reflecting this fact, HM Government decided, in July 2013, that it would wait for further evidence from Australia before proceeding further with any policy decision in this respect, and that it would **not** proceed in the absence of "*good, sound evidence*" that plain packaging actually works.⁴¹

1.9 On 12 July 2013, the Prime Minister himself made clear that the evidence for plain packaging was **not sufficient** to justify the UK moving forwards with it, and that it suffered from **considerable legal uncertainty**.⁴² Neither of these facts has changed. The only real change since then is the willingness of the DH (and Sir Cyril Chantler) to give credence to the views of supporters of plain packaging who rely upon 'evidence' (written largely by a small group of tobacco control advocates whose independence is at best questionable), which is unreliable and unconvincing.

1.10 Consistent with the DH's request that: "...respondents to this consultation ...provide new or additional information relevant to standardised packaging that has arisen since the 2012 consultation",⁴³ it is not the purpose of this response to repeat the views set out in JTI's 2012 consultation response as to why plain packaging cannot be introduced lawfully in the UK (or elsewhere within the EU), or the many evidence-based reasons why plain packaging has not achieved in Australia (and would not achieve in the UK) public health benefits.⁴⁴

1.11 Despite repeated and sustained attempts by tobacco control advocates to create this evidence, it is still the case that there is no "good, sound evidence" that plain packaging would change smoking behaviour in the UK if introduced here. It is for this reason it has been necessary for the DH repeatedly to move the goalposts and lower the evidential threshold, as it seeks to defend proceeding with introducing plain packaging regulations.

1.12 Enthusiastic support for a policy is no substitute for reliable evidence. Indeed, HM Government has previously said that it will: "resist the temptation for hasty regulation, even under intense media pressure",⁴⁵ and that it will introduce regulation only as a "last resort"⁴⁶ and in accordance with its Better Regulation principles.⁴⁷ In this respect, JTI views with particular concern, statements made by the DH prior to the launch of the Consultation that in respect of plain packaging: "The timetable that the Government are contemplating once a final decision is made should allow us to introduce the measure during this Parliament [i.e. by May 2015]."⁴⁸

1.13 Aside from the lack of an adequate evidential base, JTI also has other serious concerns regarding the regulatory process that the DH has embarked upon. This process has inevitably resulted in a set of Draft Regulations (published as part of this Consultation) which are flawed, unreasonable and disproportionate, and which JTI fundamentally opposes.

1.14 The 2014 IA fails to remedy this position; in fact, it exacerbates it. The reasons for this are considered in more detail in this response, and reaffirm JTI's view that the introduction of plain packaging would be unlawful.⁴⁹

2. THE STRUCTURE OF JTI'S RESPONSE AND ITS OVERARCHING CONCERNS

2.1 Appendix A to the Consultation asks the following four questions:

- (a) Question 1 – Observations on the Chantler Review (*Do you have any observations about the report of the Chantler Review that you wish to bring to our attention?*). Our response to this question is contained in section 3 below (paragraphs 3.1 to 3.8), and expanded upon in Annex 1.
- (b) Question 2 – Additional information on the wider aspects of the proposal (*Do you have any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging, that you wish to bring to our attention?*). Our response to this question is contained in section 4 below (paragraphs 4.1 to 4.25).
- (c) Question 3 – Comments on the Draft Regulations (*Do you have any comments on the draft regulations, including anything you want to draw to our attention on the practicalities of implementing the regulations, as drafted?*). Our response to this question is contained in section 5 below (paragraphs 5.1 to 5.25).
- (d) Question 4 – Improving the 2014 IA (*Are you aware of any further evidence or information which would improve the assumptions or estimates we have made in the*

consultation-stage impact assessment?). Our response to this question (and related Better Regulation concerns) is contained in section 6 below (paragraphs 6.1 to 6.26), and expanded upon in Annex 2.

2.2 JTI follows the structure of these four questions in both the body of this response and the more detailed information set out in the accompanying Annexes. In order to answer the four questions set by the Consultation, it has also been necessary for JTI to consider and respond to both the Chantler Report and the 2014 IA. The comprehensive nature of this response, an intentionally detailed and evidence-based document, reflects this fact.

2.3 Before addressing the specific questions set by the Consultation, JTI sets out first, six overarching concerns of relevance to each of the responses provided. We do so because this Consultation proceeds on the wrong basis. It proceeds in a way which amounts to little more than a box-ticking exercise, with the decision to introduce plain packaging having effectively already been made by the DH, without serious regard to the broader implications of this proposed policy. JTI has reached this view as:

2.4 **First**, as was the case previously, many of the ‘objectives’ stated for the proposed policy are not actually legitimate public policy objectives that can justify further tobacco regulation. They are, as JTI has explained in previous plain packaging consultations: insufficiently articulated and evidenced; insufficiently capable of changing smoker behaviour; and unnecessarily duplicative of existing regulation.

2.5 The behavioural ‘objectives’ in the first three bullets listed in paragraph 3.5 of the Consultation repeat exactly the same three bullets of paragraph 3.1 of the 2012 Consultation. After that, the list contains a further six ‘objectives’, including: “*reducing the appeal or attractiveness of tobacco products*”, “*having an effect on attitudes, beliefs, intentions and behaviours relating to the reduction in use of tobacco products*” and “*reshaping social norms around tobacco use to promote health and wellbeing*.”⁵⁰ In JTI’s view, these further ‘objectives’ have been relied upon because, even after the Chantler Review, the DH has moved the goalposts, knowing that it lacks the evidence it would need to show that plain packaging will actually reduce the amount of cigarettes smoked.

2.6 In falling back in this way on policy aspirations (which cannot be self-standing objectives) and seeking to fill the DH’s evidential gap, the DH repeats a serious failing which JTI pointed out in both its 2008⁵¹ and 2012 consultation responses.⁵² JTI relies upon the points it has made in those responses, including that: reducing the appeal or attractiveness of a product is not a proper policy objective; plain packaging would not enhance the effectiveness of health warnings; and tobacco packaging does not mislead consumers.

2.7 Ultimately, the DH’s strategy fails as the DH relies upon all nine of these purported ‘objectives’ as a means “*to improve public health*”, a legitimate goal that can **only** be achieved by changing behaviour towards tobacco use (actually stopping people from starting smoking or getting them to smoke less) and not “*reshaping social norms around tobacco use*.”⁵³

2.8 **Second**, the failure by the DH to conduct independent expert reviews into the non-public health impacts of plain packaging.⁵⁴ A series of independent reviews by leading experts should have been given the same opportunity (and a similar amount of time) as the Chantler Review to establish if the threshold set by the 2012 IA has been met, namely: “*For tobacco control policies to be justified, the impact on smoking behaviour and the consequent improvement in health need to be sufficiently large to justify the related costs*.”⁵⁵

2.9 Significant areas not considered or addressed by the Chantler Report include: “...*legal issues, such as competition, trade-marking and freedom of choice*” and “*the overall economic impact of standardised packaging.*”⁵⁶ Sir Cyril Chantler also specifically recognised that tobacco manufacturers have: “...*advanced a large range of counter arguments, many of which do not relate to the public health impact of standardised packaging (e.g. legal issues). I have not considered such arguments...*”⁵⁷ and that any decision on whether to take forward the policy will need to be taken: “...*on the basis of wider considerations than that on which I have been asked to report.*”⁵⁸

2.10 We have previously explained to the DH the nature of the further stakeholder analysis of the impacts of plain packaging which was required prior to the publication of the 2014 IA:

*“Extensive stakeholder consultation following separate and additional independent reviews of the impacts of plain packaging not being considered by Sir Cyril Chantler has to have taken place before the DH can reach any view as to the status of the broader evidence base relating to plain packaging. The basic precepts of Better Regulation and administrative law make this unavoidable, as does the significant public interest in this issue.”*⁵⁹

2.11 JTI’s position has not changed. To the extent that these non-public health issues were, partly, considered in the 2012 Consultation, a considered and thorough assessment of new evidence and information clearly is required. Without it, the policy-maker cannot reach an informed and rational view as to the status of the broader evidence base relating to plain packaging. It therefore remains incumbent upon the DH properly and pro-actively to look at and consider these different issues. This is all the more important in circumstances where HM Government had previously and very clearly decided there was insufficient evidence to justify proceeding with such a policy.

2.12 This very general and unduly short Consultation, and the 2014 IA which accompanies it, are entirely inadequate, contrary to principles of Better Regulation, and no substitute for what is properly required. The DH needs to admit that it has not assessed the real cost plain packaging poses to business, the Exchequer or the taxpayer.

2.13 **Third**, as we have previously made clear,⁶⁰ it is a critical Better Regulation requirement for the DH also to determine the views of other government departments and agencies best placed to comment on the likely impact of the proposed regulatory measure, and any unintended consequences which the measure may have. This helps ensure regulation is both consistent and targeted only at cases where action is needed. JTI specifically identified a number of bodies in respect of which it was not made clear from the 2012 Consultation and 2012 IA, whether they had been specifically consulted. It was incumbent upon the DH to determine these bodies’ views **before** this Consultation, so that this Consultation and the 2014 IA could reflect these views.

2.14 Despite us expressing this concern in our 2012 consultation response, once again, neither the current Consultation nor the 2014 IA makes clear whether these bodies have in fact been consulted.⁶¹ We therefore set out below those government departments and agencies which must, as a minimum, specifically be (or continue to be) consulted by the DH before any policy decision is made:⁶²

(a) **HMRC and the UK Border Agency**, given that expert opinion suggests that plain packaging will lead to an increase in the illicit trade in tobacco products, but the 2014 IA is unable to quantify this.⁶³

- (b) **HM Treasury**, on the cost to the UK taxpayer and public sector in terms of revenue lost as a result of an increase in both down-trading from premium brands and illicit trade. Discussions are also needed concerning: (i) the potential job losses within the sector;⁶⁴ (ii) reductions in economic activity in the UK, which are expected to flow from a plain packaging proposal; and (iii) an increase in resources required to combat the illicit trade in tobacco products (something acknowledged by the 2014 IA).⁶⁵
- (c) **BIS**, on the negative operational and competition impacts not only on tobacco manufacturers, but also on a host of other stakeholders including wholesalers, retailers and suppliers to manufacturers (creative design houses, etc.), many of which are SMEs. As BIS is committed to promoting: “...*competition and stability without impinging on businesses’ ability to operate...*”,⁶⁶ its involvement in the evaluation of the direct and indirect impacts of the proposal is essential. BIS itself has specifically already recognised the importance of this dialogue.⁶⁷ The WTO dispute that the Australian plain packaging measure has triggered will also remain of concern to BIS. Finally, the lack of adherence to Better Regulation procedures pointed out in this document and previous submissions, and the additional imposition of regulatory burdens, will be of particular concern to BIS and its **Better Regulation Executive**. As part of its response to the 2012 Consultation, the Institute of Directors in fact suggested that: “...*the Government should give consideration to the most appropriate ministerial responsibility for the industry’s regulation and suggest that it would be more appropriate for these responsibilities to be transferred from [the DH] to [BIS]. This would have the additional benefit of ensuring that the responsible department was able to consult and engage with the industry it proposes to regulate, rather than the present situation where the [DH] refuses to engage with the stakeholder community.*”⁶⁸
- (d) the **UK Intellectual Property Office** (an executive agency of BIS), as plain packaging will deprive JTI of its most valuable assets – its brands and trade marks.
- (e) the **Department for International Development**.⁶⁹
- (f) given that plain packaging is expected to frustrate competition,⁷⁰ the **Competition and Markets Authority** should be consulted.
- (g) **Local Government Regulation**, regarding the difficulties in enforcement and how this might be achieved in light of the current tobacco regulation enforcement strategies.⁷¹ Adjusting local government priorities will also necessitate discussion with the **Department for Communities and Local Government**.

2.15 It is only through pro-active, prior consultation with the types of departments and agencies identified above that the DH may be able to produce the type of IA that is fit for purpose and which can better attempt to identify the true costs and unintended consequences of introducing a far-reaching and controversial measure such as plain packaging.

2.16 HM Treasury’s Green Book places great emphasis on the importance of consultation with: “...*external experts and... those affected...*” at the early stages of policy development. In particular, it encourages: “...*joining up with other consultations, for instance in other government departments.*”⁷² The requirement for the DH to consult and assemble relevant evidence is all the more critical given the RPC’s identification of a: “*disappointing reduction in the overall quality of the evidence base underpinning changes in law.*”⁷³

2.17 Despite this, the DH operates independently in the context of tobacco regulation.⁷⁴ This has led to a lack of cross-departmental involvement in the formulation of policy; in spite of the

impact tobacco regulation can have on a host of other government and non-government stakeholders. That the DH does so is illustrated by numerous pieces of correspondence from other government departments that JTI has contacted directly regarding our concerns about any plain packaging proposal, which simply confirm our letter has been referred to the DH.⁷⁵

2.18 **Fourth**, the question asked of the Chantler Review was to: “...give advice to the Secretary of State for Health, taking into account existing and any fresh evidence, as to whether or not the introduction of standardised packaging **is likely** to have an effect on public health (and what any effect might be), in particular in relation to the health of children...” (emphasis added).⁷⁶ We remain of the view that this is an unfairly and inappropriately low evidential threshold, with the consequence that the Chantler Report cannot be sufficient to justify action by the DH given the obligations placed on it before making policy. Reasons why include:

- (a) the fact the 2012 IA acknowledged that for tobacco control policies to be justified: “...the impact on smoking behaviour and the consequent improvement in health need to be sufficiently large to justify the related costs...”;⁷⁷ and
- (b) as JTI noted at paragraph 4.7(b) in its Chantler Submission,⁷⁸ the only appropriate interpretation of the wording “...likely to have an effect on public health...” in this (inappropriately low) threshold test is for the Chantler Review to assess whether plain packaging, if introduced in the UK, would be likely to have an actual, quantifiable positive public health effect. Notwithstanding this, the Chantler Report expressly recognises: (i) that: “...research cannot prove conclusively that a single intervention such as standardised packaging of tobacco products will reduce smoking prevalence”;⁷⁹ and (ii) there is no evidence available: “...to quantify the size of the likely impact of standardised packaging.”⁸⁰

2.19 **Fifth**, the inadequacy of the 2014 IA. Its deficiencies are so serious that JTI does not consider that it is, in fact, a meaningful “consultation-stage impact assessment” or that it can now be salvaged by ‘improvements’ sought pursuant to Question 4 of the Consultation. For example, all of the options considered (including the *status quo* assessment) by the 2014 IA assume the legality of TPD2. This is despite the DH having known, before launching this Consultation, that TPD2 was expected to be the subject of legal challenges in the courts. If, despite JTI’s submissions to the contrary, the DH chooses to depart from its previously stated position in respect of plain packaging, it could not do so without first ensuring the impact assessment procedure is repeated in a manner that: (a) takes into account the factors addressed in this response; and (b) is genuinely open-minded and not merely seeking to arrive at pre-determined conclusions.

2.20 **Sixth**, the Consultation asks all respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. Having done so, it says the DH: “...will still carefully consider all consultation responses from the tobacco industry and from those with links to the tobacco industry”.

2.21 JTI makes three points in response:

- (a) Article 5.3 of the FCTC is not intended to prevent the views of manufacturers of lawful products or those linked to them from being heard and properly taken into account. On the contrary, Article 5.3 seeks to protect the legislative process from undue influence and provides an opportunity to improve transparency, inclusivity and integrity of the regulatory process by using principles of good governance (principles which JTI supports);

- (b) as Sir Cyril Chantler’s method statement notes, this is a “*polarised debate*” and it is right that there are competing views as to what the evidence base shows. The only appropriate way to address this is for the DH to give the same regard to submissions made and evidence provided, irrespective of whether they come from one side of the debate or the other; and
- (c) transparency as to vested interests should be a principle applied equally. The DH has failed to require, but should have required, respondents also to identify if they have “*direct or indirect links to, or receive funding from*”:
 - (i) the DH or one of the tobacco control groups who are effectively professional lobbyists employed to create support for plain packaging (by way of illustration, the Systematic Review has been authored by a team of academics “*core funded*” by one of the tobacco control groups (Cancer Research UK), which itself receives funding from the DH);⁸¹ or
 - (ii) the pharmaceutical industry, in circumstances where prominent tobacco control advocates: are supported by⁸² and have lobbied jointly with that industry in respect of tobacco control regulation;⁸³ and: “*Health experts who recommended that the Government tighten the regulation of electronic cigarettes failed to declare their financial interests in Big Pharma’s rival products.*”⁸⁴

2.22 For example, Public Health England (**PHE**), an executive agency of the DH, called for plain packaging in its 13 January 2014 submission to the Chantler Review.⁸⁵ This submission is likely to have been reviewed by one or both of the DH employees seconded to Sir Cyril Chantler’s team before the Chantler Report was presented to the DH (the department determining whether to proceed with such a measure). In this situation, the DH is effectively lobbying itself, and in circumstances where the House of Commons Health Committee has previously expressed concerns about insufficient separation between PHE and the DH.⁸⁶ This is made worse by the fact that PHE’s response to this Consultation amounts to assertion, not evidence, and repeats claims about the position in Australia which, in our view, are misleading.⁸⁷ It also wrongly implies that consultation responses from those who would be directly impacted by a policy should, for that reason, be considered with “*caution*”.⁸⁸

2.23 Consistent with Better Regulation principles of openness and transparency, JTI will be uploading this response on our website. The DH should carefully review this document, and all other substantive consultation responses. Such responses should then also be made publicly available at the earliest opportunity, and with far greater urgency than the two years it has taken the DH to publish even just a fraction of the ‘detailed’ responses it received in 2012.

3. QUESTION 1 – OBSERVATIONS ON THE CHANTLER REVIEW

3.1 JTI spent considerable time seeking to assist the Chantler Review Team.⁸⁹ In addition, the following expert research / analysis, which was prepared at the request of external legal counsel to JTI, was submitted to Sir Cyril Chantler during the course of his taking evidence:

- (a) a report by Professor Timothy Devinney of the Leeds University Business School (dated 3 January 2014) which specifically addressed the evidence base which the Chantler Review identified for consideration, and which concluded that the: “*...current evidence base is insufficient to justify the conclusion that plain packaging is likely to have any impact on actual smoking behaviour...*”; and

- (b) Professor Laurence Steinberg's letter (dated 7 January 2014) which explained that: "...measures to prevent or reduce youth smoking are only likely to be effective if they are informed by scientific research on risk-taking and decision-making in this age group. I know of no scientific evidence that suggests, nor would my understanding of the current research on adolescent decision-making suggest, that cigarette packaging is relevant to adolescents' decisions to experiment with or continue smoking."⁹⁰

3.2 It is now apparent, however, that much of the evidence that JTI (and other stakeholders) presented, as well as the concerns that were raised about the process that the Chantler Review was embarking upon, have not been taken into account and/or have been inadequately addressed by the Chantler Report.

3.3 As a consequence, the Chantler Report provides neither an appropriate nor an adequate basis to justify proceeding with plain packaging legislation by reference to perceived public health benefits (even if it was lawful to do so, which JTI does not accept).

The conclusions of the Chantler Report

3.4 Annex 1 to this response contains the detail of JTI's observations on the Chantler Review. In summary, however:

- (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; and
- (e) the Chantler Report was "...*not concerned with legal issues*..." or "...*issues such as the overall economic impact of standardised packaging*." As such, it still needs to be balanced by thorough analysis of wider (non-public health) issues. It also makes a rigorous regulatory impact assessment all the more necessary.

3.5 Of particular importance is the fact that the Chantler Report's conclusion that branded packaging in the UK encourages minors to start smoking is incorrect, as:

- (a) instead of methodically reviewing all, or indeed any, of the evidence on whether branded packaging in the UK has impacted on smoking initiation, it seems to accept particular propositions on the basis of their “*intuitive plausibility*” (to borrow the Chantler Report’s phrase), whilst skimming over conflicting evidence;
- (b) it ignores the principles of marketing theory which demonstrate why tobacco marketing cannot affect the decisions of non-smokers (including minors) as to whether or not to smoke in a mature market such as the UK, where the product and its characteristics are very well-known;
- (c) the decision to begin smoking is influenced by a well-documented set of factors, such as the smoking behaviour of family and friends (which the Chantler Report acknowledges and the DH’s own evidence confirms), not branded packaging;
- (d) in giving weight to the argument that “*spillover marketing*” may influence non-smokers to begin smoking, it assumes that non-target non-smokers are likely to find the marketing appealing, despite elsewhere conceding that the marketing is carefully targeted at a different set of consumers. This conflicts with evidence about the way consumers process irrelevant marketing;
- (e) it also assumes that any appeal of “*spillover marketing*” will translate into a decision to smoke, despite these non-smokers having previously decided not to smoke even though they were aware of the product, its attributes and characteristics. This assumption ignores the nature of the decision to start using a product for the first time;
- (f) tobacco marketing has not been shown to influence smoking prevalence rates, and certainly not in the way suggested by the Chantler Report; and
- (g) none of the evidence presented deals properly with whether branded packaging in the UK actually causes smoking initiation.

3.6 The net result appears to be that the DH is now “*minded*” to act not on hard evidence, but on speculative conclusions that are not borne out from the real-world experience in Australia, which remains the only country in the world to have introduced the policy.

3.7 To compound this, the Chantler Report accepts it will not be possible to assess the impact of the measure, thus failing HM Government’s own Better Regulation principles that were designed to show legislation was worthwhile because it demonstrably worked. In this respect, JTI supports the World Health Organization International Agency for Research on Cancer’s statement:

*“As tobacco policies are formulated and implemented, it is important that they undergo rigorous evaluation... [W]e need to not only consider the size and nature of effects, we also need to consider the possibility that there is no meaningful effect... We recognize that science cannot prove the null hypothesis, but it can and should make statements about interventions where there is a consistent failure to find evidence of meaningful effect.”*⁹¹

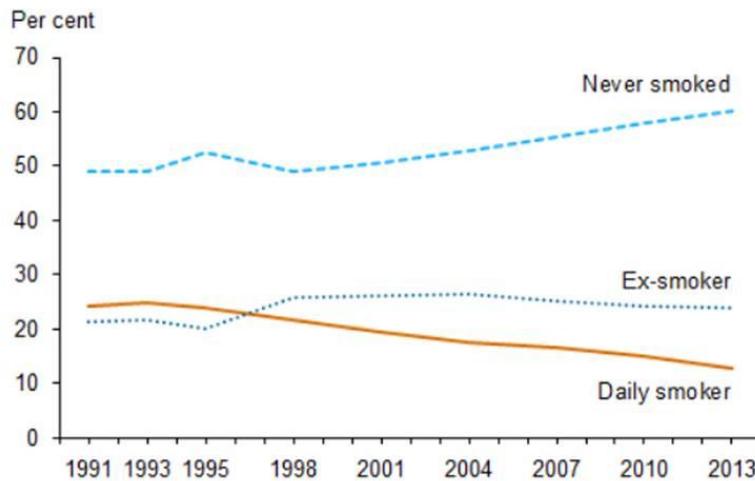
3.8 As a result, no evidence, let alone “*...robust and compelling evidence...*”⁹² is presented by the Chantler Report that plain packaging will actually cause any positive behavioural impact at all in the UK.⁹³

4. QUESTION 2 - ADDITIONAL INFORMATION ON THE WIDER ASPECTS OF THE PROPOSAL

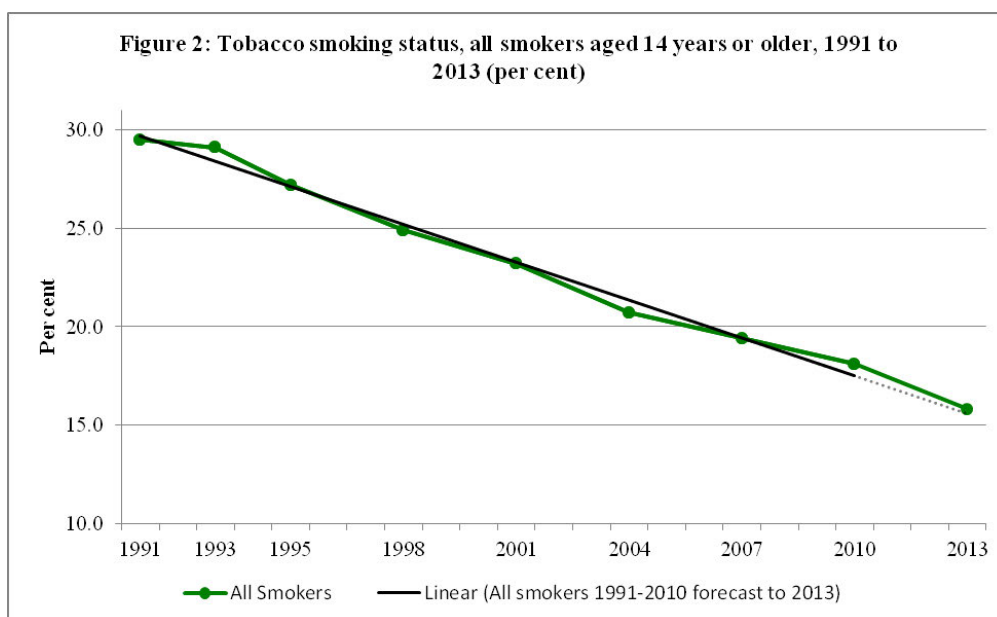
Australia – no public health impacts⁹⁴

4.1 Plain packaging has now been in place in Australia for over a year and a half. The evidence that has emerged does not show that plain packaging has accelerated the rate of decline in smoking, or has had any positive behavioural impact at all.⁹⁵ And whilst it is impossible to tell whether plain packaging was causative, data recently published by the Australian Government confirms this, as is illustrated in Figure 1 below.⁹⁶

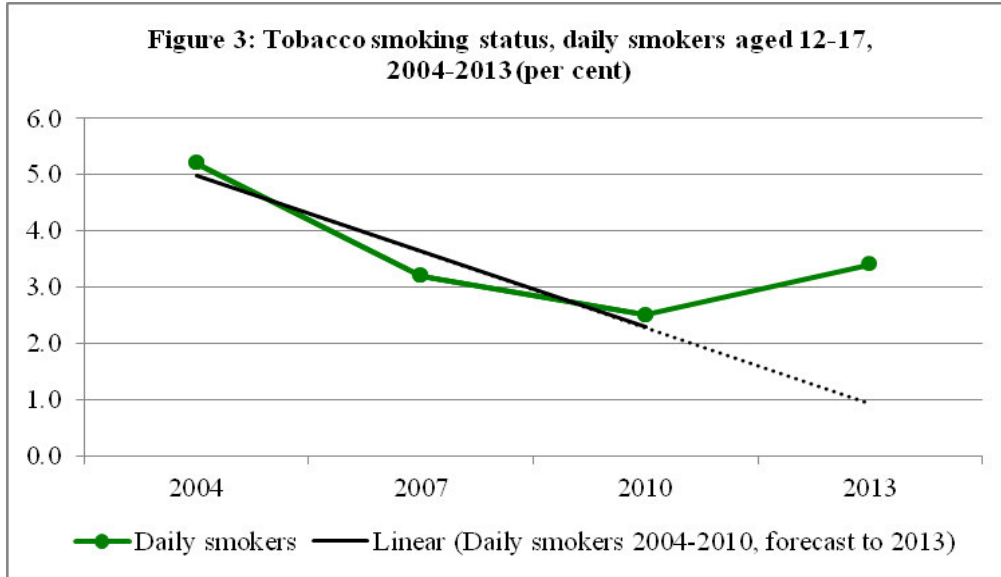
Figure 1: Tobacco smoking status, people aged 14 years or older, 1991–2013 (per cent)



4.2 The pattern of the data observed in Figure 1 above 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,⁹⁷ which 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.



4.3 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.⁹⁸ The point in time at which plain packaging was introduced in Australia (December 2012) falls in this period; although, as noted above, the data cannot determine whether plain packaging was causative.



4.4 Furthermore, the Australian Government will not initiate a review of the impact of plain packaging until December 2014.⁹⁹ Depending upon its rigorousness and its independence from those with either a vested interest in the outcome or predetermined views, the Australian Government’s review can be used by the DH in the future to assess whether there is justification for the UK to depart from the position reached in July 2013, namely that there was not sufficient evidence to move forwards with plain packaging here and that such a measure suffers from considerable legal uncertainty. This would need to be completed alongside the other detailed reviews in the various non-public health disciplines that are still missing.¹⁰⁰

4.5 The DH should wait for the outcome of such reviews (and the determination of whether the Australian law is WTO compliant) before departing from its previously stated position.

4.6 Conversely, if the UK decided to proceed now with plain packaging, it would need to rely on the available evidence that currently exists (which does not show there has been any effect on smoking prevalence), meaning that the only decision it could legitimately make would be not to proceed with plain packaging.

Additional information on illicit trade

4.7 Illicit tobacco has historically been, and continues to be, an extremely serious problem in the UK, both due to its scale¹⁰¹ and its impacts. The DH has previously stated that: “...*a continuing supply of very cheap cigarettes...ultimately presents a significant threat to public health in many countries, including the UK.*”¹⁰² As confirmed by HMRC: “*Unregulated distribution networks associated with smuggling make tobacco more accessible to children and young people and perpetuate health inequalities across socio-economic groups.*”¹⁰³

4.8 Plain packaging will worsen the trade in illicit tobacco products across the UK, as well as youth access and the social inequalities it causes.¹⁰⁴ Experts have also confirmed that it is: “...*highly likely to aggravate the existing negative impacts of the already serious and socially damaging trade in illicit tobacco.*”¹⁰⁵ By facilitating the trade in illicit tobacco products, the

claimed public health benefits of plain packaging will be undermined. Plus, the loss of tax revenues has: “...a multiplier effect since governments have less funding for healthcare, education, and other public services.”¹⁰⁶

4.9 Despite this, the 2014 IA, like the Chantler Report before it, does not analyse fully the impact of plain packaging on the illicit trade in tobacco products. As recognised by HMRC in their discussions with Sir Cyril Chantler, this impact may be difficult to quantify,¹⁰⁷ but JTI considers that this cannot justify proceeding as if no such risk existed.

4.10 As explained further in Annexes 1 and 2, rather than engaging with the substance of the existing evidence, the 2014 IA (as the Chantler Report did) oversimplifies and generalises, accepting or dismissing views in whole without adequate analysis.

The significance of an illustration: the 2014 IA’s estimated £2 billion Exchequer loss from plain packaging increasing the non-UK duty paid tobacco market

4.11 The 2014 IA gives £2 billion as an “*illustrative estimate*” of Exchequer losses for the increase in non-UK duty paid cigarettes caused by introducing plain packaging in the UK.¹⁰⁸ Even if for “*illustrative*” purposes only, the £2 billion figure must represent a significant underestimate of this estimated impact, as it only:

- (a) includes revenue lost from cigarettes (i.e. RYO is excluded, despite it representing 11.3% of the tobacco excise duty receipts the Exchequer received in 2013);¹⁰⁹ and
- (b) takes into account the direct loss of revenue to the Exchequer (i.e. none of the “multiplier effects” of losses to the Exchequer or the negative effect on those involved in the legitimate supply chain is considered).

4.12 The £2 billion figure is based on the assumption that plain packaging would lead to a 2% “*transfer*” from the UK duty paid market to the non-UK duty paid market each year.¹¹⁰ This is said to be due to a “*small*” increase of up to 1% in the illicit trade of cigarettes, and up to a 2% increase in cross border shopping (**CBS**) per year.¹¹¹ Even if one were to assume that the estimates and the underlying assumptions were reasonable (which JTI does not), what the 2014 IA fails to make clear is that, as a consequence of this 2% “*transfer*” from UK duty paid to non-UK duty paid, **over 8 billion more non-UK duty paid cigarettes would be smoked over a decade in the UK** than is currently the case.¹¹²

4.13 The 2014 IA does not provide such figures for RYO. Applying (for illustrative purposes only) the same 2% “*transfer*” from the UK duty paid RYO market to the non-UK duty paid RYO market, an equivalent of **over 3 billion more non-UK duty paid cigarettes would be smoked over a decade in the UK** than is currently the case.¹¹³

4.14 Together, this amounts to **over 11 billion more non-UK duty paid cigarettes being smoked over a decade in the UK** than would have been the case if plain packaging was not introduced.¹¹⁴ Of these, a significant proportion is likely to be a consequence of smokers “*switching from standardised tobacco packs to branded packs sourced from other countries*”.¹¹⁵ Without accepting the incorrect premise in paragraph 24 of the 2014 IA, if one were, for the sake of argument, to apply the 2014 IA’s flawed logic, these packs would undermine further the policy’s (perceived) effectiveness, as these branded packs will be seen by others in the UK, supposedly “*encouraging*” them to smoke.¹¹⁶ In addition to contraband and CBS being in branded packs, some counterfeits and “*illicit whites*” will also maintain their branding. The sale of all these additional non-UK duty paid cigarettes will take place outside of the legitimate UK retail channels, with the result that the financial benefits of the sales

relating to these cigarettes on the UK legal supply chain, including footfall generated by smokers entering shops for their tobacco purchase, will be lost.

4.15 In addition, the 2014 IA claims that it is “*not unreasonable*” to assume that plain packaging will result in a “*small*” increase of up to 1% in illicit trade per year, which equates to £120 million in lost duty.¹¹⁷ However, even this “*small*” increase would equate to **over 450 million more illicit cigarettes being smoked in the UK each year**.¹¹⁸ To put this figure into perspective, one of the biggest seizures in the UK in 2014 involved about 32 million cigarettes.¹¹⁹ In other words, the 2014 IA’s own (under)estimate suggests that the increase in illicit cigarette trade resulting from plain packaging alone would, in a year, be 14 times larger than this seizure.¹²⁰ The additional illicit cigarettes available as a result of the policy are assumed, given the approach of the 2014 IA, to include counterfeit, “illicit whites” and contraband products (purchased overseas and illegally re-sold in the UK). Plain packaging will, therefore, increase the number of unregulated tobacco products available to minors and those in low-income groups.

4.16 Again, while the 2014 IA does not provide an estimate for RYO, illustrating what the same 1% percentage point increase in illicit trade in RYO might represent in practice, it amounts to **an equivalent of nearly 280 million more illicit cigarettes being smoked each year**.¹²¹

4.17 In the context of a measure that is intended to reduce youth smoking, the 2014 IA – on an illustrative basis – is therefore implicitly acknowledging that the policy will make **nearly 750 million additional illicit cigarettes more accessible, each year, to minors and those in low-income groups**. This further undermines the policy’s public health objectives.¹²² Moreover, and ironically, while the Exchequer will lose out on £120 million in lost duty every year on the basis of the 2014 IA’s estimate, the criminal gangs who are smuggling these products into the UK with the intention of selling them on illegally will actually benefit from plain packaging as a result of the sale of these additional illicit cigarettes. This ‘policy windfall’ for such gangs could then be re-invested to finance other serious criminal or, in some cases, terrorist activities.¹²³

4.18 The examples provided above are inherently simplistic owing to the absence of the methodology behind the estimates provided in the 2014 IA. Indeed, they are illustrations of an illustration. However, they demonstrate the potential significance of the impact of the policy on illicit trade in practical terms, even where the 2014 IA’s (under)estimates are used.

New expert analysis since the 2012 Consultation

4.19 A comprehensive analysis of the potential impacts of plain packaging must also take into account, in particular and in addition to the responses received to this Consultation, the following expert reports which have been made available since the 2012 Consultation:

- (a) Professor Steinberg’s report and letter (prepared at the request of external legal counsel to JTI, and referred to at paragraph 3.1 above), and the evidence given by him at his meeting with the Chantler Review Team;
- (b) Professor Devinney’s report (prepared at the request of external legal counsel to JTI, and referred to at paragraph 3.1 above), and the evidence given by him at his meeting with the Chantler Review Team;

- (c) the two studies conducted by the Universities of Zurich and Saarland,¹²⁴ at the request of PMI, which undertook a statistical trend analysis to examine the possible effect of plain packaging on smoking prevalence of minors and adults in Australia;
- (d) the study conducted by London Economics, also at the request of PMI;¹²⁵ and
- (e) the KPMG Report which has been prepared at the request of Philip Morris Limited, British American Tobacco Australia and Imperial Tobacco Australia Limited.¹²⁶

Plain packaging undermines other Government policies

4.20 A plain packaging policy undermines other policies and priorities that have been announced by HM Government since the 2012 Consultation.

4.21 It is at odds with the Prime Minister's comments, as recently as January 2014, that Britain is 'open for business'. He stated that: "*We continue to innovate, introducing new initiatives and incentives to make the UK the most attractive business environment for foreign investors and enabling higher value investments.*"¹²⁷ He also emphasised that: "*...the welcome we extend to those who invest here [is] critical to securing our country's long term future... Britain is firmly and clearly open for business once again.*"¹²⁸

4.22 Plain packaging also undermines claims by the UK that it will ensure firms are not placed at a disadvantage by gold plating of European legislation.¹²⁹ In February 2013, the Minister for Business and Enterprise stated his intention to: "*deliver more certainty for business [and to] continue to withhold agreement for any new regulations that gold plate legislation.*"¹³⁰ The intention of the UK to layer plain packaging on top of TPD2 (and other tobacco control measures) is entirely at odds with such a commitment, and has also been recognised by the RPC, in their opinion on the 2014 IA: "*...by going beyond minimum EU requirements, the [DH] is gold-plating the measure.*"¹³¹ TPD2, which includes a ban on smaller pack sizes (which accounted for 45% of cigarette and 93% of RYO pack sales in the UK in 2013) will already create a massive disruption, and has yet to come into effect. Such layering is all the more indefensible in circumstances where the measure being gold plated, i.e. TPD2 is, as identified above, currently subject to legal challenges in the UK.

4.23 The need to avoid unnecessary layering of regulation has also been recognised by others, including the Institute of Directors, who, as part of their response to the 2012 Consultation, rightly identified that: "*The [retail display ban of tobacco products] was developed for many of the same societal benefits that the [2012 Consultation on plain packaging] seeks to address. The possibility of a display ban as well as new standardised packaging requirements is a 'belt and braces' approach to policy making... Since the proposals for standardised packaging seek to address many of the same factors as the display ban, it surely follows that the retail display ban should be thoroughly implemented and assessed before embarking upon more aggressive regulatory impositions.*"¹³²

4.24 The vital role played by intellectual property rights (**IPRs**) in the economy and society at a global, EU and UK level has also been repeatedly recognised by numerous institutions, as well as HM Government, since the 2012 Consultation. For example:

- (a) a joint study undertaken by the European Patent Office and the Office for Harmonization in the Internal Market found that: "*IPR-intensive industries generate more than a quarter of employment and more than a third of economic activity in the EU.*"¹³³ Significantly, of IPR-intensive industries, including the tobacco sector, trade

mark-intensive industries represented the highest proportion of employment and economic activity;

- (b) in 2014, the International Chamber of Commerce recognised that the intellectual property system: “...*maintain[s] fair competition and encourag[es] the production of a wide range of quality goods and services...*” as well as “...*sustaining innovation and creation...*” and “...*promoting technological and cultural advances and expression...*”;¹³⁴
- (c) HM Government has, in other contexts, rightly identified the central role that IPRs play in the growth of the British economy. For example, the Secretary of State for BIS has said: “*the quality of our IP systems represents a key determinant of economic growth.*”¹³⁵ This echoes recent statements made by the UK’s Intellectual Property Office (March 2014)¹³⁶ and the All Party Parliamentary IP Group (October 2012), which stated that “*IP is a vital foundation of economic growth.*”;¹³⁷ and
- (d) in a June 2014 Government report,¹³⁸ tobacco is identified as the second most common counterfeited item in the UK. As part of his comments on the report, the IP Minister commented that HM Government is committed to making sure that IPRs are “...*understood and respected.*”¹³⁹

4.25 These statements, which rightly identify the importance of protecting IPRs, reveal the extent to which plain packaging is at odds with such commitments (and the reliance placed upon IPRs to drive the UK’s current economic recovery). This also evidences the DH’s lack of a joined up, inter-departmental approach to dealing with these important issues when pushing ahead with the plain packaging proposal.

5. QUESTION 3 – COMMENTS ON THE DRAFT REGULATIONS

JTI’s approach to Question 3

5.1 Question 3 seeks comments on the Draft Regulations. As JTI is fundamentally opposed to the concept of plain packaging for all of the reasons outlined in this response and previously, it has addressed Question 3 by reference to the key points of principle set out below, and not the specifics of the way in which the DH would seek to bring forward this flawed policy.

The legality of plain packaging and the fundamental importance of IPRs

5.2 Beyond the many reasons why there is no credible evidence that plain packaging will (or is even likely to) achieve public health impacts and the criticisms that can be levelled at the conclusions reached by the Chantler Report, JTI reiterates the very serious concerns which we have previously raised in relation to the legality of any attempt to introduce plain packaging legislation in the UK. The Draft Regulations do nothing to change our views, and we oppose the measure *in toto*.

5.3 As explained in our letter to the Secretary of State for Health dated 10 January 2014, plain packaging would be unlawful and would put the UK in breach of various legal obligations, not least given the lack of credible evidence that plain packaging would have a positive behavioural impact; the existence of better, less restrictive alternatives; and the disproportionate nature of the measure.

5.4 Plain packaging infringes fundamental legal rights, including trade mark rights, property rights, and freedoms of expression and trade that are protected under UK, EU and

international law (including to the extent that international obligations are relevant under EU law). Forcing brand names to be written in a standard type face, colour and size, without any non-alphanumeric elements, except for very limited exceptions, is also a fundamental and entirely unjustified restriction on the normal and fair use of word trade marks.

5.5 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 ECHR and EU law) to such a degree that it would constitute a deprivation of that property. A 23 June 2014 report by Exane BNP Paribas also reaches this conclusion about deprivation.¹⁴⁰

5.6 The 2014 IA itself recognises, at paragraph 85, that: "*Types of business which could be affected by standardised packaging are as follows: tobacco manufacturers who would be deprived of the value of their brands...*" (emphasis added).

5.7 Such a deprivation of property is assumed to be unlawful, unless JTI is compensated at the full value of its property (a cost which, as explained in Annex 2, is not properly recognised by the 2014 IA).

5.8 The proposed new EU Trade Marks Directive reaffirms and highlights the importance of trade marks and their use: "*Trade marks fulfil their purpose of distinguishing goods or services and allowing consumers to make informed choices only when they are actually used on the market.*"¹⁴¹

5.9 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."*¹⁴²

5.10 Plain packaging would prohibit fundamental, consumer-facing use of a substantial part of JTI's trade mark portfolio in the UK. The fact that the Draft Regulations purport to amend UK trade mark legislation, in particular, in relation to fundamental use provisions, is further evidence that plain packaging conflicts with core principles of trade mark ownership, and UK and EU law more generally, including to the extent that international obligations are relevant under EU law.

5.11 It is not just JTI that holds these views; they are strongly supported by a number of expert bodies. Since the 2012 Consultation, for example:

- (a) MARQUES has stated that: "*Plain packaging legislation will preclude trade mark owners from the ability of making legitimate use of their trade marks, and in this sense, it would amount to an indirect legislative expropriation of lawful proprietary rights...*" (June 2014);¹⁴³ and
- (b) in relation to the proposed Irish plain packaging legislation,¹⁴⁴ 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).¹⁴⁵

5.12 In addition, the DH’s proposals would undermine the uniformity of protection of, in particular, trade marks, which has been recognised as being of paramount importance to the functioning of the EU internal market. Trade marks registered at the EU level are unitary in character and protected for the whole of the territory of the EU, including the UK. The current proposals to update the EU Trade Marks Directive and the EU Trade Marks Regulation¹⁴⁶ recognise uniformity of trade mark protection across the EU as fundamental. For example, recital 10 of the proposed Trade Marks Directive recognises that: *“It is fundamental to ensure that registered trade marks enjoy the same protection under the legal systems of all the Member States, and that the protection of trade marks at the national level is the same as the protection of European Union trade marks.”*

Article 24(2) TPD2 / legality issues

5.13 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) in TPD2 is, at least in part, to allow for the introduction of plain packaging on a unilateral basis. This is supported by the evidence given by Anna Soubry MP (then Parliamentary Under-Secretary of State for Public Health) and Andrew Black (Programme Manager, Tobacco Policy, the DH) to the House of Commons European Scrutiny Committee on 17 July 2013. In particular, Mr Black stated that:

*“The issue is that this Directive does not bring in plain packaging, and the Government has been very clear about seeking amendments to the wording of Article 24 to enable future Governments to bring in plain packaging, should they wish. That point was included within the Minister’s letter to other Government Departments and to other Ministers, so it has been very clear about Article 24 - amending Article 24 to be more acceptable and being more open in terms of allowing for plain packaging in the future. It is certainly a matter that has been exposed throughout Government.”*¹⁴⁷

5.14 As noted above, TPD2 – including Article 24(2) – is currently being challenged in the UK Courts by tobacco product manufacturers, including JTI. On 30 July 2014, Mr Justice Supperstone granted permission for these judicial review proceedings to proceed. 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.

5.15 Despite receiving letters from PMI and BAT on 6 June 2014 in which those companies expressed a clear intention to challenge the TPD2 (including Article 24(2)), the DH nevertheless proceeded to commence the Consultation on 26 June 2014, the day before PMI and BAT filed their claims. This was despite the DH being aware of the importance of a challenge to Article 24(2) to any plain packaging legislation: letters dated 20 June 2014 from the UK Treasury Solicitor’s Department (on behalf of the Secretary of State for Health) to the lawyers for PMI and BAT expressly stated that the Secretary of State had *“...considered the claims contained in your letter...”*; and in the Summary Grounds filed on behalf of the Secretary of State for Health on 18 July 2014 it is 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 standardisation of the packaging of tobacco products, regardless of whether such matters are within the scope of the Directive or not?”

As well as being relevant to the validity of the Directive, the interpretation of Article 24(2) is also relevant to a public consultation being conducted in the United Kingdom in order to decide whether it would be appropriate to adopt more stringent domestic rules in relation to the packaging of tobacco products.”¹⁴⁸

5.16 It is accepted by the DH that the Court of Justice of the European Union (**CJEU**) must now be asked to rule on the validity and/or correct interpretation of Article 24(2). The relevance of its future ruling as to whether a Member State is able to introduce plain packaging is clear, and undisputed. If the CJEU finds Article 24(2) to be invalid, it will be struck down, and cannot serve as a basis upon which the UK is “...enabled...” to “...bring in plain packaging...” (in Mr Black’s words). Even if the challenge to Article 24(2) is unsuccessful, the UK would still have to show that plain packaging does not breach EU law, or place the UK in breach of its WTO obligations – something which JTI strongly considers the UK would be unable to do.

5.17 TPD2, even if held by the CJEU courts to be valid as a matter of EU law, requires the UK 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.” The recitals 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.”

5.18 As a matter of EU law, plain packaging also clearly falls within the prohibition contained in Article 34 of the TFEU. Measures infringing the free movement of goods are unlawful as a matter of EU law unless they can be justified. The burden of justifying the interferences with the right of free movement of goods, again, falls on the UK. JTI notes in this context that detailed opinions have now been issued by three EU Member States in the context of Irish plain packaging proposals¹⁴⁹ and assumes that these opinions raise issues about the compatibility of such a proposal with free movement principles.

Other challenges to the legality of plain packaging

5.19 JTI and other tobacco manufacturers challenged the Australian Plain Packaging Act 2011 in the Australian High Court. The Australian High Court has, since the 2012 Consultation, handed down its reasoned judgment. It held that there was no “...acquisition of...property...otherwise than on just terms...”, as property had not been “acquired” by any third party.¹⁵⁰ Plain packaging did not breach that specific Australian constitutional test. However:

- (a) the Court acknowledged that trade mark rights are property rights of “...great commercial value...”¹⁵¹ and that plain packaging deprives those rights of their substance;¹⁵² and

- (b) no evaluation of proportionality was carried out (as proportionality was not part of the applicable Australian constitutional test).

5.20 According to the European Parliament's Legal Affairs Committee (*JURI*) the Australian High Court: "...found that plain packaging does indeed "deprive" tobacco manufacturers of their property." *JURI* also noted that: "...if anything, the judgment of the Australian High Court speaks against the admissibility of similar measures under EU law." Such a deprivation would require the UK to make significant compensation payments.¹⁵³

5.21 Separately the same Australian legislation is also the subject of a WTO dispute, relating to whether Australia's plain packaging measures are consistent with international treaties, including TRIPS, the Paris Convention and the TBT agreement.

5.22 As explained in JTI's 2012 consultation response, JTI believes that the adoption of a plain packaging measure in the UK would violate these international obligations.¹⁵⁴ This view is based on, among other things, the expert opinion of Professor Gervais on the interpretation of TRIPS and the Paris Convention.¹⁵⁵ Five countries (Ukraine, Honduras, Dominican Republic, Cuba and Indonesia) have brought challenges against the Australian plain packaging legislation, which is to be settled by the WTO Dispute Settlement Body. Upwards of 30 other WTO members have also joined the five complainants as third parties in their challenges.¹⁵⁶

5.23 WTO members have 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*",¹⁵⁷
- (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..."¹⁵⁸ 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.¹⁵⁹

5.24 In addition, the international law concerns regarding plain packaging have also been expressly recognised by a number of expert bodies.¹⁶⁰

5.25 It is wrong for the UK to push ahead with plain packaging, pre-empting what its actual impacts might be, until the WTO compatibility of the only plain packaging measure to be adopted (in Australia) is known. This is particularly so when the DH has said that the Draft Regulations are based upon the Australian law being challenged.¹⁶¹

6. QUESTION 4 – IMPROVING THE 2014 IA

6.1 Over the past decade, tobacco control legislation has been passed with increasing rapidity in the UK.¹⁶² The RPC has specifically commented in respect of previous IAs prepared by the DH that:

“We have seen a wide range of proposals from DH, a high proportion of which received a Red rating. Many of these proposals were highly sensitive and complex measures for which we would therefore expect a high level of evidence and analysis in order to accept with the impacts presented. The most common flaw in these IAs was that analysis of wider economic impacts was incomplete. For example, tobacco IAs tended to provide a full analysis of the benefits, but failed to estimate the full economic costs to producers and retailers” (emphasis added).¹⁶³

6.2 The DH’s 2012 IA on plain packaging was only awarded an ‘Amber’ rating by the RPC,¹⁶⁴ which acknowledged that more analysis was needed: *“...to support the claim that the proposal will have an overall neutral effect on business.”*¹⁶⁵ The 2012 IA also acknowledged that: *“...for tobacco control policies to be justified, the impact on smoking behaviour must be sufficiently large to justify the related costs.”*¹⁶⁶

6.3 Given this context, it is unfortunate, but not perhaps surprising, that the 2014 IA repeats many of the same errors displayed in previous IAs, and fails to meet the legitimate concerns previously expressed by the RPC and other stakeholders. Once again (and despite the criticisms of the 2012 IA and previous recommendations of the RPC), it has only achieved an ‘Amber’ rating, indicating that HM Government’s own regulatory experts had concerns with elements of the 2014 IA that needed (and still need to be) addressed.

6.4 According to the RPC, IAs that receive Amber ratings (such as the 2014 IA) are only: *“...fit for purpose provided the department responds to the concerns raised in the opinion.”*¹⁶⁷ The RPC, in their opinion on the 2014 IA, stated, amongst other things, that: *“...the [DH] should provide a fuller discussion of a number of costs, along with some indication of their likely extent where possible.”*¹⁶⁸ As any full discussion regarding the costs of the proposal and their extent is still lacking, the 2014 IA is, for this reason alone, not fit for purpose.

6.5 The continued failure to articulate adequately relevant costs is particularly significant given that a general meeting of the RPC on 16 June 2014, specifically identified the 2014 IA’s: *“...treatment of impact on sales and profit, and whether this should be treated as direct or indirect...”* as something that required further analysis. It was agreed at the general meeting that a position paper on the subject was to be presented to the RPC by the RPC Secretariat. Again, it is not clear that these concerns have been properly addressed in the 2014 IA.

6.6 Key failings of the 2014 IA are set out in Annex 2, but, in summary, it provides an inadequate basis for proceeding with plain packaging as it:

- (a) is detached from commercial reality, demonstrated by the fact that, in its final estimation, tobacco manufacturers are set to make a **net gain** from plain packaging;
- (b) should have assessed the policy by reference to ‘objectives’ that are actually legitimate public policy goals;
- (c) overestimates and speculates as to the benefits that the introduction of plain packaging would have. It unquestioningly adopts conclusions from the Chantler Report and, in some cases, places reliance on documents which are decades old, and which have no

relevance to the current regulatory environment in the UK, let alone the position in 2017 (when it is said full compliance with the policy would be required);

- (d) drastically underestimates the true cost the introduction of a plain packaging measure would have on manufacturers, in particular by depriving them of their property. The fact of a deprivation is recognised, but the true economic consequences of doing so are ignored;
- (e) should have assessed meaningfully and/or taken into account the many other negative impacts and costs plain packaging would have, including the complicated issue of illicit trade (a cost which the 2014 IA recognises could be significant, but which it does not adequately quantify). Its failure to do so is simply not good enough given this is the third major DH consultation which has considered this policy;
- (f) should have addressed JTI's (and other stakeholders') previous concerns about the incessant layering of tobacco control regulation. The 2014 IA does not make clear how plain packaging would have impacts beyond those deemed attributable to existing initiatives and pre-existing (and projected) public health trends, and fails to justify, therefore, why more layers are required; and
- (g) should have considered alternative means of achieving those policy goals of the DH which are legitimate, and which should have formed part of this Consultation. As identified in Annex 2, alternative means which the 2014 IA ought to have considered include:
 - (i) better enforcement of the current regulatory regime;
 - (ii) reinforcement of youth access prevention measures at a retail level;
 - (iii) more effective and targeted enforcement to tackle the illicit tobacco trade; and
 - (iv) targeted public information campaigns to reinforce messages about tobacco control measures, and the health risks of smoking.

6.7 It is particularly remarkable that as part of its justification for not quantifying branding losses, the 2014 IA cites the fact that premium brands: “...*inspire embarrassment and hostility in others not being able to afford such self-branding*”. This is itself an embarrassingly inappropriate excuse for avoiding necessary analysis, given that it actually embraces concepts of a command economy, rather than seeking to ensure the UK's standing (and branding) as a leading global free market economy.¹⁶⁹ Such a statement would be unthinkable in a UK impact assessment in any other FMCG or luxury goods context; for example, asserting that losses in relation to Burberry, Smythson, Diageo, Mulberry, Jaguar Land Rover or Barbour (all proud owners of premium iconic British brands) need not be quantified as use of their brands: “...*inspire embarrassment and hostility in others not being able to afford such self-branding*.”

6.8 Adopting such a position means the 2014 IA is brushing aside, without credible reasoning, the critical importance of branding both to consumers and to economic prosperity (or in the case of the UK, its present economic recovery), which has been confirmed, and reconfirmed, over time.¹⁷⁰ The remoteness of the 2014 IA's position from mainstream political and economic thinking in the UK about the concept of branding and its significance is revealed by contrasting it to the following statements made by the Prime Minister:

- (a) *“We weren’t the world’s first industrial power just because of the coal and the iron ore beneath our soil. It was because we had **secure property rights**, relatively **open and flexible markets** for labour and capital, and a system in which **innovation, investment and enterprise could thrive**”;*
- (b) *“In short, we need to **campaign for capitalism. To promote profit. To fight for free trade. To remind, indeed to educate, our citizens about the facts of economic life**”;*
- (c) *“...the world over the letters ‘UK’ stand for **unique, brilliant, creative, eccentric, ingenious. We come as a brand – and a powerful brand... If... the UK changed, we would rip the rug from our own reputation**”;* and
- (d) *“**Aspiration is the engine of progress. Countries rise when they allow their people to rise. In this world where brains matter more, where technologies shape our lives, where no-one is owed a living ...the most powerful natural resource we have is our people... That’s why the mission for this government is to build an aspiration nation ... we just get behind people who want to get on in life... The young people who dream of their first pay-cheque, their first car, their first home – and are ready and willing to work hard to get those things. While the intellectuals of other parties sneer at people who want to get on in life, we here salute you... we are the party of the want to be better-off, those who strive to make a better life for themselves and their families – and we should never, ever be ashamed of saying so**”.*¹⁷¹

6.9 It would be an astonishing capitulation to the ‘politics of envy’ if the heterodoxy of the 2014 IA was allowed to form the basis of policy-making by a government led by a Conservative Prime Minister who is fully committed to and passionately in favour of free trade and an open economy.

6.10 In summary, the 2014 IA’s deficiencies are so serious that it cannot now be salvaged by the future ‘improvements’ sought by Question 4 to this Consultation.¹⁷² It is not enough for the DH to take the same approach with any future IA, as this would involve the same mistakes being repeated once again. A decision in favour of plain packaging cannot be taken until an adequate consultation-stage impact assessment is prepared and published, which addresses properly the concerns and shortcomings which stakeholders have (previously) identified.

Other Better Regulation failings

6.11 The deficiencies in the 2014 IA are compounded by the fact that it has been conducted in the context of other Better Regulation failings by the DH. Therefore, we address these failings below as part of our response to Question 4.

The DH has already made its mind up

6.12 Whilst it may be the case that: *“The Government has not yet made a final decision on whether to introduce standardised packaging of tobacco product”*¹⁷³ a number of indications have been given in recent months that this Consultation is, in fact, highly unlikely to change the mind of the DH, at least.

6.13 Instead of embarking upon this Consultation with an open mind, the clear impression is that the steps now being taken are essentially part of efforts by the DH - under pressure from tobacco control groups who are effectively professional lobbyists employed to support tobacco control measures such as plain packaging - to avoid allegations of procedural irregularity and an attempt to defend the robustness of their Consultation process. For example:

- (a) even before the Chantler Report had been published, the Parliamentary Under Secretary of State for Public Health commented that: “*The power to make regulations is being proposed in the other place [i.e. the House of Lords] so that we may move quickly at the point we receive Sir Cyril’s review*” (28 November 2013).¹⁷⁴ The Minister for Government Policy also stated (just prior to the launch of the Consultation) that: “*...plain packaging is proceeding; it is not in the long grass at all. The measures are now under way...*”;¹⁷⁵
- (b) the legislative history surrounding the plain packaging provisions of the Children and Families Act 2014 reveals the DH’s recognition of the need to maintain an inappropriately low evidential threshold before the making of Regulations by the Secretary of State. The Government’s amendment on plain packaging for tobacco products, which was introduced at the House of Lords’ Report Stage of the Children and Families Bill (as it then was), was considered in the House of Commons on 10 February 2014. Ahead of this, an amendment to the Government’s amendment was tabled by Philip Davies MP. The effect this proposed amendment would have had is set out in full in Annex 3. As can be seen, the amendment proposed changing the word “may” to “will” in sub-clauses (1) and (4), and the phrase “at least some” to “each” in sub-clause (3)(a). That amendment, which was unsuccessful, would have introduced a requirement for a slightly more meaningful (although still very low) evidential threshold before the making of Regulations. It is apparent that this more meaningful threshold would not have been met by the conclusions reached in the Chantler Review in respect of the predicted effect of a plain packaging measure on public health. What is telling is that the DH had in fact already anticipated that such a higher threshold could not be met. The Parliamentary Under-Secretary of State for Health recognised, during the debate in the House of Commons on 10 February 2014, that: “*Constraining Ministers’ decision making in that way would probably have the effect of stopping the use of the powers altogether*”;¹⁷⁶
- (c) in her letter to the DH dated 2 April 2014, the Chief Medical Officer for England noted that prior to the Chantler Review, she was: “*...already of the opinion that we had the evidence to suggest that implementation of plain packaging should save some children and young adults from smoking*”;¹⁷⁷ and
- (d) finally, as soon as the Chantler Report had been published, and despite the fact that: (i) the Chantler Report only considered a narrow range of issues; and (ii) the clear indication had previously been given that “*Ministers will take all other factors into consideration...*”;¹⁷⁸ the Parliamentary Under Secretary for Public Health stated that she was: “*...minded to proceed with introducing regulations to provide for standardised packaging.*”¹⁷⁹ She acknowledged that all that was left was for there to be “*...a final, short consultation.*” It was then confirmed that this would be a: “*...a six-week consultation to ensure that our decision is properly and fully informed by any further relevant views and, very importantly, that it will be capable of withstanding the greatest scrutiny, including in the courts.*” (3 April 2014) (emphasis added). Similarly, it was recognised that: “*...if the Government did not consult properly on the regulations, far from speeding up matters, it would delay them...My colleagues in the Temple would be over the road with an application for judicial review before one could say ban on anything*” (3 April 2014).¹⁸⁰

6.14 Also indicative of the DH’s determination to proceed with a plain packaging policy, irrespective of the evidence base and proper Parliamentary procedure, is the evidence given to the House of Commons European Scrutiny Committee by the then Parliamentary Under-

Secretary of State for Public Health in July 2013. When explaining why that Committee had not been kept sufficiently informed of important legislative developments in respect of TPD2, the Minister explained that: *“I took the very firm view that not just this Government, but any Government, would not want to be in a position whereby its hands were tied by a Directive that would preclude it from taking more actions, should it so choose, on standardised packaging, or indeed the amount of health labels and other matters on tobacco.”*¹⁸¹

Inappropriate use of statistics

6.15 Following the publication of the Chantler Report, the Public Health Minister stated that: *“Sir Cyril points out that if this rate of smoking by children were reduced by even 2%, it would mean that 4,000 fewer children took up smoking each year.”*¹⁸² She went on to say *“...even a modest impact on a major killer is really important.”* The “4,000 figure” was then (wrongly) apparently portrayed or accepted as fact by some MPs during Parliamentary debate.¹⁸³

6.16 It is in fact apparent from paragraph 6 of the Chantler Report that this 2% figure was a hypothetical one as far as the effect of an introduction of a UK plain packaging measure is concerned: *“If this rate [smoking prevalence] were reduced even by 2%, for example, it would mean 4,000 fewer children took up smoking each year...”* (emphasis added).¹⁸⁴

6.17 Whilst accepting that this figure is presented as a hypothetical (even if it appears to have been subsequently accepted as a fact by some), there is no detail in the Chantler Report on which to base the assumption that the introduction of a domestic plain packaging measure would result in such a reduction or, indeed, any reduction. Indeed, Sir Cyril Chantler acknowledges that: *“...I have not seen evidence that allows me to quantify the size of the likely impact of standardised packaging...”*¹⁸⁵ and that *“...research cannot prove conclusively that a single intervention such as standardised packaging of tobacco products will reduce smoking prevalence.”*¹⁸⁶ There is therefore no basis on which to propose this figure.

6.18 Similarly, it has also been necessary for JTI publicly to respond to ASH’s misleading claims (made in July 2014)¹⁸⁷ that evidence has emerged showing that plain packaging has caused a “huge drop” in smoking in Australia. Contrary to claims made by ASH and others, the numbers that the Australian Government has produced do not show that plain packaging has had a positive impact on smoking behaviour (see paragraphs 4.1 to 4.3 above). Instead, as we were required to point out in a press release of our own,¹⁸⁸ daily smoking prevalence in Australia declined by 2.3% between 2010 and 2013, consistent with the pre-existing trend. The decrease in prevalence between the introduction of plain packaging in December 2012 and December 2013 is not capable of being measured in this data set, because that level of detail is not available.

Length of the Consultation period

6.19 As JTI advised the Secretary of State for Health in a letter dated 17 April 2014, a six week consultation is clearly inadequate given the wide-ranging and controversial nature of the proposed measures.¹⁸⁹

6.20 It is concerning that the Consultation has been portrayed as a straightforward exercise in: *“...seek[ing] new, or additional, information relevant to standardised packaging that has arisen since the 2012 consultation.”*¹⁹⁰ The 2014 IA, and the three policy options now being considered, do not simply represent straightforward, comparative extensions of the policy options considered in 2012. The 2012 Consultation purported to assess the relative costs and benefits of introducing a plain packaging measure against the status quo that existed **at that time**. By contrast, the baseline against which plain packaging is now being assessed, two years

on, has changed materially. An environment in which a form of pack standardisation has already been effected by TPD2 is assumed in respect of the policy options presented in the 2014 IA (which themselves differ from the policy options presented in the 2012 IA). Consequently, the 2012 and 2014 IAs proceed from two very different starting points, meaning comparisons between them are highly complex. This makes inappropriate the characterisation of this Consultation as a simple updating exercise, and the six week consultation period more unfair. The brevity of the Consultation will, undoubtedly, have frustrated a number of stakeholders from responding at all, or responding fully.

6.21 Moreover, the RPC's opinion, explaining why it was only able to award the 2014 IA an Amber rating was only published on 25 July 2014. This was almost two months after the opinion (dated 29 May 2014) was issued, and less than two weeks before the end of the six week consultation period. This opinion, which allows stakeholders to understand more fully the concerns the RPC has with the 2014 IA, could and should have been published by the DH alongside the other Consultation materials on 26 June 2014. At the very least, and consistent with Better Regulation principles of openness and transparency, the 2014 IA should have made clear the RPC's concerns, and the extent to which they had or had not been addressed.

Inadequate treatment of previous consultation responses

6.22 Having taken almost a year to review the responses to the 2012 Consultation, the DH published its summary report in July 2013.¹⁹¹ On publication of the summary report, the Secretary of State's ministerial statement failed to mention or acknowledge that of the total 668,000 responses, almost two thirds were opposed to plain packaging. Instead the summary report relegated 665,989 responses to the status of "*campaign responses*" which "*used identical template documents (typically a postcards [sic], emails or letters), a single letter signed by multiple people or petitions*" or "*where the respondent did not attempt to address more than a handful of consultation questions*". This allowed the DH to focus on the fact that a small majority (53%) of the 2,424, "*detailed responses*" that had answered the relevant question were in favour of plain packaging.¹⁹²

6.23 Almost a year after the publication of the summary report (and on the same day the Consultation was launched), the DH announced that it had: "*published the detailed responses that were received to the 2012 consultation.*"¹⁹³ In fact, the DH has only uploaded 105 of the "*detailed responses*" (representing just 4%). A rudimentary examination of these (which is all that has been possible in the "short" consultation period) reveals that these "*detailed responses*" included one-line or one-page emails that did not attempt to answer more than a handful of questions. Indeed, nearly 91% of those in favour of plain packaging are no more than two pages long and 68% are based on "*template documents*" of the kind the DH said it had classed as "*campaign responses*" (so as to relegate them from the analysis of "*detailed responses*").¹⁹⁴ An example of such a "*campaign response*" that has been published by the DH, apparently as a "*detailed response*", can be seen from the extract below:¹⁹⁵

INSERT ORGANISATION NAME

SUBMISSION SUPPORTING PLAIN, STANDARDISED PACKAGING OF TOBACCO PRODUCTS

To tobaccopacks@dh.gsi.gov.uk

I would like to express my strong support for measures to introduce plain, standardised packaging for all tobacco products in the UK as part of the current Government consultation.

We fully support introducing here in the UK the same type of plain packaging that is being implemented in Australia in December 2012 - tobacco products with no branding, a uniform colour and standard font and text for writing on the pack. We believe these would bring public health benefits over and above those from current initiatives in the UK.

Around 340,000 children in the UK try their first cigarette every year. Smoking starts not as an adult choice but in

6.24 The fact that it has taken the DH over two years to publish even just a small fraction of the responses received means JTI and other stakeholders have, until very recently, been unable to respond to or meaningfully comment on certain evidence put forward by others as part of the 2012 Consultation.

6.25 The DH has not made clear why it has published only 4% of the responses, or indeed the basis upon which it has decided to publish the particular responses that it has done. What is apparent, however, is that the DH has failed to publish detailed responses which do address the major issues. For example, JTI's comprehensive and evidence-based 2012 consultation response - whilst available on our website - has, inexplicably, not been published by the DH. By contrast, the following, apparently "*detailed response*" (replicated in full), has been published:¹⁹⁶

[REDACTED]

From: [REDACTED]@gmail.com
Sent: 19 June 2012 10:18
To: Tobaccopacks
Subject: Plain packaging of tobacco products

Tobacco Packs DoH Tobacco Packs DoH

I support the plain, standardised packaging of tobacco products to protect our children.

I confirm I do not have any links with or receive funding from the tobacco industry.

[REDACTED]

6.26 In the light of the various statements discussed at paragraph 6.13 above, in conjunction with the brevity of this present Consultation period and the inadequate treatment of the 2012 consultation responses, it is clear that the DH is not proceeding with an open mind or wishing seriously to consider the broader implications of this proposed policy. They are, instead, indicative of the DH simply going through the motions in an attempt avoid allegations of procedural irregularity.

Conclusions

6.27 For the reasons set out in this consultation response, JTI remains categorically opposed to the introduction of any plain packaging measure in the UK. As the 2014 IA recognises, plain packaging would deprive us of the value of our brands – our most valuable assets. It would unjustifiably damage our ability to compete, worsen the illicit trade in tobacco and be unlawful. It infringes our fundamental legal rights without reducing smoking.

6.28 This third DH consultation on plain packaging in six years gets no closer to identifying the evidence which would be needed to justify the introduction of such an extreme measure and again fails to consider alternatives. Instead, the DH has once again sought to lower the evidential threshold and move the goalposts to try and make the policy fit the weak evidence. The only rational decision HM Government could now make about this policy is **not** to introduce it in the UK.

JTI

6 August 2014

ANNEX 1: OBSERVATIONS ON THE CHANTLER REVIEW

1. INTRODUCTION

1.1 Even within Sir Cyril Chantler's narrow remit, the flaws which JTI has identified within the Chantler Report make it an inappropriate and inadequate basis to justify proceeding with plain packaging legislation. Further, many of these concerns relate to issues which JTI had previously identified as needing to be properly addressed and explained to the DH.

Background to the Chantler Review

1.2 On 12 July 2013, HM Government announced that it had decided to wait until the emerging impact of plain packaging in Australia could be measured before making a final decision on whether to introduce plain packaging in the UK.¹⁹⁷ On 28 November 2013, less than five months later, a Ministerial Statement announced the setting up of the Chantler Review to examine any public health evidence for plain packaging.¹⁹⁸ It was asked to operate according to a Terms of Reference, and produced its own method statement (included as Annex A to the Chantler Report).

1.3 The Chantler Review Team comprised the Chair, Sir Cyril Chantler (a paediatrician), together with two DH employees seconded to the team.¹⁹⁹

1.4 The Chantler Review Team heard evidence from various stakeholders between the end of November 2013 and the end of March 2014, and also received "...50 new [written] submissions..."²⁰⁰ as well as follow-up responses to various of the meetings.

1.5 JTI made its concerns about the process which the Chantler Review was to embark on known in a letter to the Secretary of State for Health on 10 January 2014.

1.6 Notwithstanding these concerns, JTI sought to engage constructively with the Chantler Review, and sought to assist the Chantler Review Team via:

- (a) its detailed Chantler Submission, which also reiterated many of the concerns JTI had previously expressed with the process being embarked upon by the Chantler Review, as well as other concerns likely to be of relevance to the Chantler Review Team's review; and
- (b) JTI's Head of UK Corporate Affairs' attendance at a meeting with the Chantler Review Team on 29 January 2014, as a member of the TMA.

1.7 Beyond this, and in terms of engaging with the DH more generally:

- (a) JTI has provided detailed evidence-based submissions²⁰¹ to the DH's 2008 and 2012 Consultations which also addressed plain packaging; and
- (b) JTI met with the DH in 2013 in order to provide further information on the operations of its businesses and to seek to address the information gap at the heart of the 2012 IA. This was the first time JTI was given the opportunity to meet with the DH in the context of plain packaging, despite the various offers made by JTI before then to meet.²⁰²

1.8 On 3 April 2014, the Chantler Report was published. In the light of Sir Cyril Chantler's conclusion that, in his view, it is: "*highly likely that standardised packaging would serve to reduce the rate of children taking up smoking*", the DH stated that: "*Health Ministers [are]*

currently minded to proceed with introducing regulations” in respect of the plain packaging of tobacco products.²⁰³

2. NO EVIDENCE OF ACTUAL SMOKING BEHAVIOUR

2.1 The Chantler Report presents no evidence that plain packaging would have any impact on actual smoking behaviour, if introduced in the UK, as:

- (a) the “*clear plausible link*” to a behavioural change asserted by the Chantler Report is unfounded and unsubstantiated;
- (b) both the Systematic Reviews, and the studies underlying the Systematic Reviews, are methodologically flawed and incapable of determining whether plain packaging will have any impact on actual smoking behaviour; and
- (c) the existing data from Australia is acknowledged as being “*inconclusive*”.

No link between a reduction in appeal and changes in behaviour

2.2 The terms of the Chantler Review’s own method statement stated that Sir Cyril Chantler was to assess whether: “...*the introduction of standardised packaging is likely to lead to a decrease in the consumption of tobacco.*”²⁰⁴ Therefore, Sir Cyril Chantler was to determine whether the evidence suggested that plain packaging was likely to result in people not taking up smoking, smoking less or being more likely to quit.

2.3 This focus on behaviour is consistent with NICE Guidance. It recognises that: “...*there is overwhelming evidence that changing people's health-related behaviour can have a major impact on some of the largest causes of mortality and morbidity*”²⁰⁵ and recommends: “...*changes in behaviour...be at the heart of all disease prevention strategies.*”²⁰⁶ It also goes on to acknowledge that: “...*attempts to change behaviour have not always led to universal improvements in the population's health...*”²⁰⁷

2.4 By contrast, the Chantler Report does not convincingly 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. Indeed, Sir Cyril Chantler largely ignored the advice from a leading academic in youth behaviour (with specific expertise in adolescent decision-making and risk-taking) who appeared before him. This is despite Professor Steinberg having explained to Sir Cyril Chantler that, in his long professional experience, the introduction of such a measure was unlikely to lead to changes in youth smoking behaviour.²⁰⁸

2.5 In the absence of such evidence, Sir Cyril Chantler adopts a two-step approach to make the link between plain packaging and smoking behaviour. He first states that: “...*the aim of standardised packaging is to **reduce the tobacco package's visual identity and appeal as an advertisement for the product...***” (emphasis added) and then assumes, without basis, that: “...***by reducing its appeal, standardised packaging would therefore affect smoking behaviour...***” (emphasis added). To conclude there is a causal link between reduction in “appeal” and behavioural change, Sir Cyril Chantler takes a leap of faith. The Chantler Report suggests that “*intermediate outcomes*”, such as reduced appeal, are likely to eventuate in changes to behaviour (and could be, he says, seen as benefits in themselves, in any event).

2.6 As noted above, however, and as explained in JTI's 2012 consultation response, reducing the "appeal" of tobacco products to consumers *per se* is not, and cannot be, a self-standing justification for tobacco regulation.

2.7 It does not follow that any reduction in the "appeal" of tobacco packaging would result in smoking behaviour change. 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, 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 Chantler Report concedes: "...*stated intentions are generally weak predictors of behaviour*".²⁰⁹

2.8 These studies do not address whether reported reductions in "appeal" have any relevance to the actual decision to start (or continue) smoking. Absent such evidence, there is no basis to assume reducing the appeal of tobacco packaging is relevant to the factors that contribute and determine an individual's attitude to smoking and becoming a smoker. The Chantler Report does not address this, let alone provide robust evidence in support of this conclusion.

2.9 No link to actual smoking behaviour has been established in any of the studies relied upon in the Chantler Report. Such a link is assumed without justification.

2.10 Instead, the Chantler Report seeks to support its conclusions by referring very generally to: "...*evidence linking concepts such as 'appeal' to behaviour which exists elsewhere in the literature and wider fields such as contemporary theories of behaviour psychology...*"²¹⁰ (citing Webb et al. (2006)).²¹¹

2.11 However, Webb et al. actually test discrepancies between an individual's *behavioural intentions* and their behaviour (and not the effect of "appeal" on actual behaviour).²¹² The authors do not make any connection whatsoever between appeal and behaviour (intended or actual). Nor do they attempt to define what "appeal" is, or its effect on behaviour. It is wrong for the Chantler Report to rely on this scientific evidence on an apparently crucial point in this way.

2.12 The Chantler Report states further that these: "...*contemporary theories of behavioural psychology...*" (evidenced by a single citation to Webb et al.) "...*stress the importance of non-conscious processes in determining behaviour rather than conscious statements of intent...*"²¹³ Although non-conscious processes are referred to in Webb et al.,²¹⁴ they are not the focus of the article nor is it apparent that they relate to appeal. It is clear, however, from a review of the cross-referenced articles cited in Webb et al. and the article itself, that considerable uncertainty remains over the role conscious and non-conscious processes play in determining behaviour. For example:

- (a) in 2006, Webb et al. state in relation to studies where participants undergo a behavioural intervention to evaluate its impact only that: "...*it is possible that interventions directly affected behaviour because goal activation occurred outside the participants' awareness...*" (emphasis added), concluding "...*that future behaviour change efforts might do well to give greater consideration to nonintentional routes to action...*"²¹⁵ without specifically referring to the question of appeal at all;
- (b) in 2013, Sheeren et al.²¹⁶ underline the still untested status of non-conscious processes in their discussion of "*implicit attitudes*", stating that: "*Further tests—that move beyond*

merely comparing the effects of implicit attitudes versus explicit attitudes—are crucial in order to make the case that implicit attitudes constitute important additional predictors of health behaviors.”²¹⁷ Again, the authors do not make any connection at all between appeal (reduced or otherwise) and behaviour, instead observing (with respect to implicit attitudes) that: “...*the mechanisms underlying these effects are not yet clear*”;²¹⁸ and

- (c) Marteau et al. (2012)²¹⁹ similarly acknowledge that non-conscious process: “...*remains an elusive concept, difficult to understand and identify.*”²²⁰ Professor Marteau gave evidence to the Chantler Review Team, and her work is extensively relied on in the Chantler Report.

2.13 Despite this, the Chantler Report inappropriately seeks to use non-conscious processes to posit that “*intermediate outcomes*” are likely to result in changes to behaviour (and could be, he says, seen as benefits in themselves, in any event). This, it is said, is compatible with known risk factors for smoking uptake such as peer pressure and parental smoking.²²¹

2.14 It is similarly inappropriate for the Chantler Report to support this position by reference to studies where it is simply assumed that “*intermediate outcomes*” like those identified in the Chantler Report will ultimately result in reduced consumption, when those studies do not say that this would be the case.

2.15 Even given the limited conclusions that the Chantler Report could properly draw from the studies it cites, any finding that reductions in the “appeal” of tobacco products influence actual smoking behaviour would still require a leap of faith. For example, the Chantler Report refers to Marteau et al. where the authors aspire to various “*interventions*” targeting automatic/non-conscious behaviour. Interventions provided as examples by Marteau et al. in this context are designed specifically to target automatic processes by “...*presenting a stimulus that activates or inhibits an associated mental representation (a concept, action or goal).*”²²² This is called “*priming*”.

2.16 There is a significant distinction between using priming interventions to affect behaviour in a certain environment and causing a “*change in the physical environment*”;²²³ in this case by banning branded packaging, in order to effect a behavioural change.²²⁴

2.17 Even if priming studies were relevant to the effect of appeal on behaviour (which they are not), the studies cited in the Chantler Report do not link appeal to reduced consumption; they broadly focus on the effects of advertisements. The studies presented in this area relate to TV advertisements which, by their very nature, can include a wide range of concepts that stimulate, interact with and influence emotions and perceptions about a brand.²²⁵ However, by virtue of previous regulatory interventions in the UK, the advertisement of tobacco products on TV has long been prohibited. Reference to such studies in the Chantler Report is indicative of the mistaken conflation between branding, packaging and advertising.

2.18 The Chantler Report nevertheless relies on the following two priming studies to support assertions that: “...*it has been proven that appealing branding does influence consumption...*”²²⁶ and “...*theories of ‘unconscious’ or ‘automatic’ behaviour demonstrate a causal pathway between concepts such as appeal and behaviour, and are supported by evidence from fields such as food and alcohol...*”;²²⁷

- (a) a study by Robinson et al. (2007)²²⁸ which concludes that children prefer the taste of food which they believe has been bought from McDonald’s (i.e. children’s taste perception is affected by priming). The study indicates that branding can influence young children’s

taste perceptions, in particular those children with more television sets in their home, but does not link perception to consumption. However, Robinson et al. were prepared to accept in their study that each instance of direct and indirect exposure to McDonald's marketing, food and packaging was: "...a complex whole of both independent and interacting influences on emotions and perceptions about the brand."²²⁹ Robinson et al., like Sir Cyril Chantler, do not adequately define what causes the observed effect on preference (or, in the Chantler Report, behaviour), and whether this is in fact linked to packaging, the product itself or something else; and

- (b) participants in Harris et al. (2009)²³⁰ were primed by way of television advertising to consume snack foods, the authors concluding that food advertising can influence how much food is consumed (namely, it increased the immediate consumption of both healthy and, more so, snack foods). However, the authors, as did Robinson et al., note in respect of their findings that: "...the specific mechanisms through which food advertising increased automatic eating behaviour cannot be identified with certainty."²³¹ This is consistent with Marteau et al., who state in respect of studies on the effect of advertising on consumption that: "...the potential of using priming interventions to reduce consumption is promising but little studied so far."²³²

2.19 Such priming studies cannot tell us if plain packaging would affect actual behaviour. It follows that it is insufficient and overly simplistic for the Chantler Report to support the link between "appeal" and actual behaviour by observing that: "...humans are generally predisposed to approach positive stimuli (those we anticipate as being rewarding) and avoid negative stimuli (those we anticipate as being unrewarding or even punishing)."²³³

2.20 There is also little clarity whether or to what extent changes to a physical environment can affect actual behaviour, or the durability of such interventions.²³⁴ This was confirmed in Hollands et al. (2013), where the authors, including Professor Marteau, state that: "*The idea that behaviour can be influenced at population level by altering the environments within which people make choices (choice architecture) has gained traction in policy circles. However, empirical evidence to support this idea is limited, especially its application to changing health behaviour.*"²³⁵

2.21 In summary, the Chantler Report erroneously adopts a two-step approach to try and make the link between plain packaging and smoking behaviour. First, it states that: "*The aim of standardised packaging is to reduce the tobacco package's visual identity and appeal as an advertisement for the product*"²³⁶ and concludes (wrongly) that plain packaging would reduce the "appeal" of **smoking**. Second, it then makes the assumption that, if "appeal" is reduced, this in turn must affect actual behaviour. However, this is an assumption unsupported by fact or evidence. Only by making a leap of faith is Sir Cyril Chantler able to conclude that plain packaging is likely to affect actual smoking behaviour.

The existing studies on plain packaging are flawed

2.22 Absent evidence to demonstrate that plain packaging would change smoking behaviour, the Chantler Report turns to studies which: "...show outcomes that support likelihood of behaviour change, including increased calls to quitting helplines, hiding packs in social situations, smoking less around others, and smoking fewer cigarettes overall."²³⁷ Doing so is unreliable because:

- (a) although no reference is provided, the studies to which this statement is attributed are understood to be Young et al. (2013),²³⁸ Wakefield et al. (2013)²³⁹ and Zacher et al.

(2013).²⁴⁰ Both Young et al. and Wakefield et al. test only perceptions, attitudes and recall, namely whether participants thought they had smoked less or reported that they had called the Quitline more often post plain packaging. This is not a direct measurement of behaviour, as acknowledged by the studies' authors;

- (b) Young et al. (2013) does not show causality between increases in calls to the Quitline and plain packaging. All it is able to demonstrate is that calls to the Quitline have generally decreased over time, but that fluctuations at certain periods occur. Of course, the fact that someone has called a Quitline does not mean they will in fact quit or otherwise change their smoking behaviour; and
- (c) Zacher et al. (2014) only suggest that, in certain cafes, restaurants and bars in selected suburbs in Melbourne and Adelaide, more patrons appeared to conceal their tobacco packaging immediately after the introduction of plain packaging than in previous months. The authors acknowledge limitations in their research and that other variables (e.g. the presence of children) may have been a factor in any reduction in the display of tobacco packaging. Moreover, at his meeting with Sir Cyril Chantler, Professor Devinney outlined that, while he considered the design of this study to be more methodologically robust than other studies he has considered in this area because it at least sought to examine smoking behaviour: "...the implication of that behaviour in terms of smoking outcome was not clear, as it was never established."²⁴¹

2.23 It is difficult to understand how Sir Cyril Chantler could reliably conclude that it is "...highly likely that standardised packaging would serve to reduce the rate of children taking up smoking..."²⁴² given how the Chantler Report acknowledges the limitations of the existing evidence base. For example:

- (a) "...the Stirling evidence has been criticised for relying on stated intentions in hypothetical situations. I recognise that stated intentions are generally weak predictors of behaviour (regardless of whether the situation is hypothetical or not). I see the importance of Stirling as being the consistency of its results on appeal, salience and perceptions of harm, most notably that standardised packaging is less appealing than branded packaging..."²⁴³
- (b) "...the specific evidence base, centred on the Stirling Review and update, is relatively modest and put forward awareness of its limitations due in particular to constraints on study design..."²⁴⁴ and
- (c) the Chantler Report acknowledges the warning in the Systematic Review for the need for "some caution" in interpreting these findings as: "expressed smoking-related intentions are not always representative of future smoking behaviour."²⁴⁵ One of the authors of the Systematic Review herself accepted that: "...the systematic review had not, in fact, drawn firm conclusions about behaviour."²⁴⁶

2.24 That there is no evidence that plain packaging would have any impact on actual smoking behaviour is also entirely consistent with the views of other experts who met with the Chantler Review Team, including Professor Devinney, whose reports address specifically the evidence base considered in the Chantler Report.²⁴⁷ When Professor Devinney met with the Chantler Review Team, he explained that: "Because of the well-known lack of a link between surveyed attitudes and intentions and behaviour (known as the attitude-behaviour gap in the literature), the burden of proof falls onto the researcher to show that a relationship exists between their survey responses and actual behaviour (or behaviour in circumstances that mimic the decision

*models individuals will be using in reality).*²⁴⁸ He has previously concluded that: “*a systematic review of fundamentally invalidly conducted research will amount to little more than “garbage in, garbage out”*”²⁴⁹ Others have said that: “*...we need to recognise that enthusiastic support for a policy is no substitute for good evidence.*”²⁵⁰

The way in which Australian data is selectively used in the Chantler Report

2.25 Sir Cyril Chantler states that “*it is too early to draw definitive conclusions*”²⁵¹ from the only country in the world to have introduced plain packaging to date, Australia.

2.26 In doing so, Sir Cyril Chantler appears to accept that there are limitations in the current evidence base. But, he then considers he is nevertheless able to use this limited evidence base to reach a conclusion that plain packaging is likely to have an impact on smoking behaviour, which is unproven in any of the studies or in existing data from Australia.

2.27 Despite these reservations and acknowledged difficulties of currently being able meaningfully to rely upon certain information emerging out of Australia, the Chantler Report nevertheless dismisses a number of concerns raised by opponents of plain packaging on the basis that such concerns have not been borne out in Australia.

2.28 For example, in respect of the impact of plain packaging on prices in Australia, the Chantler Report states that: “*Prices have generally increased in the data available to date, with most leading brands in Australia increasing prices by more than the inflation tax rises since plain packaging was introduced. This is a continuation of the trend for prices of leading brands to increase by more than tax rises which has occurred for several years in Australia. This provides evidence that the widespread price reductions predicted by some opponents of plain packaging have not materialised to date.*”²⁵²

2.29 Also, the Chantler Report dismisses the risk, previously recognised by the DH, that: “*Children may be encouraged to take up smoking if plain packages were introduced, as it could be seen as rebellious*”, simply by stating that: “*I am not aware of any suggestions that this effect has been seen to date in Australia.*”²⁵³ Since the Chantler Report, Australian Government data has been released which, as discussed at paragraph 4.3 of the main body of this response, shows that daily smoking prevalence among 12 to 17 year olds has increased in the period 2010 to 2013, albeit the data cannot determine whether plain packaging was causative.

2.30 The status of the Australian evidence is further discussed in paragraphs 4.1 to 4.5 in the main body of this response.

3. THE CHANTLER REPORT’S TREATMENT OF THE EVIDENCE RELIED UPON

3.1 Sir Cyril Chantler asked himself the question whether “*...the introduction of standardised packaging is likely to lead to a decrease in the consumption of tobacco...*”²⁵⁴ but ultimately concludes that the existing research cannot prove that plain packaging will reduce smoking prevalence. This, he says, is because this is “*...not an issue capable of scientific proof...*”²⁵⁵ and that he “[Does] *...not consider it to be possible or ethical to [undertake] a [randomised control] trial...*”²⁵⁶ to test the impact of plain packaging. While not commenting on its content, JTI notes the recent publication, by authors of previous studies considered in the Systematic Reviews, of “*Plain packaging of cigarettes and smoking behavior: study protocol for a randomized controlled study*”,²⁵⁷ which would indicate the authors believe that collecting evidence seeking specifically to test smoking behaviour is, in theory, possible.

3.2 Having identified that the question cannot be resolved through scientific proof, the Chantler Review Team was instead ultimately reliant upon their own consideration and assessment of: “*The best available evidence.*”²⁵⁸

3.3 As explained below, JTI has a number of serious concerns about the way in which the evidence base has been considered, and conclusions drawn, given that:

- (a) the “*independent academic review*” of the evidence base is flawed;
- (b) the evidence base is not “*the best available*”;
- (c) the Chantler Report wrongly dismisses or ignores evidence “*pointing the other way*”;
- (d) the Chantler Report uses the available Australian plain packaging evidence selectively; and
- (e) the Chantler Report accepts studies without assessing their reliability.

The ‘independent academic’ review of the evidence base is flawed

3.4 Unable to reach a determinative conclusion on the evidence base himself, Sir Cyril Chantler “...*decided to commission analyses of the quantitative and qualitative elements from independent academics.*”²⁵⁹

3.5 The commissioning of an independent and critical review of the evidence base is consistent with Better Regulation principles. But, such a review should be conducted by those who have appropriate expertise to conduct the analysis, and the assessment itself should follow a robust and methodologically sound approach.

3.6 In its Chantler Submission, JTI stated that, according to best practice guidelines, any independent review of the evidence should draw upon a range of appropriate expert sources that should be sufficiently wide to reflect the diversity of opinion among experts in the appropriate fields and in a balanced way. This view was reiterated by Professor Devinney at his meeting with the Chantler Review Team. While recognising that plain packaging was related to public health, he pointed out that the vehicle by which that health issue was going to be addressed was fundamentally via consumer choice and that the authors of the various studies may not have properly recognised that the issue was essentially one of individual consumer behaviour. Hence, they did not take into account research that could have informed them both theoretically and in the structure of their studies.²⁶⁰

3.7 Contrary to this, Sir Cyril Chantler commissioned the review of the evidence base by Dr Yanzhong Wang and Professor Catherine Pope, both of whom specialise in the area of public health.

3.8 Further to concerns around the suitability of the individual reviewers, JTI is particularly concerned that the methodology adopted by the reviewers is flawed. Best practice guidance on undertaking a review of the evidence base in the context of public health measures, co-authored by Professor Pope herself,²⁶¹ states that a systematic review has to meet a number of criteria in order to be effective, including: “...*a critical appraisal of studies and grading of evidence.*”²⁶² The guidance goes on to state that: “*Knowing that the individual components are of good quality does not itself indicate that the overall review meets quality criteria*”²⁶³ and puts an onus on the reviewer to determine this against a number of key criteria.

3.9 Unfortunately, this approach is not adopted by Dr Wang and Professor Pope, as they simply assume that the studies are “good quality” and conclude that: “*In the absence of population studies or experiments, this is **probably** the best evidence available.*” (emphasis added).²⁶⁴ This is a low threshold to apply to a review of the evidence base, given its “*centrality to the debate*” on plain packaging.

3.10 Indeed, their analysis amounts to a relatively scant review of certain of the “*stronger and weaker*” studies and, of more concern, accepts wholesale the quality ratings for each study as determined in the Systematic Review. It is not – as it claims to be – an independent appraisal of the evidence base, nor does it undertake a comprehensive review of each of the studies underlying the Systematic Review to determine if they are methodologically sound. Rather, it assumes that the Systematic Review, and the studies underlying it, are reliable, which expert analysis has found is not the case.

3.11 In any event, Dr Wang and Professor Pope merely repeat the conclusion of the Systematic Review and state that the evidence: “*...provides a reasonable summary of attitudes and perceptions regarding plain packaging.*”²⁶⁵ Ultimately, however, they acknowledge that there is: “*...an absence of strong experimental or quantitative analyses of actual behaviour...*”²⁶⁶

The evidence base is not ‘the best available’

3.12 The Chantler Report seeks to fortify the Systematic Review, the limitations of which are acknowledged by Sir Cyril Chantler, by stating that: “*...the methods employed by the Stirling Review, such as the search protocol, were appropriate and as close as could be achieved to a Cochrane standard given the particular circumstances and nature of the problem being considered.*”²⁶⁷ The position adopted by Sir Cyril Chantler appears to be that as the Systematic Review was close to the standards set by the Cochrane Collaboration, this forgives it of any of its (acknowledged) limitations.

3.13 The Cochrane Collaboration is: “*...a global independent network of health practitioners, researchers, patient advocates and others, responding to the challenge of making the vast amounts of evidence generated through research useful for informing decisions about health.*”²⁶⁸ The researchers are solely made up of a community of public health professionals, and the standards applied by these researchers are unique to the Cochrane Collaboration. In measuring the reliability of the Systematic Reviews only against standards applied by the Cochrane Collaboration, the Chantler Review fails to consider methodologies in other fields which are equally or, arguably, more relevant to the issue of plain packaging, such as consumer behaviour. Professor Deviney discussed this issue with the Chantler Review Team, indicating that he was a founding member of an “evidence-based” collaboration in his own field, and that, in reviewing studies from an angle not rooted in public health methodologies, such as the Cochrane Collaboration, he was: “*...applying a different lens to the research – an example of ‘methodological pluralism...’*”²⁶⁹ Concerns have also been raised regarding the methodologies adopted by the Cochrane Collaboration.²⁷⁰

3.14 In sum, even if the Systematic Reviews broadly followed the standards of the Cochrane Collaboration, this does not, of itself, make them, or the studies underlying them, reliable evidence.

The Chantler Report wrongly dismisses or ignores evidence “pointing the other way”

3.15 The Chantler Report seeks to mitigate the limitations of the evidence base by pointing to its consistency in findings, stating that: “...it [the evidence base] *points in a single direction, and I am not aware of any convincing evidence pointing the other way.*” Further, it states that: “*Contrary to the criticisms made, the authors [of the Systematic Review] rightly place emphasis on the overall consistency of results collected through multiple study designs and across several countries (and the absence of evidence pointing in the other direction).*”²⁷¹

3.16 These statements, however, dismiss, a number of studies / important data / expert analysis “*pointing the other way*”²⁷² often with no or very limited explanation, including for example:

- (a) Professor Steinberg’s Report and Letter to Sir Cyril Chantler (the detail of which was set out in paragraph 2.8 of JTI’s submission to the Chantler Review) where, in respect of the question of whether plain packaging is likely to have any actual positive public health impacts and the evidential position on the same, Professor Steinberg explains that “...*measures to prevent or reduce youth smoking are only likely to be effective if they are informed by scientific research on risk-taking and decision-making in this age group. I know of no scientific evidence that suggests, nor would my understanding of the current research on adolescent decision-making suggest, that cigarette packaging is relevant to adolescents’ decisions to experiment with or continue smoking...*”;²⁷³
- (b) Professor Devinney’s Reports, and the evidence given by him at his meeting with the Review Team. The Chantler Report concludes that: “*I have come to the view that the criticisms made [of the studies] rarely go beyond the limitations recognised and described in the Stirling Review by its authors*”²⁷⁴ and that “*the criticisms of the primary research have a tendency to take a ‘binary approach’, dismissing studies in their entirety on the basis that each has some (usually identified) limitations.*”²⁷⁵ In fact, this statement is at odds with the discussion which took place between Professor Devinney and the Review Team, in which Professor Devinney “...*noted that he had limited a number of his criticisms, while at the same time acknowledging where the studies had done things well.*”²⁷⁶ As discussed in detail at paragraph 2.23 above, the Chantler Report itself acknowledges weaknesses in the evidence base;
- (c) the Universities of Zurich and Saarland studies,²⁷⁷ which undertake a statistical trend analysis to examine the possible effect of plain packaging on smoking prevalence of minors and adults in Australia. The studies related to data from pre and post the introduction of plain packaging in Australia, and found that plain packaging had no effect on smoking prevalence, either among minors or adults. Professors Wolf and Kaul met with one of the members of the Chantler Review Team to discuss the results of their study in relation to minors (as their study in respect of adults was not published at the time), but no reference to this study or their meeting is included in the Chantler Report; and
- (d) the study by London Economics, which 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.*”²⁷⁸ Again, this study is not referred to in the Chantler Report.

3.17 The Chantler Report does not deal with the contention raised by Professor Steinberg that: “...*there is no evidence that changes in cigarette packaging affect adolescents’ experimentation*

with or use of cigarettes... The impact of changes in cigarette packaging on adolescent smoking is, at best, likely to be very small,²⁷⁹ and his conclusion that “[o]verall, it is unlikely that standardized packaging will affect underage smoking at all, either in terms of initiation or progression...”.²⁸⁰ As Professor Steinberg sought to clarify in his meeting with the Chantler Review Team, the “*very small*” effect of plain packaging (if it exists at all) would be in relation to any single adolescent’s decision to take up smoking: i.e., for some individual adolescents, plain packaging may, at best, play a marginal role in his or her decision to experiment with cigarettes. He was also clear that he was not saying that plain packaging would cause any adolescent (or small group of adolescents) to start smoking.²⁸¹ Professor Steinberg had explained that, by contrast, at a population level, plain packaging is not likely to have any effect on underage smoking.²⁸² The note of this meeting, however, erroneously portrays Professor Steinberg’s views as being that plain packaging will deter a small number of people from taking up smoking, such that “...*small effects mount up at a population level.*”²⁸³ This is not a justifiable interpretation given both the remainder of the findings in Professor Steinberg’s Report and Letter to Sir Cyril Chantler, and the clarification he provided to the Chantler Review Team on this point.

3.18 In addition, the Chantler Report does not adequately respond to the contention raised by Professor Devinney in his meeting with the Chantler Review Team, and by JTI in paragraph 2.32(a) of its Chantler Submission, that the consistency of findings in the survey research is likely to be a result of the authors applying the same fundamentally flawed methodologies time and time again. This is despite Professor Devinney explaining to the Chantler Review Team that: “...*it remained possible for an accumulation of studies pointing in one direction to show a false conclusion if all that researchers did was continue to use the same basic measures in the same basic way.*”²⁸⁴

The Chantler Report accepts studies without assessing their reliability

3.19 The Chantler Report appears to rely, at paragraph 4.15, on a study by Hatchard et al. (2014)²⁸⁵ which criticised the evidence submitted to the Chantler Review by tobacco manufacturers. The statement is simply made that the study was published and found that the tobacco product manufacturers “...*misrepresented the evidence base*”.²⁸⁶ As an independent reviewer, it is surprising that Sir Cyril Chantler did not comment upon why he found the study / criticism made to be sufficiently reliable to justify such reliance on it.

3.20 This is even more disappointing because the study itself makes unfounded and unreasonable statements about the “quality” of certain tobacco manufacturers’ previous submissions on the issue of plain packaging (including JTI’s 2012 response) and expert reports commissioned on behalf of tobacco manufacturers, despite these experts being leading individuals in their fields. One of the criticisms made of JTI’s submissions is of “*misleading quoting of evidence*”. However, on review of each of the alleged instances, it is clear that each amounts to no more than the exclusion of words which do not have any material impact on the meaning of the sentence. By way of illustration, an example given in the study of such “misleading quoting of evidence” in JTI’s 2012 consultation response is as follows, with the word complained of identified in bold / square brackets:

“[Yet] in nearly every study of experts carried out within the judgment and decision-making approach, experience has been shown to be unrelated to the empirical accuracy of expert-judgments.”

4. THERE IS NO LINK BETWEEN MARKETING AND ADOLESCENT SMOKING INITIATION

Introduction

4.1 Paragraph 7 of the Chantler Report states that: *“There is very strong evidence that exposure to tobacco advertising and promotion increases the likelihood of children taking up smoking. Industry documents show that tobacco packaging has for decades been designed, in the light of market research, with regard to what appeals to target groups.”* The Chantler Report also concludes that: *“...the appeal of branded packaging acts as one of the factors encouraging children and young adults to experiment with tobacco and to establish a continuing habit of smoking.”*²⁸⁷

4.2 No evidence that branded packaging has actually been shown to cause minors to start and/or continue smoking is put forward to support either of these statements directly. Instead, the Chantler Report reveals that this conclusion has been reached on the basis of three unsubstantiated and false premises: (a) marketing cannot only affect brand switching; (b) marketing “spillover” can affect people (e.g. minors) outside the target audience sufficiently to cause them to alter their behaviour; and (c) advertising increases smoking prevalence. For the reasons explained in paragraph 3.5 of the main body of this response, the Chantler Report is wrong to reach such conclusions.

4.3 No evidence is put forward by the Chantler Report to substantiate how exposure to advertising and promotion could increase the number of minors deciding to become a smoker and when that decision is a complex one engaging the decision-making processes of minors regarding risky products and the role that advertising, a medium that induces scepticism from audiences from an early age, can play. In any event, the fact that, even if true, tobacco manufacturers have designed packaging to “appeal” to its target audience is neither controversial, nor does it follow on in any way from the prior statement. The target audience of JTI is existing adult smokers. It is not minors or non-smoking adults.

4.4 The Chantler Report also cites *“industry documents”* which refer only to adults. It is entirely legitimate and appropriate for tobacco product manufacturers who are in direct competition with each other (as accepted by the 2014 IA), in a declining market like the UK, to encourage brand loyalty among its users in its target market of existing adult smokers and to encourage brand switching by existing adult smokers.²⁸⁸

Failure to take into account basic marketing theory

4.5 The Chantler Report fails to take into account basic marketing theory. It employs instead an ‘intuitive’ approach,²⁸⁹ weighing up the apparent plausibility of contrasting arguments. At the heart of the Chantler Report’s conclusions about the effect of tobacco marketing is the belief that: *“...it is not plausible that the effect of branded packaging is only to encourage brand switching amongst adult smokers, and never to encourage non-smokers from taking up smoking.”*²⁹⁰ This intuition is misplaced given the very different nature and context of the two decisions. It is not only plausible, but it is the case, that branded packaging only influences brand choice amongst existing smokers. Once these erroneous assumptions are stripped away, there is in fact no basis for the Chantler Report to conclude that branded packaging encourages minors to start or continue smoking, even if the Chantler Report was right to equate branded packaging in the UK to advertising (which it was not).²⁹¹

4.6 First, the Chantler Report argues that even if tobacco marketing is only targeted at existing adult smokers, manufacturers: *“...cannot explain how it would only ever attract*

*switchers from one brand to another, and would never encourage initiation...*²⁹² On the contrary, if the Chantler Review had commissioned evidence on the fundamental principles of how marketing works in a mature market, the ability of tobacco marketing only to affect brand choice amongst existing smokers (including retention of existing customers and price support) would have been readily explained. It is a basic tenet of marketing that it performs different functions at different stages of a product's "life cycle".

4.7 It is well accepted that when a product²⁹³ is first introduced (such as the launch of smartphones), promotional marketing can communicate the product's attributes and benefits to persuade people to use that product (as well as to buy a particular brand). However, by the mature and declining stages of a product's life, consumers are aware of the product and its attributes, so marketing has a negligible impact on the consumer's decision to start using that product category. External factors become more important in deciding whether a consumer will participate in the category or not. Instead, the role of marketing is to differentiate brands, reinforce brand loyalty, limit price erosion and encourage switching behaviour (which is hugely important to all tobacco manufacturers in the UK).

4.8 Brand advertisements do not promote the generic act of product consumption, nor can they persuade someone to join a mature, known category. They promote the brand. Tobacco packaging is described in the Chantler Report as having a promotional role, and acting as a "*silent salesman*".²⁹⁴ The defect in this analysis is that the report does not clarify *what* the packaging is "selling" – the brand or the activity. JTI does not agree that branded packaging acts as an advertisement, but in any event, there is a significant difference between acting as an advertisement for a cigarette brand, and as an advertisement for the activity of smoking. The branded packaging conveys and builds upon the brand identity, and so can only be meaningful in differentiating brands, which is irrelevant to non-smokers.

4.9 This so-called "mature market theory" is a very well-known pillar of marketing.²⁹⁵ It is not mentioned by the Chantler Report at all in considering what tobacco marketing can be expected to achieve in a mature, declining market like the UK. This market has existed for many decades and smoking prevalence in the UK has been in decline for some time. In addition, the product is well established with widely known attributes and uses. This means advertisements, even if they were possible in the UK in the future, could not communicate anything about smoking to the consumer which is at all likely to influence initiation, when the significant external factors which influence the decision to smoke are considered.

4.10 By contrast, many studies have shown (using statistical and empirical evidence) that tobacco advertising has an effect on building market share for a brand (from among existing smokers) and on brand choice.²⁹⁶ Given the impossibility of marketing to change non-smokers' decision not to participate in the category in this mature market (not to mention the lack of any intent to change non-smokers' minds), manufacturers focus on winning share within the existing market. This is of huge commercial significance to tobacco manufacturers in the UK.

4.11 The Chantler Report also fails to differentiate between the decision to start smoking and the choice between different brands of cigarettes for an existing smoker. This failing is significant because these are very different types of consumer decisions. The process of becoming a regular smoker happens over a prolonged period of time and involves significant emotional involvement. The factors which influence the two decisions are also therefore significantly different. The decision to smoke or not to smoke is influenced by a range of well-documented external factors, such as parental influence and peer behaviour and not by brand imagery.

4.12 This is confirmed by the DH's own evidence on the predictors of smoking, and corroborated by the expert research on which JTI relies.²⁹⁷ The controversy of smoking as an activity, and minors knowing that smoking is an activity met with disapproval by many adults only adds to the significance of the decision. By contrast, the decision for a smoker as to which brand to smoke is a habitual purchase decision often made quickly, which means that pre-existing knowledge of a product's brands and characteristics can play an important role in this simple decision.

4.13 The Chantler Report asserts that it is "*not plausible*" that branded packaging only influences brand choice amongst smokers, and never causes initiation among non-smokers. This disregards the differences between the ways that smokers and non-smokers process tobacco advertising (insofar as advertising exists) and packaging. It also ignores the different ways in which advertising and packaging are regulated.²⁹⁸ When consumer psychology is taken into account, it is not only plausible, but it is the case that a factor (such as packaging) which can play a part in a decision as to brand choice, will have no influence upon the decision to start (or continue) smoking.

"Spillover"

4.14 The second basis for the Chantler Report's conclusion that packaging is a factor encouraging smoking initiation is the importance attributed to: "...a '*spill-over*' effect, whereby products aimed at young adults could also, albeit inadvertently, appeal to children."²⁹⁹ Although this spill-over effect is not actually demonstrated, the Chantler Report finds that this is "*extremely plausible*". This fails to take into account the way that consumers have been shown to process marketing, and the possible effects of marketing on non-smokers (whether minors or adults). Clearly it is true that non-smokers may see tobacco packaging (even in a display ban environment), but the question is what effect (if any) is this likely to have on them? More specifically, will this lead to them becoming smokers when they would not have otherwise become so?

4.15 The Chantler Report repeatedly acknowledges the careful research underlying marketing decisions. Manufacturers of FMCG go to great lengths to ensure that their marketing is targeted to the correct segment to avoid inefficiency and wasted marketing spend. This obviously greatly reduces the likelihood of the packaging being "attractive" to people outside the target segment (so this cross-segment appeal is not "*highly likely*" as the Chantler Report suggests). That said, even if the "*colours, size, shape*" of a specific pack are proven to be "attractive" to a 16 year old (as implied by paragraph 3.6 of the Chantler Report), this is irrelevant when the 16 year old (who had previously decided to be a non-smoker) does not start smoking as a result. As set out above, standard marketing theory indicates that packaging is not capable of influencing a non-smoking consumer's decision to smoke. Further, finding an aspect of a product's packaging attractive is not the same as finding the actual product (and its use) attractive. In any event, no 16 year old can lawfully purchase, or should otherwise be able to access a tobacco product in the UK.

4.16 As evidence that minors have been shown to make choices influenced by brand imagery, paragraph 3.18 of the Chantler Report points out that children have been shown to be influenced by fast food branded packaging. This illustrates well how marketing can influence the brand choice of existing consumers who are already lawfully buying the product or lawfully having it bought for them. In the study relied upon, minors are exposed to television advertising and are already consumers of the fast food in question, so the McDonald's packaging in the study cited is effective in influencing minors to choose the branded carrots over the non-branded carrots. This also illustrates how people, including minors, process marketing which is relevant to them.

The “likelihood of smoking”

4.17 The third and final premise which the Chantler Report relies upon for its conclusion that marketing causes smoking is that, “...*exposure to tobacco advertising and promotion increases the likelihood of smoking.*”³⁰⁰

4.18 First, the Chantler Reports overlooks the point that, by virtue of a suite of previous regulatory interventions (most notably the Tobacco Advertising and Promotion Act 2002), tobacco product manufacturers have effectively been stopped from advertising their products in the UK for over a decade, and will be entirely stopped from April 2015 when the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004 are fully revoked.

4.19 Second, this statement is misleading, as it is far from proven that advertising increases smoking prevalence, and the Chantler Report seems to ignore substantial evidence to the contrary.³⁰¹ The vast majority of published studies conducted to understand why minors take up smoking fail to identify tobacco marketing as a primary or meaningful/significant cause.³⁰² Studies show that the primary causes of smoking initiation are social (e.g. peer pressure, parental or sibling influence) or psychological (rebellion and risk-taking). This is true of the DH’s own evidence on the predictors of smoking.³⁰³ Certain personality factors have also been shown to be significant risk factors for future smoking behaviour.

4.20 There is extensive literature on the subject of tobacco advertising bans’ effect on tobacco consumption, which mostly concludes that laws prohibiting or significantly curtailing tobacco advertising in numerous countries have not had an effect on the overall demand for tobacco.³⁰⁴ This evidence is noticeably absent from the Chantler Report.

4.21 In any event, this literature looks at the effect of tobacco advertising (in the traditional sense) upon smoking. The Chantler Report provides no evidence at all that branded packaging in the UK, where manufacturers have effectively been stopped from advertising their products, increases tobacco consumption.

The Chantler Report’s reference to the Australian litigation

4.22 JTI also wishes to put into its correct context a statement which the Chantler Report apparently relies on (on at least three occasions) to sustain the argument that tobacco product manufacturers align packaging and advertising. The Chantler Report (repeated at paragraph 69 of the 2014 IA) seemingly attaches considerable weight to the point that:

“Branded packaging is seen by the 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. This appears to be particularly important in the absence of advertising or point of sale display. This is borne out by legal representatives of Japan Tobacco International in proceedings in the Australian High Court, stating that the Commonwealth ‘is acquiring our billboard’, your Honour, in effect.”

4.23 During the full court hearing from which the quotation was taken (namely a challenge brought by manufacturers regarding the Australian Tobacco Plain Packaging Act 2011), Counsel for JTI used a ‘billboard’ analogy in the context of the argument that the manufacturers’ ability to control the space on the pack, in particular the space not used for health warnings, was extinguished by the Act, as it prescribes how that remaining space must be used (i.e. with a drab brown background, standardised font for the brand name, etc.). To put the quote in its proper context, therefore, Counsel used the analogy in the following way:

“For example, were it our billboard, we could put any message on our billboard. What the Commonwealth has done is to prescribe the message that the Commonwealth desires to have put on that billboard and that message does not have to be a message such as this one, the Pantone colour with our trademark on it. It could be any message whatsoever. What the Commonwealth’s law does, and within the ambit of the argument presented here, says that under the Commonwealth law, this packet, which remains our packet, is appropriated for whatever message the Commonwealth seeks to apply to that product.”³⁰⁵

4.24 It is clear that the analogy was not being used to equate packaging with advertising, and that the references to the analogy both in the Chantler Report and the 2014 IA unfairly take the quotation out of the specific context in which it was being used.

5. TREATMENT OF THE ILLICIT TRADE ISSUE BY THE CHANTLER REPORT

5.1 Despite the gravity of this issue, the DH has consistently failed to analyse meaningfully the impact plain packaging would have on the illicit trade in the UK.³⁰⁶ The lack of an adequate or fair analysis in respect of illicit trade by the Chantler Report represents yet another example of such a failure.³⁰⁷

5.2 There are inherent difficulties in understanding the workings of the illicit trade due to its clandestine and complex nature in the UK. In cutting through the layers of complexity, however, the Chantler Report relies on oversimplification and generalisation, which allows it to arrive at a conclusion that assists its broader views in support of the introduction of plain packaging.

5.3 The review poses the question of whether it is likely that plain packaging will lead to an increase in tobacco consumption by increasing the consumption of illicit products. It attempted to tackle this issue by seeking responses to the following questions:

- (a) Is it easier to counterfeit plain packaging?
- (b) Are consumers duped by counterfeits?
- (c) Will plain packaging boost demand for illicit branded products?

5.4 The Chantler Report’s response to each question above was an unqualified and resounding “no” – despite previous indications to the contrary by the DH itself³⁰⁸ and specialists in this field (including academics³⁰⁹ and those with valuable first-hand experience, such as packaging manufacturers and enforcement agencies³¹⁰). The highly intricate workings of this illicit trade and the significance of its impact merit a more thorough analysis than the one provided in the Chantler Report. This lack of analysis has meant that the conclusions reached in the Chantler Report and the reasoning behind such conclusions conflict with the reality of the evidence put forward by those with relevant expertise.

5.5 The 2014 IA suffers from the same weaknesses as those of the Chantler Report, as the 2014 IA largely relies on the “findings” of the Chantler Report, rather than carrying out its own assessment of the impact of plain packaging on illicit trade. The ways in which the Chantler Report and, in turn, the 2014 IA failed in their analysis of illicit trade issues are dealt with in greater detail in Annex 2.

ANNEX 2: QUESTION 4 – IMPROVING THE 2014 IA

1. INTRODUCTION

1.1 In light of Question 4 of the Consultation, we set out below some of the key failings of the 2014 IA which, in the limited time available, JTI has identified. A more comprehensive analysis would require more time. As identified in the main body of this response, the 2014 IA's deficiencies are so serious that it cannot now be salvaged by the future 'improvements' sought as part of this Consultation. In this Annex we explain why this is the case by reference to:

- (a) general failings which permeate the 2014 IA;
- (b) the 2014 IA's inadequate assessment of illicit trade issues;
- (c) the 2014 IA's failure to consider alternative means of achieving its objectives; and
- (d) issues raised by the 2014 IA of relevance to the Equality Act 2010.

2. GENERAL FAILINGS OF THE 2014 IA

2.1 JTI acknowledges that it is not always possible to pinpoint the exact costs and benefits that a regulatory proposal is likely to have. In circumstances where it is not possible to do this, however, it is incumbent upon the regulator to take all reasonable steps to estimate credibly the true value of a given proposal. In doing so, they must give equal regard to both the costs and benefits that are likely to accrue over and above the existing regulatory environment, i.e. the baseline. The importance of conducting this process objectively and with an open-mind is all the more important when controversial and complex measures, such as the plain packaging of tobacco products, are under consideration,³¹¹ and previous consultations have failed to conduct the process in this way.

2.2 Far from adopting an impartial and balanced approach, the document appears to reflect a political (rather than evidential) approach to regulation.³¹² Throwing 'good after bad' in the way that the DH appears to be proposing will not salvage the 2014 IA. Nor will it serve as an adequate platform for the future impact assessment(s) that it concedes will be required. If, despite JTI's submissions to the contrary, the DH chooses to depart from its previously stated position in respect of plain packaging, it could not properly do so without first ensuring the impact assessment procedure is repeated in a manner: (a) that takes into account the factors addressed in this response; and (b) which is genuinely open-minded and not merely seeking to arrive at pre-determined conclusions.

2.3 JTI identifies in this Annex those concerns that it has with the 2014 IA. The RPC shared a number of JTI's concerns regarding the quality of the 2014 IA. As with the 2012 IA, the 2014 IA was only awarded an Amber rating by the RPC, indicating that HM Government's own regulatory experts were concerned by it.

2.4 One of the RPC's principal concerns was that: "...the Department [of Health] should provide a **fuller discussion of a number of the costs** along with some indication of their likely extent where possible" (emphasis added). We agree, but as explained in this Annex, the 2014 IA has not done this. Instead, the authors have sought to do the bare minimum to address the RPC's concerns, and the 2014 IA continues to lack a thorough assessment of the likely costs of plain packaging, despite the RPC's recommendation. This is despite the fact that: (a) there

were almost four weeks between the date of the RPC's opinion (29 May 2014) and the publication of the 2014 IA (26 June 2014); (b) the 2014 IA, as noted by the RPC, does attempt, unlike for the costs: "...a full assessment of the wide health benefits associated with the measure"³¹³; (c) two years previously the RPC identified similar concerns in relation to the 2012 IA; and (d) JTI has previously identified to the DH, including in its 2012 consultation response, many of the errors of methodology and substance that are now repeated in the 2014 IA.

Lack of meaningful objectives

2.5 The 2014 IA states that a plain packaging measure would have no fewer than nine 'objectives'. As JTI explains at paragraphs 2.4 to 2.7 in the main body of this response, many of these stated goals are not legitimate policy objectives capable of justifying further tobacco regulation. Lacking the evidence to pursue a meaningful target, the DH has settled for an assortment of objectives to reflect the 'evidence' it does have. Favouring 'quantity over quality' in this way to justify desired policy is against Better Regulation principles, and does not remedy the lack of evidence to justify plain packaging.

Flawed baseline scenario

2.6 A clear, credible and meaningful baseline scenario is the indispensable starting point for any impact assessment. As explained in the Government's "IA Toolkit: How to do an Impact Assessment", it is essential to: "...present only the costs and benefits that are additional (i.e. incremental or marginal costs and benefits) to those that would have been incurred if no action were taken (i.e. versus the baseline, counterfactual or 'do nothing')." ³¹⁴ An analysis of any additional costs and benefits is only possible once the baseline itself is adequately understood.

2.7 Professor Martin Cave OBE (an expert in regulatory economics who has specialised knowledge in the design of regulatory policies to achieve economic and also social objectives, including expertise in the field of IAs), 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."³¹⁵

2.8 Properly understanding the baseline scenario (and therefore whether further regulation is capable of delivering a material net benefit to the status quo) is vital so that the unnecessary 'layering' and gold plating of regulatory measures can be avoided. Regulators should seek to avoid this for a number of reasons, including that:

- (a) once markets adapt to regulatory changes, the costs of compliance are much less than the costs of compliance in the period of adjustment. A constant churn of new regulations therefore increases the overall regulatory costs of firms 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;
- (b) 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; and

- (c) 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.

2.9 In the context of tobacco regulation, the baseline must determine how pre-existing declines in tobacco consumption and/or prevalence in the UK are likely to continue, absent the proposed regulation. It is from this essential foundation and reference point that the 2014 IA's costs/benefit analysis should flow. In the context of the 2014 IA, any such credible analysis is frustrated by a baseline analysis which is ambiguous, inconsistent and, in places, misleading.

What is the baseline employed in the 2014 IA?

2.10 The answer to this important question is not particularly clear. Paragraph 15 of the 2014 IA summary states that “...*intervention would be expected to generate after two years:*

a decline in the proportion of 11-15 year olds who have ever smoked of three percentage points (from a baseline of 27% at the time of the research); and

a decline in adult smoking prevalence of one percentage point (from a baseline of 21% at the time of the research), as more people find themselves able to quit.” (emphasis added).

2.11 The “*the time of research*” referred to is 2010. Given that the DH contemplates plain packaging being introduced in 2016, these figures cannot constitute a meaningful baseline. Towards the end of the 2014 IA, this point is effectively conceded when the authors provide what they consider to be up to date baseline figures: “*around 21%*” (not 27%) for 11-15 year olds ‘ever smokers’ and “*about 19.7%*” (not 21%) for adult smokers.³¹⁶

2.12 As the Green Book states, an impact assessment:

*“...should provide an easy audit trail for the reader to check calculations, supporting evidence and assumptions...This should help to ensure that decision makers understand the assumptions underlying the conclusions of the analysis, and the recommendations put forward.”*³¹⁷

2.13 The lack of clarity surrounding the 2014 IA baseline deviates from this requirement, which precludes a proper assessment of the supposed incremental impacts of plain packaging.

Detailed baseline analysis only comes after assessment of costs

2.14 The purpose of a baseline scenario is to understand the costs and benefits that are additional to the status quo. Delaying any serious consideration of the baseline scenario until *after* an assessment of the costs of a plain packaging measure, as the 2014 IA does, defeats this purpose.

2.15 The 2014 IA, places the ‘cart before the horse’. It seeks to determine the costs of a plain packaging measure before understanding the starting point from which those costs should be measured. Worse still, the estimation of costs does not even cross-refer to the subsequent analysis of the baseline. This makes the 2014 IA's costs analysis inaccurate as it is not - as it is required to be - clearly and consistently benchmarked against the baseline.

In any event, the calculation of the baseline is deeply flawed

2.16 The resultant calculation of the baseline is unclear, inaccurate and incomplete. These shortcomings are largely derived from the 2014 IA's failure to forecast adequately how the "tobacco market" might be expected to evolve (absent a plain packaging measure) in light of:

- (a) the current underlying downward trend in smoking prevalence;
- (b) trends in other markets, such as e-cigarettes; and
- (c) the impact of other regulatory measures.

Failure to take account of the existing trends in smoking prevalence

2.17 It is essential that any IA considering plain packaging should clearly articulate how it expects such a measure to accelerate the UK's existing downward trend in smoking. This is only possible once the reduction in prevalence in recent years is properly understood.

2.18 In this context, the 2014 IA makes the following assertion at the outset:

*"Tobacco use remains one of the most significant challenges to public health across the United Kingdom and is the leading cause of premature death in the UK. While rates of smoking have declined over past decades, in recent years this decline has lost momentum."*³¹⁸ (emphasis added)

2.19 It is not apparent that any meaningful attempt (quantitative or qualitative) has been made to incorporate this assertion into the baseline analysis. In fact, the notion that the decline in smoking rates has lost momentum appears to be directly contradicted elsewhere in the 2014 IA. Not least, paragraph 149 states that the impact of the display ban alone will lead to the number of 11-15 year old "ever smokers" falling from 27% in 2010 to 21% in 2016.³¹⁹ If it occurs as predicted, such a continued decline cannot fairly be described as "lost momentum".

2.20 The 2014 IA relies upon the Health & Social Care Information Centre's (HSCIC) "Smoking, drinking and drug use among young people in England" data series. A "key finding" of the 2013 data set of this series, made available to the public in July 2014, is that:

*"In 2013, less than a quarter of pupils reported that they had tried smoking at least once. At 22%, this is the lowest level recorded since the survey began in 1982, and continues the decline since 2003, when 42% of pupils had tried smoking."*³²⁰

2.21 This new data therefore further casts doubt on the suggestion that the decline in smoking prevalence is losing momentum. It is convenient for the 2014 IA to propose that such momentum has been lost and, as a result, claim that yet further regulation is required. But this assertion is not adequately substantiated. Instead, it appears to be excluded from the baseline analysis and even contradicted elsewhere in the 2014 IA where the authors state:

*"In England, we anticipate that legislation to end the open display of tobacco in shops and the revised TPD will help to sustain the medium to long-term downwards trend in smoking prevalence among the adult population."*³²¹

Failure to take account of the e-cigarette market

2.22 The market for e-cigarettes has grown in recent years and this growth is projected to continue.³²² In May 2014, for example, PHE which, as noted above, is an executive agency of the DH, acknowledged that the market for e-cigarettes is expected to continue to grow from £193 million in 2013, to £340 million in 2015.³²³ Despite this, the DH does not include this significant growth – or even account for the possibility – in its baseline projection. This is a serious omission, particularly given that: (a) PHE also claims that: “*Most users use [e-cigarettes] to either replace cigarettes in places where smoking is prohibited or discouraged, to cut down on smoking, to reduce harm from smoking, or to quit smoking*”;³²⁴ and (b) the 2014 IA states that plain packaging may: “*...encourage innovation in the wider market for nicotine products that would not be subject to standardised packaging, such as e-cigarettes.*”³²⁵

Failure to take account of other regulatory measures

2.23 The 2014 IA’s baseline does not take sufficient account of all recent tobacco regulatory initiatives (referred to at paragraph 6.1 in the main body of this response) that the DH has stated will have a positive effect on smoking prevalence and/or consumption.³²⁶ As far as JTI is aware, there has been no independent evaluation of whether any such measures have actually achieved their stated objectives.

2.24 Additionally, on 15 July 2014, the DH published an entirely separate consultation in relation to its proposal to ban smoking in private vehicles. Yet the 2014 IA makes no reference to this further regulatory proposal, let alone how it anticipates such a measure might affect its baseline projections. This is despite the fact that the 2014 IA asserts, at page 3, that plain packaging: “*...may have benefits... due to second hand smoke exposure in homes and cars.*”

2.25 In fact, the only regulatory measures that the 2014 IA does seek to incorporate into the baseline are the display ban and TPD2. It does so by reference to the estimated impacts of those measures as stated in the relevant impact assessments. To understand properly the 2014 IA’s baseline analysis it is therefore necessary to re-visit these impact assessments and the calculations they made regarding, respectively, the likely impact of the display ban and TPD2.

2.26 In relation to anticipated impacts of the display ban on smoking initiation among minors, the 2014 IA states that: “*By the time both the TPD and standardised packaging policies are to commence (2016), we expect the result of the display ban to be a reduction in the proportion of ever smokers [aged 11-15] to around 21%. To reach this figure, we have applied the estimate of **effectiveness data** cited in the IA on the prohibition of tobacco displays at the point of sale for the effectiveness of this intervention, to a baseline of 25%*”³²⁷ (emphasis added).

2.27 The “*effectiveness data*” from the 2009 display ban IA appears to be (albeit the 2014 IA does not specify this) a Californian study conducted more than a decade ago by Henriksen et al. The study suggested that amongst schoolchildren: “*...exposure to retail tobacco marketing resulted in a 50% increase in the odds of ever smoking.*”³²⁸ The 2009 IA noted the severe limitations of this study: “*Clearly, the effect size in the Henriksen study is very large – and, as stated above, UK point-of-sale advertising is already quite restrictive, so the comparison is not entirely fair. The effect size in the UK could not reasonably be expected to be of this magnitude.*”³²⁹ Recognising these weaknesses, the 2009 IA suggested: “*...that advertising and display of tobacco products yields only a 1-5% (instead of 50%) increase in the number of ‘ever smokers’.*”³³⁰ No reasoning or evidence was presented to substantiate this assumption; it

was merely put forward as an alternative to the untenable proposition that the UK display ban might lead to a 50% reduction in youth smoking.

2.28 The 2014 IA appears to take, from the 2009 IA, the mid-point of this unsubstantiated range (3%) and compounds that figure over a period of five years to predict the impact of the retail display ban on smoking prevalence (i.e. 25% in 2011 to: “around 21%” in 2016). Such an analysis, even if it was founded upon an evidence-based assumption, would be entirely without merit. Neither the Henriksen study nor the 2009 IA suggested that the impact of the display ban can be multiplied in this way.

2.29 In any event, the use of the 2009 IA as the basis of calculating any current or future impact of the display ban in the UK is misguided because:

- (a) expert analysis of smoking data for young people in other countries indicates that such bans have had no discernible impact in accelerating the already existing decline in smoking;³³¹ and
- (b) the display ban took effect in large shops in England, Wales, Northern Ireland and Scotland at various points in 2012 and 2013. In order to make the figures in the 2014 IA more robust, the DH could and should have undertaken an analysis of any actual impact of the display ban in the UK rather than rely on the 2009 IA, which is five years out of date (and which itself relies on an irrelevant American study more than a decade old). For reasons unknown, it did not do this.

2.30 The determination of the baseline in relation to anticipated adult quitters is similarly problematic. The 2014 IA states that: “*The decrease in prevalence due to the display ban is taken from the IA for the ending of tobacco displays. This gives us an initial baseline prevalence of around 19.8% in 2016.*”³³² The reticence in specifying the precise amount by which the 2009 IA would decrease quit rates is presumably because that document modestly predicted that the display ban “...*may also make it easier to successfully quit smoking*” (emphasis added). Given that the 2009 IA provides no specific figure or range to quantify the impact of the UK display ban on quitters, it is difficult – if not impossible – to imagine how the DH meaningfully used that document to calculate accurately the 2014 IA’s baseline for quitters.

2.31 The 2014 IA’s analysis of the baseline concludes by attempting to incorporate the predicted impact of TPD2 (as set out in the TPD2 impact assessment) on smoking prevalence. The analysis in the TPD2 impact assessment is therefore relevant to understanding the baseline scenario presented in the 2014 IA.

2.32 The 2014 IA, both in relation to initiation and quitters, states that: “*We assume the TPD is expected to reduce tobacco consumption by a factor of 2.15% over five years...*” When predicting this impact on prevalence in the EU, the European Commission was clear that: “*It has to be stressed that this figure is a best effort estimate.*”³³³ The 2014 IA makes no recognition of this qualification, let alone examining how this uncertainty affects the baseline.

2.33 Nor does it seek to address the various flaws that undermine the European Commission’s assumption that TPD2 will lead to 2.15% reduction in consumption. First and foremost, the TPD2 *proposal* to which that assumption relates differs significantly from the TPD2 that has now actually been adopted. Moreover, the TPD2 IA also misquotes data from an Australian IA.³³⁴ It fails to acknowledge that evidence it cites from a DH IA³³⁵ on the

introduction of pictorial warnings is derived from an untested assumption made by the DH to assess the impact of the tobacco advertising ban in 2001.³³⁶ In short, the prediction made by the European Commission as to the likely impact of TPD2 on prevalence is not reliable, even if TPD2 (as adopted) is upheld by the courts. By simply ‘copying and pasting’ this assumption the DH has ensured the 2014 IA suffers from the same fundamental failings.

Beyond the baseline: “best guesses” as to impacts on prevalence

2.34 In relation to Option 2, the 2014 IA speculates as to the future impact that a plain packaging measure will have on smoking prevalence over and above its already flawed baseline.

2.35 In predicting impacts on prevalence, the 2014 IA refers to work commissioned by the DH, which asked experts in tobacco control to provide “best guesses” as to the likely percentage reduction in smoking prevalence among adults and minors two years after the introduction of the measure. The median estimate given in this study, a three percentage point reduction, is then used in the 2014 IA as a central figure in the costs / benefits analysis. For example, in relation to smoking initiation, the 2014 IA states that: “*On the basis of Pechey et al. (2013) findings, we use the reduction in prevalence of 3 in 27, or around 11 %, to represent the impact of standardised packaging given existing tobacco control measures.*”³³⁷

2.36 JTI has previously raised detailed concerns on this study,³³⁸ and does not repeat them here. In summary, however, reliance on this study (acknowledged guesswork) to determine the impact of plain packaging on smoking prevalence is inappropriate given that:

- (a) expert analysis concludes that it is: “...*seriously flawed and its conclusions cannot be considered to have much, if any, validity.*”³³⁹
- (b) there is a wealth of evidence on the use of expert judgements which shows clearly that experts invariably (and overwhelmingly) underperform statistical models;³⁴⁰
- (c) so far as JTI is aware, neither the DH nor Pechey et al. has been prepared to identify publicly the names of the individuals whose best guesses form the basis of the study. As a result, consultation respondents are prevented from assessing whether these individuals have the necessary academic expertise and independence (both from the DH and plain packaging as a policy). Given that this study’s guesswork now forms the basis for a highly controversial and restrictive policy proposal, this represents a troubling lack of transparency. The DH justified the approach of the Pechey et al. study on the basis that it followed academic best practice on the use of expert judgment panels (and cited guidance in that regard). However, one of the authors of that guidance has raised specific concerns with the DH about such an approach, stating in a response to the 2012 Consultation that: “*the list of potential experts would seem to favour those that would have an economic / political view against tobacco use. Drawing experts from this pool and not considering motivational bias to be a disqualifying factor would seem to invite biased results. This is essentially an economic issue and I wonder if these organizations can provide well qualified economists*”³⁴¹ and
- (d) the 2014 IA claims elsewhere it is unable (or unwilling) to undertake what would essentially be equivalent or similar analysis in respect of other crucial issues. For example, in respect of the impact of plain packaging on the illicit trade in tobacco products, the 2014 IA states that: “*We conclude that there is likely to be an increase in*

*the UK duty unpaid segment but we have no means of quantification.*³⁴² Irrespective of the appropriateness of relying on guesswork, it is noteworthy that the 2014 IA is content to rely on guesswork in respect of the purported evidence of plain packaging (something which Sir Cyril Chantler identified as not being capable of quantification), but at the same time does not take a similar approach to calculate the very significant *costs* of such a measure.

Failure to quantify significant impacts

2.37 The 2014 IA adopts a ‘cherry-picking’ approach to the quantification of costs. Consequently, and as the 2014 IA concedes, “*potentially significant*” impacts of plain packaging are omitted from the balance sheet of costs and benefits altogether.³⁴³ JTI recognises that quantifying precisely every potential cost of a policy proposal may not always be possible. However, omitting significant costs, when, for example, an estimate or range might have been provided, inevitably creates a misleading impression of the true value of the measure under consideration.³⁴⁴ If key costs cannot be assessed, that of itself may mean the prudent policy-maker should not proceed with the policy.

2.38 The extent to which the 2014 IA’s costs-benefit analysis is detached from commercial reality is demonstrated by the fact that, in its final estimation, tobacco manufacturers are said to make a **net gain** from plain packaging.³⁴⁵ This is clearly nonsensical, and an oversimplified estimate used to justify the preferred policy option.

2.39 By its own admission, the 2014 IA fails to quantify or provide any monetary assessment of:

- (a) “*...lost consumer surplus...*”;
- (b) “*...a rise in legal cross-border importation of legal branded tobacco from other countries in the European Union...*”;
- (c) “*...a rise in consumption of illicit tobacco products...*”; and
- (d) “*...[r]econfiguration of machinery (eg plates) to comply with new packs.*”³⁴⁶

2.40 These omissions cannot be rectified simply by acknowledging the fact of them. As guidance issued by BIS makes clear, the point of any IA is: “*...to enable the Government to weigh and present the relevant evidence on the **positive and negative effects** of such interventions*”³⁴⁷ (emphasis added). The approach adopted is not good enough, especially given this is the DH’s third major consultation on this policy.

The IA’s failure to understand the impact on “branding”

2.41 As the 2014 IA concedes, plain packaging would deprive JTI and other manufacturers of the value of their brands (which, being these manufacturers’ most valuable assets, are worth billions of pounds).³⁴⁸ In fact, the summary of quantified costs itemised at paragraph 19 of the 2014 IA refers only to three costs: (a) manufacturing costs; (b) Exchequer losses; and (c) “*...loss of brand value to manufacturers and retailers...*” The 2014 IA fails even to attempt a proper quantification of the property being deprived.³⁴⁹

2.42 The £166 million “*...one-off loss of value to tobacco manufacturers and retailers resulting from standardised packaging in the base case...*”³⁵⁰ attributed to this third and

confusingly described cost is not in any sense an estimation of the value of tobacco manufacturers' deprived IPRs, despite the 2014 IA recognising in paragraph 89 that: “[T]he impact... is therefore best expressed as a one-off decline **in the value of the assets...**” (emphasis added).³⁵¹ Rather, this £166 million “one-off loss of value” figure appears to be an estimation of the costs to both manufacturers **and** retailers of: “[R]educed profits attributable to the reduction in brand value due to increased downtrading and due to reduced prevalence...”. Even if this was the correct measure of loss to “...tobacco companies’ UK shareholders...” and retailers “...discounted over the ten year time horizon of the IA” (and it is not), this assessment is undermined by the following incorrect assumptions in paragraphs 89 and 90 of the 2014 IA:

- (a) “Any impact on profitability for manufacturers will over time be eroded as investors move capital between investment opportunities” and “[i]n the event that revenues fall... and lower profits are expected, capital will be re-allocated elsewhere.”

These assumptions ignore, amongst other things:

- (i) the fact that it is impossible to re-allocate elsewhere capital which has been eroded by the measure;
 - (ii) some capital is non-transferrable; the expense of moving remaining capital; and
 - (iii) the fact that in a free market, it is for the investor to choose where to invest their capital. Put simply, if the investor considered the alternative investment opportunity to be more advantageous it would not be the alternative to investing in tobacco product manufacturers.
- (b) “Reduced profits resulting from reductions in demand will be offset by increased profits on goods and services purchased in place of tobacco.”

This assumption ignores:

- (i) the fact that any redistribution of profits away from tobacco products in favour of other goods and services will not be spent to the benefit of those whose property would be deprived by plain packaging (i.e. tobacco manufacturers);
- (ii) the risk that the benefits of any such “off-setting” would be lost to the real economy. As explained in section 3 of this Annex, the 2014 IA concedes that it is not “unreasonable to assume” that plain packaging will lead to a rise in the illicit trade of tobacco. By the 2014 IA’s own analysis, a proportion of any “...offset... increased profits...” would therefore be expected to be received by organised criminals who may use it to subsidise a whole range of criminal activities;
- (iii) the role of tobacco as a main driver of footfall (i.e. the number of people entering a shop). In May 2014, the *Convenience Store* magazine, for example, stated that the average convenience store retailer receives 152 tobacco shoppers a week.³⁵² Small retailers, in particular, benefit from ancillary purchases (which may carry a higher profit margin for retailers) being made by purchasers of tobacco products, as was noted by Lord Howe when he served as the Conservative Party spokesperson for Health in the House of Lords in 2009:

“People who come in to buy cigarettes typically buy other things as well, which carry a higher profit margin. If those people cease to patronise small shops, the effect on trade in those outlets could well be terminal.”³⁵³

The 2014 IA assumes that a plain packaging measure will reduce tobacco consumption but fails to address how the loss of such footfall purchases will affect such retailers as trade shifts to larger shops/there is less reason to make regular trips to a local shop; and

(iv) even assuming the 2014 IA’s offsetting analysis is correct, such a process would only take place following a sustained period of transition during which lost profits would not be fully materialised elsewhere in the economy.

(c) *“...all cigarette packets cost broadly the same to produce...”*

JTI can confirm that this is not the case. Of JTI’s UK brands, the most expensive pack to produce costs us over three and a half times more than the least expensive.

(d) *“...the excess revenue [i.e. 65p] on a higher price [brand] as opposed to a lower price brand is split between manufacturer and retailer.”*

No evidence is put forward to support this claim on the basis of the 65p value relied upon. Again, JTI can confirm that it is incorrect. Not least, the 2014 IA – illustrating a broader lack of understanding of tobacco markets – ignores, amongst others, wholesalers and distributors from its profit split.

(e) *“...10% of the profits of multinational tobacco companies are received by UK shareholders.”*

This inference is methodologically and commercially flawed, as explained further at paragraphs 2.61 to 2.67 below.

(f) *“...100% of the retailer’s [profit] share is retained in the UK”*

Self-evidently, this assumption is incorrect. In June 1999, for example Asda – one of the UK’s largest tobacco retailers – was bought by Wal-Mart Stores Inc. (an American multinational, listed on the New York Stock Exchange).³⁵⁴ Further, Tesco, Morrisons and Sainsbury’s (all major tobacco retailers in the UK) are publicly listed companies whose shares can be and are owned by international investors. Sainsbury’s, for example, is over 25% owned by a subsidiary of the Qatar Investment Authority.³⁵⁵

(g) *“...there are no extra profits for a Premium/Midprice pack above an Economy/ULP pack for the wholesale sector.”*

No evidence is presented to substantiate this assumption which, for the reasons set out in paragraphs c and d, above, is flawed. To the extent that there are extra profits, the wholesale sector would typically receive a share of such extra profits.

(h) *“...these combined effects [should be treated] as a one-off loss of value to tobacco manufacturers and retailers...”*

It is incorrect to assume, as the 2014 IA does, that the costs to manufacturers and retailers are limited to a “one-off loss of value”. Even if it is the case that the

deprivation of property effected by plain packaging is correctly analysed as a “one-off” event (an issue on which JTI does not comment), it is unclear why the 2014 IA rules out further, incremental value losses over time. This is particularly so when expert evidence submitted in response to the 2012 consultation concluded that there would be severe impacts from plain packaging over time: “...as brand awareness degrades, competition initially becomes fixated on one or two brands for most price segments (damaging within-price-segment competition) and eventually there is large-scale down-trading into lower quality products.”³⁵⁶

2.43 In calculating losses to “branding” in this way, the 2014 IA is effectively repeating the mistakes that were made in the 2012 IA. In its 2012 consultation response, JTI explained how the 2012 IA massively underestimated the true loss to JTI of a plain packaging measure because it failed to assess:

- (a) what tobacco product manufacturers’ brands are worth;
- (b) how these brands are valued; and
- (c) the loss to JTI caused by the inability to use its branding and the deprivation of its trade marks.³⁵⁷

2.44 The £166 million “...one-off loss of value to tobacco manufacturers and retailers...” is orders of magnitude away from the true loss that plain packaging would cause to those negatively impacted (including packaging suppliers, designers, manufacturers, distributors, wholesalers and retailers) and is not offset, as the 2014 IA suggests, by: “...cost-saving to business associated with the loss of scope for branding...”³⁵⁸

2.45 JTI has invested very substantially in its IPRs, brands and products, and this is reflected in the strong brand equity of JTI’s brands in the UK. Plain packaging would destroy the substance of our intellectual property. A 23 June 2014 report by Exane BNP Paribas also reaches this conclusion about deprivation.³⁵⁹

2.46 The 2014 IA’s failure to quantify this impact is indefensible, especially when JTI and other respondents to the 2012 Consultation alerted the DH to the potentially substantial losses in their responses. A major food manufacturer, for example, emphasised the: “...overwhelming value of trade marks and other rights for brand owners, in particular those which have been used for many decades and which have come to be uniquely associated in the minds of consumers with that brand owner...” and the “dramatic” consequences of plain packaging for brand owners and consumers.³⁶⁰

2.47 The other reasons given in the 2014 IA for not attempting to quantify this loss are inadequate (including the fact that “it is hard to assess”).³⁶¹ The value of this loss is one of many that must be addressed properly, or at least estimated, in order to quantify the overall impact of plain packaging on branding.

2.48 As explained above, the DH is content to rely on the “best guesses” of experts to determine the impacts of plain packaging on prevalence. Contrary to JTI’s views, the DH appears to accept that this is an approach which is useful to predict policy impacts. If so, it is unclear why it has not attempted an equivalent analysis in respect of the real impact on manufacturers’ brands.

2.49 It is incumbent on the DH either to: (a) estimate that loss in order to assess meaningfully the real costs and impacts of the proposed measure; or (b) admit that it has not assessed the real cost plain packaging poses to business, the Exchequer or the taxpayer (particularly in relation to the compensation that will be required for the property rights deprived).

The 2014 IA ignores impacts on SMEs, jobs and competition

2.50 Despite what is stated in the 2014 IA, it is not clear how any decision to proceed with a plain packaging proposal satisfies HM Government's 'One-in, Two-out' rule,³⁶² which was introduced in January 2013 as a drive to end red tape. Similarly, plain packaging would force HM Government again to ignore its Small Business Moratorium as thousands of small retailers and other SMEs would be affected by plain packaging proposals.

2.51 The 2014 IA is dismissive of the concerns of SMEs, stating that small retailers: "... *in order to thrive in this changing world, already need to be planning their future business strategies, considering diversifying, and thinking about how to cope with all the trends and shocks that are likely to affect them.*"³⁶³ This is a remarkable statement. That retailers currently face many challenges is no reason simply to add another to the list. On the contrary, it means that further regulatory burdens should be avoided wherever possible.

2.52 The 2014 IA costs analysis also says nothing about potential UK jobs losses, including at distributors, design agencies and packaging companies. In circumstances where the UK continues to suffer from an unemployment rate of over 6%, this is a regrettable omission.³⁶⁴ The very real threat that plain packaging poses to jobs is widely recognised. Unite (the UK's largest trade union), for example, has recently explained that:

*"Around 6000 high-valued jobs in UK manufacturing and 53,000 more employed by businesses throughout the supply chain, such as packaging manufacturing, printing design, origination, cylinder production, engraving, embossing and creasing could be threatened and also the distribution, palletising and transportation companies involved in the sector."*³⁶⁵

2.53 The 2014 IA notes that: "*An additional benefit is the possible enhancement of price competition between tobacco companies and the potential for **accelerated product innovation** to exploit other avenues for product differentiation.*"³⁶⁶ It appears that the 2014 IA wrongly assumes that the competition driving this innovation might generate jobs. This would be mistaken for two reasons:

- (a) TPD2 will (even if found to be lawful) all but end innovation vis-à-vis traditional tobacco products; and
- (b) TPD2's impact would be compounded by the fact that plain packaging will frustrate remaining innovation in the sector generally. The DH makes its flawed assumption despite detailed statements in previous JTI submissions on the current inter-brand and intra-brand competition in the UK tobacco market,³⁶⁷ and expert analysis by Dr Lilico (at the request of JTI) which found both that: "...*a plain packs requirement should be expected to have very significant negative competition effects in the UK*" and would "...*totally eliminate pack innovations.*"³⁶⁸ The 2014 IA is silent as to how the potential for product innovation and differentiation could be enhanced by banning branding and creativity.

2.54 The 2014 IA adds that: “...an additional benefit is the possible enhancement of price competition between tobacco companies...”³⁶⁹ In fact, the DH has elsewhere rightly recognised such competition as a potential disadvantage of plain packaging.³⁷⁰ Not least, cheaper prices risk causing an uptake in smoking initiation among minors given that lower prices may increase availability and access for minors to tobacco products.

2.55 In light of the concerns previously raised by the RPC in respect of the 2012 IA and its failure to engage with the potential competition impacts of a plain packaging measure, it is disconcerting that the 2014 IA has essentially repeated the same (flawed) analysis. This is contrary to generally recognised best practice: “*The benefits for citizens and consumers are potentially largest where markets are open, new entrants can compete against incumbents, investment is encouraged and innovation flourishes. For this reason, we are committed to promoting open and competitive markets. Where appropriate, therefore, Impact Assessments need to show the extent to which the options under consideration would have an impact on competition.*”³⁷¹ Similarly, Professor Cave has previously identified the need for regulators to take into account: “...potential impacts on competition, including any distortionary effects of the proposal...”³⁷²

The IA ignores any losses to adult smokers

2.56 The 2014 IA acknowledges that: “*those who continue to smoke may also feel as though they have suffered a restriction in freedom*”, but ultimately ignores this loss on the basis that “*the freedom to have branded tobacco...carries a cost to others.*”³⁷³ In short, the DH accords no value (or loss as a result of plain packaging) to adult smokers who have chosen not to quit.

2.57 Despite paragraph 24 of the 2014 IA contending that: “*society arguably need not accord value to a freedom that involved inflicting harm on others,*” the DH cannot justify a measure on the basis of a reduction in harm to third parties without properly considering also the negative impacts on those that wish to lawfully use, make and/or sell the product. By way of analogy, it is widely recognised that the consumption of alcohol has serious societal impact, including a negative impact upon third parties (for example, by way of anti-social behaviour).³⁷⁴ Similarly, being able to drive cars results in serious road traffic accidents. However, it is implausible that a policy maker proposing to ban alcohol products or cars would do so without at least attempting to assess any losses accruing to those informed adults who want to continue buying alcohol or drive.

Failure to consider consumer surplus

2.58 The 2014 IA acknowledges: “...a consumer surplus loss to those who do not give up as a consequence of the packaging change.”³⁷⁵ There is, however, no attempt made to quantify this loss.

2.59 The 2014 IA justifies its position owing to the uncertain role of “*addiction*”³⁷⁶ in smoking behaviour.³⁷⁷ But such uncertainty is irrelevant to understanding the scale of consumer surplus loss to those that would choose to continue to smoke in a plain packaging environment. A calculation estimating such loss could have been made using consumer surplus loss analysis techniques that are used in other sectors. This omission places the 2014 IA squarely outside regulatory best practice and seriously undermines the relevance of its entire cost-benefit analysis.

Miscalculation of costs of plain packaging

2.60 As well as excluding significant costs, the 2014 IA underestimates those costs that it does attempt to quantify.

Exclusion of non-UK shareholders

2.61 In particular, the 2014 IA disregards the very significant losses that will accrue to non-UK shareholders as a result of plain packaging. Not only does this effectively make the calculation of the costs of plain packaging meaningless, it is also unjustified and contrary to the principles set out in the Green Book, which state that:

“All impacts (including costs and benefits, both direct and indirect) on non-UK residents and firms should be identified and quantified separately where it is reasonable to do so, and if such impacts might affect the conclusions of the appraisal.”³⁷⁸

2.62 The 2014 IA makes no such attempt. It arbitrarily eliminates from its calculations 90% of the losses to tobacco manufacturers caused by plain packaging because it wrongly assumes that only: *“10% of the profits of multinational tobacco companies are received by UK shareholders...”* This approach is both methodologically unsound and commercially naïve.

2.63 Methodologically, it is inappropriate to exclude costs to shareholders simply because they are located outside of the UK. The relevant issue is whether the affected activity, in this case the production and sale of tobacco products, is located in the UK. To assume otherwise (as the 2014 IA does) would mean that a regulatory measure that only affected UK businesses with non-UK shareholders could never give rise to relevant costs. This is clearly illogical, particularly given that one or more of those businesses could eventually be purchased by UK shareholders, thereby creating benefits that may require the regulation to be repealed (or at least re-assessed).

2.64 The 2014 IA's disregarding of impacts on non-UK shareholders has negative implications for UK businesses operating overseas. For example, earlier this year GlaxoSmithKline (a British multinational) purchased the vaccine division of Novartis (a Swiss multinational) for an initial \$5.25 billion. UK policymakers, presumably, would not welcome a move by the Swiss authorities to disregard losses to GlaxoSmithKline when regulating in the Swiss pharmaceutical sector.³⁷⁹ However, opposition by a UK business to such a move by an overseas policy-maker is made less tenable by the analysis adopted in the 2014 IA.

2.65 Also, from a methodological perspective, even if the approach taken were the correct one, there is no reason for the 2014 IA simply to guess at a figure of 10%. Key tobacco product manufacturers operating in the UK (or their ultimate parent companies) are publicly listed³⁸⁰ and research could have identified with greater precision the extent of their UK and non UK-based institutional investors.³⁸¹ The failure of the 2014 IA to undertake this basic analysis reflects its generally lacklustre consideration of the costs of the preferred approach.

2.66 By ignoring the damage that a regulatory measure of this magnitude will have upon foreign investors in the UK, the DH is sending a clear message that the UK is not, as HM Government claims, ‘Open for Business.’³⁸² The approach taken is particularly egregious to investors based elsewhere in the EU given the EU's commitment to the freedom of establishment (supposed to enable: *“...an economic operator... to carry on an economic activity in a stable and continuous way in one or more Member States...”³⁸³*) and the free

movement of capital (supposed to enable: “...*integrated, open, competitive and efficient European financial markets and services...*”³⁸⁴), all of which are intended to buttress the EU Single Market.

2.67 The benefits that are claimed for plain packaging are extensively surveyed in the main body of the 2014 IA. Additionally, calculations behind the benefit analysis are explained at length in Annex A to the 2014 IA. There is no such annex to explain the calculation of costs and, to a significant degree, the reader must simply rely on the figures presented by the 2014 IA. This asymmetry of information frustrates the ability of respondents to test the assumptions the DH relies upon. It also belies the DH’s claim that its final views on plain packaging are not yet determined.

Flawed analysis of health inequalities

2.68 The 2014 IA’s assessment of the impact of a plain packaging measure on health inequalities states that: “...*we expect a greater impact of standardised packaging on smoking prevalence among smokers of high price than low price brands...*”³⁸⁵

2.69 It is reasonable to assume, and the 2014 IA does concede, that higher priced brands are generally smoked by higher income groups. However, the 2014 IA (in the same paragraph) goes on to state that the: “...*health gain amongst lower income groups is likely to be more important than the corresponding gain amongst higher income groups...*”

2.70 This is not supported by quantitative or analytical bases and runs counter to the 2014 IA’s own conclusions regarding the impact of plain packaging (i.e. that it will affect higher price brands which are more likely to be smoked by higher income groups). As such, this view is, contrary to regulatory best practice, little more than an unsubstantiated assertion.

Improper formulation and inadequate consideration of Options

2.71 The 2014 IA proposes three regulatory options in relation to plain packaging:

- (a) “*Option 1: Require changes to legislation to bring the UK in line with the European Tobacco Products Directive in 2016 (i.e. go no further than the UK’s Legal requirements)*”;
- (b) “*Option 2: Go beyond the European Tobacco Products Directive in 2016 and require standardised packaging*”; and
- (c) “*Option 3: Defer a decision pending collection of evidence from experience in Australia.*”³⁸⁶

2.72 The Green Book emphasises that the: “...*relevant costs and benefits to government and society of all options should be valued, and the net benefits or costs calculated.*”³⁸⁷ As explained above, these costs and benefits should be measured against the baseline. The 2014 IA, particularly in relation to Options 1 and 3 (the policy alternatives to introducing plain packaging now), fails to complete this analysis.

2.73 Contrary to what is stated in the 2014 IA, Option 1 does not constitute a “*do nothing*” option.³⁸⁸ The DH wrongly assumes the legality of TPD2, despite having known, before launching the Consultation, that TPD2 was expected to be the subject of legal challenges in the

UK Courts. The 2014 IA should have considered the extant *status quo* (through an independent evaluation of the impact of tobacco-control measures already introduced to date), together with an assessment of the potential evolution of the baseline both with and without the implementation of TPD2. The assumption that the appropriate figure for both the costs and the benefits of Option 1 is zero is, therefore, flawed and overly simplistic.

2.74 The Option 3 ('wait and see') analysis is equally flawed. Whilst paragraph 28 of the 2014 IA sets out the claimed benefits of regulating immediately, nothing is said of how these claimed benefits might be affected by waiting to understand and learn from the Australian experience. Similarly, the costs that would be incurred under Option 3 if a decision were eventually taken to regulate are also ignored. The 2014 IA may be assuming that any costs under Option 3 would be exactly the same as under Option 2, but this would not necessarily be the case given the constant evolution of, amongst other things, the tobacco market and regulation in this sector.

2.75 It is surprising that the 2014 IA is so dismissive of Option 3 given that the DH's July 2013 summary report on the 2012 Consultation recognised that many of those who responded to the 2012 Consultation identified that there may be merit in this approach.³⁸⁹ Reasons given included that such an approach would allow HM Government to: (a) evaluate the impacts of plain packaging on businesses; (b) identify unintended consequences; (c) ascertain whether there are any public health benefits; (d) assess whether there is any increase in the illicit tobacco trade; and (e) consider the outcomes of legal challenges against the Australian Government. These are important issues (the costs and benefits of which are ignored by the 2014 IA), which are central to the question of whether plain packaging is necessary and proportionate. Indeed, this ultimately was the considered view of HM Government last year, making it all the more surprising that this Option has been all but written off without any analysis in the 2014 IA.

3. THE 2014 IA'S INADEQUATE ASSESSMENT OF ILLICIT TRADE ISSUES

3.1 The 2014 IA fails to give adequate consideration to the impact of plain packaging on illicit trade and CBS.

3.2 The 2014 IA correctly identifies this as being a risk: "*The two key risks associated with introducing standardised packaging are a potential increase in the illicit market and a potential increase in the cross border shopping. Both risks may have wider implications for the Government's strategy in limiting tobacco consumption.*"³⁹⁰ The 2014 IA also recognises that even a small increase in illicit trade and CBS would be significant, as every percentage point increase in the size of the illicit cigarette market would, alone, result in a revenue loss of around £120 million per annum to the Exchequer.³⁹¹

3.3 Acknowledging that there is a risk is insufficient, however. Indeed, the 2014 IA acknowledges this somewhat: "*We recognise that using an (unquantified) increase in the UK duty unpaid segment for this IA is not ideal.*"³⁹² Determining the impact of illicit trade is a difficult exercise, given the clandestine and complex nature of the activities involved. However, the 2014 IA makes no real effort even to attempt to quantify this acknowledged increase in the illicit tobacco trade, despite the potentially huge sums involved. This failure is unacceptable, given that this is the third major IA on the plain packaging policy. The incomplete nature of the 2014 IA is highlighted by the fact that the illicit trade analysis is described as being for "*illustrative*" purposes only, and that a later impact assessment could

“*differ significantly*” from the 2014 IA.³⁹³ Further, the 2014 IA seeks to avoid committing to any meaningful conclusions on illicit trade by referring to a “*later consultation*.”³⁹⁴

3.4 More could and should have been done by way of quantification. The 2014 IA, for instance, could have reviewed the evidence arising out of Australia to consider what impact plain packaging has had on illicit trade in Australia, and then sought to assess the extent to which those changes may or may not be replicated here (recognising that there are differences in dynamics between the UK and Australian markets, and therefore the nature of the illicit trade problem). Doing so would have provided a platform for a more informed analysis as to the true likely cost of plain packaging.

3.5 For example, KPMG’s 2013 full-year report, which was published in April of this year,³⁹⁵ shows, amongst other things, a significant increase in the size of the illicit tobacco market since the measure has been in place. According to this report, over the course of the year that the measure has been in place, the illicit tobacco market in Australia grew by 2.1%.³⁹⁶ This is consistent with other information available from Australia which was not available at the time of the 2012 Consultation. For example, the ACBPS’s figures show that the number of cigarettes seized increased by 41.8% between 2011/2012 and 2012/2013.³⁹⁷ As shown in paragraph 3.16 below, new illicit brands which look like they are legitimate ‘plain packs’ have been found, since the introduction of plain packaging.³⁹⁸

3.6 The 2014 IA appears to have resigned itself from the outset to the conclusion that: “...*there is likely to be an increase in the UK duty unpaid segment but we have no means of quantification*.”³⁹⁹ Accordingly, the 2014 IA simply adopts the Chantler Report’s findings for the most part, despite the flaws in those findings (as explained in Annex 1).⁴⁰⁰ Even when the Chantler Report is not specifically cited as the source, it is apparent that the 2014 IA’s analysis depends upon the assertions made in the Chantler Report. In consequence, what the 2014 IA provides is a series of observations and assertions, which are largely reiterations of what had previously been said in the Chantler Report, and which are often inconsistent with actual evidence pointing the other way.

3.7 In the limited time that it has had available to respond to the 2014 IA, JTI has identified a number of key problems in respect of various assertions made in the 2014 IA, which are then used to form the basis of that document’s conclusions.

The 2014 IA mistakenly argues that the supply of illicit tobacco products can be “capped”

3.8 The 2014 IA claims that plain packaging “...*may introduce an additional incentive*...” for consumers who “*wish to*” increase their illicit tobacco consumption. The 2014 IA refers to this being a “*wish*”, because it assumes that such a “*wish*” will not in fact be fulfilled, as the supply can be “*capped*” through enforcement.⁴⁰¹ This leap of faith is unjustified, and demonstrates a lack of understanding as to the dynamics at play in the UK illicit tobacco market.

3.9 Echoing arguments made in the Chantler Report, the 2014 IA makes the following claims in order to conclude that any impact that plain packaging would have on the supply of illicit products could be mitigated:

- (a) tobacco products in plain packaging still need to carry health warnings and “*authentication markings*” in colour;

- (b) counterfeiters are already able to copy existing branded tobacco packaging in the UK market, including sophisticated ones; and
- (c) the cost of producing illicit whites and counterfeits is already so low that further reduction in cost is unlikely to provide additional incentives to illicit traders.

3.10 Taking each of these points in turn, below, it is clear that the 2014 IA overestimates the likely extent to which the acknowledged effects on illicit trade could be mitigated, were plain packaging to be introduced.

Health warnings and “authentication markings” in colour

3.11 From the notes of the meetings with Sir Cyril Chantler, it is apparent that a number of tobacco control advocates have continued to argue that security markings, in particular, will ensure that tobacco products in plain packaging will not be easier or cheaper to counterfeit than existing branded packs.⁴⁰² In adopting this view,⁴⁰³ the 2014 IA ignores the fact that 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 markings outweighs the cost savings resulting from the plain pack design. The reality is that counterfeiters will have less to duplicate when counterfeiting a plain pack and counterfeiters will only do what is necessary to ‘fool the consumer’. The same applies to health warnings in terms of their ability to add to the complexity of counterfeiting tobacco products in plain packaging.

3.12 The ability of coloured health warnings to act either as a meaningful deterrent or an effective obstacle to illicit trade is also significantly undermined by the fact that the colour designs are easily accessible to counterfeiters in electronic form,⁴⁰⁴ including having been placed online by one leading tobacco control advocate: <http://www.tobaccolabels.ca/countries/united-kingdom>.

Counterfeiters’ ability to copy existing branded tobacco packaging in the UK market

3.13 The 2014 IA, as the Chantler Report had done, treats the fact that illicit traders are currently able to copy certain branded packs as evidence that plain packaging will make little difference to their ability to manufacture/supply illicit tobacco products.⁴⁰⁵ As such, the 2014 IA provides no further analysis and appears to conclude that there is no risk in this regard. As a result, the 2014 IA understates the impact plain packaging is likely to have on the supply of illicit tobacco trade.

3.14 Pack complexity (starting at the raw material level),⁴⁰⁶ and the use of specialist manufacturing processes, present technical and financial barriers to counterfeiting. The level of complexity involved in counterfeiting a branded pack of tobacco products goes far beyond ‘pack design’. In fact, it includes ink colour and embossing on cartons, inner frame, overwrap film, tear tape and cigarette tipping paper, for example. To the extent that such elements are taken away over and above the requirements of TPD2, counterfeiting of tobacco products in plain packaging will make it that much easier and cheaper to counterfeit. A recent article in the UK press shows this very point has already been recognised by certain overseas illicit traders supplying the UK market: “*We will make more money. We can make it cheaper but sell for the same price.*”⁴⁰⁷

3.15 Whilst counterfeiters can undoubtedly already copy some of the packaging in the UK market, the 2014 IA does not address the crucial point that plain packaging makes it easier and cheaper to counterfeit *all* packs, as:

- (a) illicit traders are given a significant amount of information on *'how to make the pack'* (for example, the Draft Regulations stipulate that specific text on external packaging must be in Pantone Cool Grey 2 C with a matt finish, and that the external packaging itself must be in Pantone 448C with a matt finish).⁴⁰⁸ Currently, design specifications and colours are deliberately kept confidential in order to deter counterfeiters;⁴⁰⁹
- (b) *static packaging reduces future cost burdens* for illicit traders as they no longer need to keep up with the legitimate packs' evolving innovations and developments;
- (c) plain packaging *allows for cigarette packs to be printed on offset machines that are significantly cheaper* than gravure machines which currently print around 90% of UK cigarette packs;⁴¹⁰ and
- (d) plain packaging creates *economies of scale in production*. Plain packaging, as envisaged by the Draft Regulations, limits numerous aspects of packaging above and beyond what is required by TPD2. Once a counterfeiter copies a plain pack, he can reproduce packaging of many other brands with minimum effort.

3.16 By failing to engage with the ways in which plain packaging might open up new illicit market opportunities, and how they might be exploited by savvy illicit traders, the 2014 IA underestimates the true cost of plain packaging. For example, in recent months, Australia has seen 'new' illicit brands in circulation, such as Spoonbill, products which JTI understands are not available legally anywhere (see Figure 4 below).⁴¹¹

Figure 4: 'New' illicit brands that have emerged in Australia since the introduction of plain packaging



3.17 In a plain packaging environment, some smokers may mistakenly purchase packs of illicit whites under the assumption that they are lawful products outside the UK. In these circumstances, illicit whites in plain packaging may further their legitimacy in the eyes of the consumer over time, which would work against the objectives that the Draft Regulations set out to achieve.

Counterfeiters' ability to fool consumers

3.18 JTI is concerned that plain packaging would make it easier for criminal gangs to 'fool' consumers both in relation to illicit tobacco products in branded and plain packaging. For example, as consumers become increasingly less familiar with the appearance of genuine branded products over time, it will become easier to pass off counterfeit products as contraband.

3.19 The 2014 IA states that price is an important indicator of "*...a pack's legal status*" and, in doing so, seeks to dismiss the point that consumers will find it more difficult to detect a genuine plain pack from a counterfeit pack.⁴¹² Plain packaging will allow illicit traders to produce better copies of genuine products than has previously been the case. In these circumstances, JTI is concerned that unscrupulous retailers and illicit traders would be able to get away with charging full price for counterfeits masquerading as a legitimate product, on the basis that they are sold in packaging virtually indistinguishable from genuine packs. At full price and in indistinguishable packaging (without the visual cues currently available to smokers), the price will not necessarily enable a purchaser to discern "*a pack's legal status*" as the 2014 IA suggests.

3.20 If the 2014 IA is right and some counterfeit packs currently sell for half the price of a legitimate pack,⁴¹³ the unscrupulous retailer's margin would be doubled for each pack sold in this way, making this type of illicit sales to unsuspecting smokers more lucrative to such a retailer. Given the profit incentive, it would be unsurprising if sophisticated illicit traders started to focus their efforts on improving the quality of the products so as to make these high-quality copies even more difficult to differentiate for the smoker. Were this to happen, a smoker may be less likely to complain to legitimate manufacturers or enforcement authorities if they believe that they have purchased a genuine pack, at an ostensibly legitimate shop, at full price. This would make detection less likely.

The cost of producing illicit whites and counterfeit products

3.21 The 2014 IA's position that any further reduction in production cost will not make a difference to illicit traders because it already costs so little to produce counterfeits and illicit whites, is also misguided.⁴¹⁴

3.22 The 2014 IA uses Jin Ling as an example, and explains that the manufacturing cost of a packet of Jin Ling is estimated to be €0.16, with the rate of profit as high as 900%.⁴¹⁵ Assuming, however, that approximately 450,000 packs fit in a 40ft shipping container, even if the reduction in production cost resulted in only a small amount per pack (and JTI questions whether the degree of reduction would be quite so modest, given that counterfeiters would no longer have to copy various pack elements for each brand and one prototype would suit all brands of the same pack shape), the potential saving could be significant for a counterfeiter with a large portfolio of brands. For example, a recent undercover journalistic investigation has revealed that an illicit trader investigated in Indonesia would charge £75 for 500 packs of counterfeits. The price was reduced to £56.60 for the same product in plain packaging. This difference would mean that an illicit trader would pocket approximately £215,000 more in illegal profit per year by bringing in just one container per month into the UK.

3.23 In addition, a reduction in cost of production could have two further consequences (neither of which is either identified or quantified in the 2014 IA):

- (a) *Diversification* – a counterfeiter who previously only had the resources to invest in a few brands could diversify their ‘portfolio’, adding many brands at minimum cost (and potentially drawing in a more diverse ‘customer base’); and
- (b) *Cost savings trickling down to the consumer* – illicit traders could choose to generate greater demand by lowering the price of their offerings, which could increase the availability/accessibility of illicit product to minors and economically deprived groups in the UK.

The 2014 IA’s reliance on enforcement as the solution

3.24 The 2014 IA, like the Chantler Report, presents enforcement as the paradigm solution for all present illicit trade issues, as well as all future issues, were plain packaging to be adopted.

3.25 It is, however, too simplistic to suggest that such a serious and complicated problem can be resolved simply by placing “*restrictions*” on borders. In this respect, the 2014 IA belies a lack of understanding as to the supply and demand dynamic of illicit tobacco products in the UK. As a result, it overestimates the extent to which effective enforcement would mitigate the illicit trade problem.

3.26 Over the last decade or so, HMRC has made significant progress in combating illicit trade. However, the recent Home Affairs Select Committee Report (2014)⁴¹⁶ raises the concern that, in their view, the falling numbers of prosecutions and convictions for organised crime cases involving tobacco appears to be due to a reduction in enforcement action rather than a reflection of a fall in this type of crime.⁴¹⁷ JTI agrees, and does not believe that (even currently) enough prosecutions are pursued against criminal gangs, given the scale of the problem.⁴¹⁸

3.27 Even if better enforcement of border restrictions, for example, were to provide part of the solution to the problem, the 2014 IA recognises that: “...*these stronger measures are likely to involve additional resources and funding which cannot be assumed or guaranteed.*”⁴¹⁹

3.28 If additional resources and funding were guaranteed, as explained by Professors Zimmerman and Chaudhry,⁴²⁰ there are a number of other variables at play that would still affect the supply side of the UK illicit tobacco market, including:

- (a) the affordability of legitimate tobacco products;
- (b) geographical vulnerabilities i.e. the UK is porous, with multiple entries and proximity to mainland Europe with many markets selling tobacco products at significantly lower prices;
- (c) profit incentives for criminals;
- (d) consumer complicity;
- (e) the fact that cigarettes are ‘ideal smuggled product’ as they are extremely valuable for their size / weight, and are easy to transport,⁴²¹ and
- (f) weak sanctions and enforcement.

3.29 Therefore, even if the UK were to find the optimal enforcement regime and appropriate sanctions, it would only address one of the contributing factors listed above i.e. (f).

3.30 The 2014 IA also fails to recognise that while plain packaging makes life easier and cheaper for counterfeiters, it may make life more difficult for those – including HMRC, Trading Standards, police and retailers – who are required to differentiate between genuine and fake packs. The loss of the visual/tactile cues that are currently used to assess the authenticity of a tobacco product by retailers and enforcement agencies alike will mean that even industry experts may have to resort to more resource-intensive and time-consuming tools of verification in a plain packaging environment.⁴²² The 2014 IA fails to consider what additional resources would be required for enforcement (or, rather, “*effective enforcement*”) when all packs effectively look the same (coupled with the effect this might have on the rate of detection). This is a serious omission given that the 2014 IA presents enforcement as the paradigm solution to the illicit trade issues that would be exacerbated by plain packaging.

3.31 If plain packaging were to be adopted, this additional burden would be introduced at a time when detection of illicit tobacco products is already made more difficult due to changing smuggling tactics. The Home Affairs Select Committee Report notes that illicit traders are moving away from large consignments towards consignments that are “*fragmented into smaller values*”,⁴²³ which would be more difficult to detect.

3.32 In addition, while the majority of legitimate retailers do not engage in illicit trade, it unfortunately remains the case that some smokers (including those under 18) are able to buy illicit tobacco products from some shops in the UK. Recent operations by Trading Standards have resulted in a number of detections of unscrupulous retailers selling illicit tobacco in their shops, many of whom were employing sophisticated concealment tactics. Some of these illicit products might be being presented to the consumer as contraband when, in fact, they are counterfeit. Whilst the 2014 IA correctly identifies that in a plain packaging environment, consumers will find it more difficult to detect a counterfeit pack,⁴²⁴ it then makes no attempt to quantify what this impact might be.

3.33 The 2014 IA also fails to consider the impact of the land border between Northern Ireland and the Republic of Ireland. This was identified in JTI’s 2012 consultation response⁴²⁵ as a problem given the very real security issues in policing it and that, once smuggled product has crossed the border to Northern Ireland, it has effectively made its way into the UK. Problems will still persist, even if both countries adopted plain packaging. The issue of porous borders is exacerbated by the fact that the UK and Ireland are the two markets with the highest tobacco prices in the EU⁴²⁶ and it is estimated that 28% of cigarettes in Ireland were non-Irish duty paid in 2012.⁴²⁷ As reported in the recent Home Affairs Select Committee Report, the link between tobacco illicit trade and organised crime is widely acknowledged.⁴²⁸ Near perfect market dynamics are already in place which will be exploited further by criminal groups on both sides of the border if, as expected, plain packaging were to worsen the illicit trade in either market.

3.34 As far as JTI is aware, there has been no established/recognised research base on the actual impacts (in terms of illicit or otherwise) on a neighbouring state of another having a measure such as plain packaging in place. The 2014 IA itself has identified this as a real risk only in the context of (legal) CBS, and has acknowledged that CBS: “*could increase further if standardised packaging was introduced in the UK but not in other EU countries, with extra incentives for tobacco in branded packets being available at cheaper prices.*”⁴²⁹ Such an increase in CBS would not only reduce the amount of duty received by the UK, but would

undermine the alleged effectiveness of plain packaging.⁴³⁰ The 2014 IA, however, merely identifies this as a risk and does not attempt to quantify it in any way.

The 2014 IA's analysis of illicit trade wrongly relies upon the Chantler Report

3.35 The 2014 IA appears to take comfort from the fact that its findings with regard to the impact of plain packaging are consistent with those of the Chantler Report. Given that the Chantler Report's analysis of illicit trade issues is overly simplistic, the fact that the conclusions of the 2014 IA and the Chantler Report broadly align provides no comfort as to its reliability. The extent to which the 2014 IA relies on the arguments made in the Chantler Report makes it difficult for the 2014 IA to sustain its claim that it: "...draws upon information provided in consultation responses."⁴³¹

3.36 The views and expertise of those with highly relevant knowledge on the subject of illicit trade, presented to the Chantler Review,⁴³² appear not to have been taken into account or given sufficient weight either by the Chantler Report, or, consequently, the 2014 IA. For example, neither Sir Cyril Chantler nor the 2014 IA appear to have relied upon Professors Zimmerman and Chaudhry's report (with no explanation as to why not), despite the fact that this report specifically addresses this issue in great depth. Since the 2012 Consultation, additional information of direct relevance to this issue has also become available.

3.37 JTI is concerned that the 2014 IA, through its reliance on the Chantler Report, has depended too heavily, and therefore unfairly, on the views of tobacco control advocates, rather than reviewing all evidence from a wide range of sources and reaching its own balanced conclusion. The Chantler Review's dismissal of the findings of the KPMG Report is a case in point in this regard: "[I]n a situation where estimates differ by such magnitudes, I do not have confidence in KPMG's assessment of the size of – or change in – the illicit market in Australia."⁴³³ Such dismissal, however, is based on the (largely) unsubstantiated grounds that: (a) "...Australian Government departments, both Health and Customs, appear to be strongly of the view that KPMG's methodology is flawed..."; (b) "...official Customs data..." shows no significant effect on illicit tobacco following the introduction of plain packaging; and (c) "...analysis undertaken by the Cancer Council Victoria (based on data from the National Drug Strategy Household Survey)..."⁴³⁴

3.38 One cannot ignore one data source on the basis that it shows a different finding from another data source, without a valid justification as to why one source of data is convincing and the other is not. As explained in the KPMG Report, it was commissioned to "...conduct an independent report..." and it exercised "...final decisions on all methodologies and messages contained in [the] report."⁴³⁵

3.39 Every methodology has its strengths and weaknesses. Reflecting this, HMRC has said: "...neither the KPMG nor the HMRC estimates [on illicit tobacco market in the EU] provide a definitive, representative picture of the composition of the illicit market as a whole."⁴³⁶ In this respect the 2014 IA in fact (rightly) recognises that in order to "monitor" the risk of illicit trade and CBS, it will: "...need to take account of sources of evidence such as the Empty Pack Survey and data collected by HMRC."⁴³⁷

3.40 The soundest approach to addressing a methodology's potential for bias and error is to consider various methods and to judge *trends* on the basis of these multiple methods. According to the KPMG Report, its methodology (i.e. the empty pack surveys and consumer surveys, calibrated further against other information, such as rolling paper analysis and level of legal domestic sales) appears to have been designed to achieve just that. Besides, the *trend*

demonstrated by government-led research and tobacco manufacturer-commissioned studies alike is a clear increase in illicit trade since the introduction of plain packaging. While the fundamental differences between the two markets limit the applicability of what is purported to have happened in one market in the other, what is notable is the undisputed *direction of change* observed in Australia.⁴³⁸

3.41 The 2014 IA repeats the Chantler Report's mistake by relying on the criticisms made by tobacco control advocates. In doing so, the 2014 IA fails to take into account a valuable source of information which could have been used in assessing the potential impact of plain packaging on the UK illicit tobacco market. If it had done so, the 2014 IA may have been able to present some quantification of the impact, rather than having to repeat that the impact on illicit trade is difficult to quantify.

3.42 That said, there are limitations as to how much one can reliably assume, in an illicit trade context, that what appears to have happened in Australia to date will apply equally in the UK. The Chantler Report makes the mistake of assuming that what it (wrongly) believes to have happened in Australia with respect to illicit trade will automatically apply to the UK. The 2014 IA takes the same view.⁴³⁹ For example, there have been suggestions that plain packaging did not result in counterfeiters copying tobacco products in plain packaging in Australia.⁴⁴⁰ Even if this were the case, given the fundamental differences between the two markets, an 'absence' in Australia does not preclude it from taking place in the UK.

3.43 The differences between the Australian and the UK illicit tobacco markets, both in terms of the nature and the scale, have been widely acknowledged. ACBPS state, for example: "*It is likely that part of the reason that Australia has a significantly smaller illicit tobacco market than the UK (and a number of other countries) is that there is not such a large-scale, organised distribution network for illicit tobacco in Australia as compared with the UK.*"⁴⁴¹

3.44 Unlike Australia, the UK is a particularly attractive market for illicit tobacco products,⁴⁴² which has suffered a more serious problem in counterfeit (as well as in illicit tobacco trade more generally) than has been the case in Australia. Therefore, illicit traders are likely to react differently in the UK to the introduction of plain packaging than they have done so in Australia.

3.45 In any event, recent trends demonstrate a shift in the illicit trade market in Australia. While the emergence of new illicit white brands since the introduction of plain packaging (as shown in Figure 4 above) is particularly notable, at least one seizure of counterfeits in plain packaging has been reported.⁴⁴³ The evidence from Australia to date could have been a valuable tool for the DH to adapt, taking into account the dynamics of the UK illicit tobacco market. As noted above, the drafters of the 2014 IA could have reviewed the evidence arising out of Australia to consider what impact plain packaging might have had on illicit trade in Australia, and then sought to assess the extent to which those changes may or may not be replicated in the UK. However, the 2014 IA has opted not to make use of this useful source of information to the detriment of the quality of its analysis.

Other relevant issues overlooked by the 2014 IA

The 2014 IA's failure to consider the impact of illicit trade on social equality

3.46 The 2014 IA fails to consider the impact of illicit trade on social inequality. In fact, the 2014 IA mistakenly argues that plain packaging could help reduce health inequalities between socio-economic groups.⁴⁴⁴ This view is not only overly simplistic, but plainly wrong. It is

widely acknowledged that the availability of cheap illicit tobacco has a significant impact on social inequalities, affecting the poorest groups with higher rates of smoking.⁴⁴⁵ Therefore, to the extent that plain packaging worsens illicit trade, it will further widen existing social inequalities.

3.47 Regulators and public health officials in the UK (as well as Australia) have repeatedly expressed the concern that smokers could be exposed to greater health risks by consuming illicit products that are not produced under regulated conditions.⁴⁴⁶ Following a seizure of 600,000 Jin Ling cigarettes, an HMRC spokesperson reported that: “...tests have found such cigarettes had contained traces of materials including rat poison and rat excrement.”⁴⁴⁷

3.48 Detections of illicit tobacco in circulation reveal that these products often do not have the requisite health warnings.⁴⁴⁸ For instance, in a recent detection of 67,000 cigarettes worth £25,000, none of the cigarettes carried the required health warning.⁴⁴⁹ Non-UK duty paid tobacco products entering the UK via CBS will frequently not carry health warnings in English. JTI notes that the 2014 IA itself recognises that CBS is a significant risk for which the supply cannot be “capped” as the CBS is legal.⁴⁵⁰ Yet those supportive of the introduction of plain packaging argue that plain packaging will: “...increase the effectiveness of health warnings.”⁴⁵¹

Assumption mistakenly relied on by the 2014 IA’s critical value approach

3.49 The 2014 IA’s critical value approach concludes that to: “Produce a net benefit of zero, 20% of the UK duty paid market would need to transfer to the UK duty unpaid market, giving a UK duty unpaid market share of 30%.”⁴⁵² It makes this point perhaps assuming that a change/transfer of this magnitude is not plausible. Taking HMRC’s own mid-point estimates, over the ten-year period between 2001/2002 and 2011/2012, non-UK duty paid cigarettes decreased from 28% to 10% of the total market for cigarettes. During the same period, non-UK duty paid RYO decreased from 72% to 41%. HMRC’s figures also show that dramatic increases/decreases can take place within a relatively short period of time. In 1996/1997, illicit trade in cigarettes (excluding CBS)⁴⁵³ constituted 3% of the UK cigarette market. Four years later, the percentage had risen to 22%.⁴⁵⁴ Therefore, the 2014 IA should have assessed whether it is plausible that similar fluctuations could reoccur in the future.

The 2014 IA’s failure to consider RYO

3.50 The 2014 IA’s “plausible assumption” in relation to what impact plain packaging might have on CBS and illicit trade does not include RYO. The 2014 IA explains that: “[F]or illustrative purposes the assumptions are worked through below for cigarettes which make up the largest part of the tobacco market. This analysis will be performed for [RYO] as well in due course.”⁴⁵⁵ RYO constitutes a significant portion of both the legitimate UK tobacco market, but also the illicit market. According to HMRC’s estimate referred to in the 2014 IA, the illicit market share of RYO is 36%.⁴⁵⁶

3.51 The 2014 IA does not specify the reason for excluding RYO from its quantification exercise. According to the HMRC’s own mid-point estimate, as recent as 2008/2009, 50% of RYO smoked in the UK was non-duty paid. Given the extent of historical changes of this illicit market, the 2014 IA should have assessed whether it is plausible that the level of illicit trade would not increase to such an extent as to undermine the alleged benefits of plain packaging.

4. FAILURE TO CONSIDER ALTERNATIVE MEANS OF ACHIEVING OBJECTIVES

4.1 JTI is committed to the development of appropriate and proportionate tobacco regulation and believes that there is still work which can be done to prevent youth smoking. Further UK packaging regulation, however, is neither appropriate nor necessary. In JTI's 2012 consultation response, JTI suggested five alternative means of achieving the goals it shares with the DH of reducing minors' uptake of smoking, preventing minors from obtaining tobacco products and ensuring that adult smokers are reminded of the health risks of smoking.

4.2 In our Chantler Submission, we also set out alternative means to achieve these goals,⁴⁵⁷ including:

- (a) ensuring better enforcement of the current regulatory regime (including the under-utilised provision of The Children and Young Persons Act 1933 on the confiscation of cigarettes from minors) and tackling the illicit trade in tobacco products;
- (b) reinforcing retail access prevention measures, such as 'No ID, No Sale'; and
- (c) following the Scottish example by penalising proxy purchasing by adults and penalising the purchase or attempted purchase of tobacco products by minors.

4.3 The Chantler Report did not (consistent with its method statement): "...*assess[...]* *the merits of alternative means of tobacco control.*" Nor does the 2014 IA consider these alternative means (or indeed any others), despite BIS's stated commitment of principle to: "...*wherever possible, seek[ing] to implement EU policy and legal obligations through the use of alternatives to regulation.*"⁴⁵⁸

4.4 DH-funded research has recognised that: "[i]ncreased regulation may serve to inadvertently heighten the kudos of smoking as an act of rebellion against adult regulation". The same research also recognises that: "[a]pproaches that inhibit young people's ability to obtain tobacco may...be more appropriate for preventing smoking in this age group".⁴⁵⁹

4.5 The measures set out above, the other non-regulatory measures that we consider below, and a genuine 'no change' option, should have been taken into consideration by the DH. This is particularly so as such alternative options are likely to be effective when evaluated against Better Regulation principles, and address the key methods by which minors access tobacco products, and studies exist to support their efficacy.⁴⁶⁰

4.6 Since the 2012 Consultation, HM Government has taken forward only one of the suggestions identified above, namely by legislating to criminalise proxy purchasing of tobacco or rolling papers through the Children and Families Act 2014. Whilst JTI welcomes this move, we remain concerned that other alternative options, which are less restrictive and more targeted than plain packaging, continue to be overlooked. We believe more can be done to restrict underage access to tobacco.

Better enforcement of the current regulatory regime

4.7 Studies exist which suggest that youth smoking prevalence decreases in communities where strong enforcement measures are consistently applied.⁴⁶¹ There is, however, evidence which suggests that penalties available under existing legislation are not being used fully or applied consistently.⁴⁶²

4.8 The success of negative licensing schemes (discussed in detail in JTI's 2012 consultation response)⁴⁶³ and minimum age of sale provisions relies on Trading Standards Officers to identify incidences and take appropriate action. The number of test purchases carried out by Trading Standards in 2012 was, however, 34% lower than in 2010.⁴⁶⁴ We expect the drop to be even greater for 2013 once the relevant figures are published.

4.9 Trading Standards Officers should be provided with sufficient resources and training to enforce relevant existing legislation, which was introduced, and has real potential, to have a significant impact on youth smoking prevalence. This is particularly important given the recent introduction of penalties for proxy purchasing under the Children and Families Act 2014. JTI has long supported criminalising proxy purchasing (as well as penalising purchase or attempted purchase of tobacco products by minors), and maintains that it can be an effective tool for achieving the DH's policy goals, if properly enforced.

4.10 The question, therefore, is why the DH is considering introducing further regulation, when the current legislation is yet to be utilised and tested fully.

Reinforcement of retail access prevention measures

4.11 According to Trading Standards, some small shops are still one of the key sources of tobacco for minors.⁴⁶⁵ In 2012, JTI assembled a working group to analyse under-age sales prevention measures and to examine what more could be done by JTI in this area. The group found that small and independent retailers often lack the resources to provide high quality staff training and compliance monitoring. This was corroborated in a recent survey of 500 independent retailers, commissioned by JTI, in which nearly a third of respondents (32%) admitted that they did not offer any formal training to their staff in preventing under-age sales. The survey also found that 67% felt that regular compliance testing is an effective way to increase standards.⁴⁶⁶

4.12 In response to these findings, JTI launched a pilot scheme in September 2013 in North West England in which Serve Legal, an independent company which specialises in testing retailers for compliance with under-age sales regulations, made more than 6,000 test purchases across 2,500 randomly selected independent retailers in order to identify those retailers that may be at risk of failing to comply. The "at risk" retailers were then offered on-site training from Under Age Sales Ltd, an independent specialist company, paid for by JTI.

4.13 The scheme also strengthened the nationally recognised "No ID, No Sale!" campaign to create an expectation that customers will be asked for proof of age, including by producing redesigned "No ID, No Sale!" packs in response to retailer feedback. As a result, both retailers and customers are more aware of youth retail access prevention measures in the North West. Following the success of the pilot scheme, and the positive feedback from retailers, JTI intends to roll the programme out across the country later this year, with support from other manufacturers.

4.14 JTI is committed to playing a meaningful role in youth smoking prevention by taking and supporting targeted measures. The DH should do the same. It is not appropriate simply to legislate. Businesses must be supported to comply with legislation designed to prevent youth access to tobacco products by increasing training for retailers and education programmes for minors, and championing compliant retailers.

More effective and targeted enforcement to tackle the illicit tobacco trade

4.15 The significant scale, and extremely serious consequences, of the illicit trade in tobacco products in the UK are set out in JTI's 2012 consultation response, and above. JTI acknowledges that efforts to tackle the illicit trade in tobacco products have made an impact – particularly in cigarettes – in recent years. It is important that further enforcement resources are dedicated to the problem.

4.16 In addition, the level of fines and penalties must be sufficiently high and consistently applied in order for them to act as deterrents. The Home Affairs Select Committee Report received submissions from a range of contributors, including Trading Standards, tobacco control advocates, public health organisations and tobacco product manufacturers, all of whom agreed that sentencing for illicit tobacco related offences is too lenient. Offenders rarely receive the maximum penalty; 43.5% of sentences for tobacco smuggling offences in England and Wales since 2011 have been non-custodial or suspended.⁴⁶⁷ As such, JTI supports Trading Standards' calls for dedicated sentencing guidance to be issued in this area.

Targeted public information campaigns

4.17 As stated in our 2012 consultation response, studies suggest that government-led public information campaigns are an important aspect of successfully implementing retail access prevention measures.⁴⁶⁸ JTI encourages HM Government to launch renewed campaigns in support of these measures (such as negative licensing schemes) and to explain the recent changes to tobacco control laws (including the new proxy purchasing offence and higher minimum age of purchase).

4.18 In addition, JTI acknowledges that public information campaigns have been carried out in the UK previously, with considerable success to reiterate the health risks associated with smoking, so that adults are able to make informed choices. We note, in particular, the success attributed to the NHS's Stoptober campaign in conjunction with the distribution of NHS "Quit Kits" through pharmacies in the UK.⁴⁶⁹ We suggest that renewed use of such campaigns would be a better use of resources by HM Government than introducing plain packaging. This is particularly likely if they are targeted at those groups that the DH has identified in the Equalities Analysis as having the highest smoking prevalence.

4.19 Indeed, rates of smoking in the US, where packs are branded and carry smaller health warnings, are significantly lower than rates in Europe despite tobacco products being much more highly regulated and taxed in the latter. Studies suggest that the main reason for the difference in smoking rates is that the US has relied more on public advocacy work (i.e. reinforcing messages about the health risks) than regulation.⁴⁷⁰ Moreover, that public advocacy work has involved a range of creative and targeted initiatives, including internet campaigns, text messaging in support of those trying to quit, community-led programmes, school-based programmes, and training for parents.

5. EQUALITY ACT 2010 ISSUES

5.1 As the DH acknowledges in the Equalities Analysis accompanying the Consultation and the 2014 IA, some of the impacts of plain packaging may disproportionately affect certain minority and socio-economic groups. The DH has, however, failed adequately to assess those impacts in order to understand properly the effect of such a policy on those groups, despite its requirement to do so under the Equality Act 2010.⁴⁷¹

Socio-economic groups

5.2 The DH considers that the plain packaging proposal has the potential to close the “*health inequality gap*” between the poorest and richest socio-economic groups in the UK.⁴⁷² Despite this, the 2014 IA states that plain packaging is expected to have a greater impact on smoking prevalence among smokers of premium, higher price cigarettes than value brand cigarettes, on the basis that cheaper cigarettes are less likely to be subject to brand attachment.⁴⁷³

5.3 As previously explained in JTI’s 2012 consultation response, evidence shows that plain packaging is likely to push down the price of cigarettes, and increase the availability of illicit tobacco products.⁴⁷⁴ It is the lower income socio-economic groups, and young people, who will be most vulnerable to such changes.⁴⁷⁵ Indeed, the criminal gangs selling illicit tobacco products are not concerned about who they sell their products to. Rather than close the health inequality gap, plain packaging may exacerbate it.

5.4 The DH has acknowledged these risks in the Equalities Analysis. Rather than analyse them properly, however, with input from the potentially affected groups,⁴⁷⁶ as it should in accordance with its duty under the Equality Act, it dismisses them on the basis of speculative and groundless conclusions. It states, for example, that: “...*standardised packaging is a population level measure to which everyone will be equally exposed, and therefore at the very least should not increase health inequalities and may help to reduce them. If the policy leads to reduced smoking uptake then it should have a positive effect on health inequalities between socio-economic groups because the impact would be greater in those groups in which smoking prevalence is the highest.*”⁴⁷⁷ There is nothing in the 2014 IA (or indeed elsewhere) to support such a conclusion. As the Equality and Human Rights Commission’s guidance on the equality duty states: “...*it is not acceptable to simply conclude that a policy will universally benefit all service users, and therefore the protected groups will automatically benefit, without having evidence to support that conclusion.*”⁴⁷⁸ This is precisely what the DH has done.

5.5 The DH also inappropriately relies on conclusions in the Chantler Report to dismiss the risk of plain packaging depressing tobacco prices as “*small*”,⁴⁷⁹ even though the Chantler Review did not consider: “*issues such as the overall economic impact of standardised packaging.*” The impact of the increased availability of illicit tobacco products on these groups is not considered in the Equalities Analysis.

5.6 The DH should have considered these impacts further, including by seeking the views of other government departments and agencies best placed to comment on these issues,⁴⁸⁰ and properly taking those views into account.

Sight and literacy difficulties

5.7 In the Equalities Analysis, the DH identifies the potential impact of plain packaging on partially sighted people, those with learning disabilities (including dyslexia and dyspraxia) and those whose first language is not English. The DH’s analysis of these impacts is limited, and appears to rely on suggestions provided by respondents to the 2012 Consultation. JTI is not in a position to comment on these impacts but recommends that the DH ensures a full and proper assessment of the potential impact of plain packaging on these groups is performed.

Ethnicity

5.8 The DH concludes in the 2014 IA that plain packaging: “...*would not have any significant negative impact on any particular aspect of equality...*”⁴⁸¹ This conclusion is not justifiable. As noted in the Equalities Analysis, a significant proportion of retail businesses are owned or run by individuals from minority backgrounds. Any loss of revenues associated with plain packaging, as a result of, for example, down-trading to cheaper brands, reduced footfall, channel shift due to changes in transaction time (especially where the first language of retail staff is not English), the increase in illicit trade or re-training of staff, is likely to have a much larger impact on these groups.

5.9 It is clear from the reasons given in the Equalities Analysis that the DH has not seriously considered and assessed these risks with the necessary rigour. The assumption that: “...*losses from tobacco sales may be offset by consumption of [small retailers’] other products*” is unsupported by evidence or research.⁴⁸² It is a fallacy, and, in fact, the opposite is true (see, for example, the quote from Lord Howe at paragraph 2.42(iii)). Further, the DH’s suggestion that: “*retailers already need to be planning their future business strategies*” on the basis that “...*there are many trends already impacting [them] (e.g. internet sales, economic cycles, big supermarket competition and demographic changes)...*” is unsatisfactory. It underplays the impact plain packaging would have on small retail owners (who are already having to invest to comply with the display ban of tobacco products that comes into force for smaller shops in April 2015) and their local communities.⁴⁸³ It reveals the DH’s lack of understanding of how small businesses operate (particularly in rural communities), and the impact on revenues that the loss of just one consumer can have.

5.10 Likening plain packaging to: “...*internet sales, economic cycles, supermarket competition and demographic changes...*” is inappropriate. Plain packaging is not inevitable; it is unnecessary and avoidable. Small businesses already face onerous regulatory requirements. A further layer of regulation will only add to this compliance burden. The DH must reconsider these issues, with the assistance from relevant government departments, such as BIS. As stated in our Better Regulation consultation response,⁴⁸⁴ these issues fall squarely within BIS’s remit given that it is committed to promoting: “*competition and stability without impinging on businesses’ ability to operate*” and to removing: “*unnecessary red tape to encourage economic growth and increase personal freedom and fairness.*”

ANNEX 3: PROPOSED AMENDMENT TO THE CHILDREN AND FAMILIES BILL

*“(1) The Secretary of State may make regulations under subsection (6) or (8) if the Secretary of State considers that the regulations ~~may~~ **will** contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18.*

(2) Subsection (1) does not prevent the Secretary of State, in making regulations under subsection (6) or (8), from considering whether the regulations may contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people aged 18 or over.

(3) The Secretary of State may treat regulations under subsection (6) or (8) as capable of contributing to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18 if the Secretary of State considers that—

*(a) ~~at least some~~ **each** of the provisions of the regulations are capable of having that effect, or*

(b) the regulations are capable of having that effect when taken together with other regulations that were previously made under subsection (6) or (8) and are in force.

*(4) Regulations under subsection (6) or (8) are to be treated for the purposes of subsection (1) or (2) as capable of contributing to reducing the risk of harm to, or promoting, people’s health or welfare if (for example) they ~~may~~ **will** contribute to any of the following—*

(a) discouraging people from starting to use tobacco products;

(b) encouraging people to give up using tobacco products;

(c) helping people who have given up, or are trying to give up, using tobacco products not to start using them again;

(d) reducing the appeal or attractiveness of tobacco products;

(e) reducing the potential for elements of the packaging of tobacco products other than health warnings to detract from the effectiveness of those warnings;

(f) reducing opportunities for the packaging of tobacco products to mislead consumers about the effects of using them;

(g) reducing opportunities for the packaging of tobacco products to create false perceptions about the nature of such products;

(h) having an effect on attitudes, beliefs, intentions and behaviours relating to the reduction in use of tobacco products.” (Emphasis added)

ENDNOTES

1 See paragraph 3.8 of this response and Annex 1, paragraph 3.3.

2 See paragraph 1.7 of this response.

3 *Ibid.*

4 See paragraph 5.13 of this response.

5 See paragraph 1.9 of this response.

6 See paragraph 3.4(a) of this response and Annex 1, paragraph 2.23, paragraph 2.26.

7 See Annex 1, paragraph 2.23(b).

8 See paragraph 2.18(b) and paragraph 6.16 of this response.

9 See Annex 1, paragraph 2.1(c).

10 See paragraphs 6.22 to 6.26 of this response.

11 See paragraphs 2.5 to 2.6 of this response.

12 See paragraph 1.8 of this response.

13 See paragraph 2.18 of this response.

14 See paragraph 6.13(b) of this response and Annex 3.

15 *Ibid.*

16 *Ibid.*

17 See paragraph 6.13(d) of this response.

18 *Ibid.*

19 See paragraph 6.19 of this response.

20 See Annex 1, paragraph 2.25.

21 See endnote 251 of this response.

22 See Annex 2, paragraph 2.11.

23 See paragraph 4.19(c) of this response and Annex 1, paragraph 3.16(c).

24 See paragraph 4.19(d) of this response and Annex 1, paragraph 3.16(d).

25 See paragraph 4.1 and paragraph 6.18 of this response.

26 See paragraph 3.5 of Annex 2 of this response.

27 See Annex 2, paragraph 3.5.

28 See Annex 2, paragraph 3.16 and Figure 4.

29 See paragraph 6.2 and paragraph 6.21 of this response and Annex 2, paragraph 2.4.

30 See paragraph 4.22 of this response.

31 See paragraphs 4.11 and 4.12 of this response.

32 See Annex 2, paragraphs 2.61 to 2.63.

33 See paragraph 4.21 of this response.

34 See paragraph 6.7 of this response.

35 See paragraph 6.8 of this response.

36 See paragraphs 5.2 to 5.25 of this response.

37 The DH has previously, including in the 2012 Consultation, referred both to standardised and plain packaging and has used these terms interchangeably. In the Consultation, the DH makes reference to the term ‘plain’ in the context of both the Draft Regulations (regulation 5(2)) and the 2014 IA. Footnote 3 of the 2014 IA states: “*Standardised packaging has also been referred to as plain packaging. As packs would not be plain (for example, they would be required to have coloured picture warnings). The term standardised packaging is considered to be a more accurate description.*” (JTI does not consider the term “standardised packaging” to be more accurate given that the Consultation, at paragraph 5.6, is at pains to stress that: “...we do not propose requirements relating to ... the size of cigarette packets...”). Option 3 in the 2014 IA is to: “*Defer a decision pending collection of evidence on experience with plain packaging in Australia.*” The Chantler Review also refers to: “*Plain Packaging Review: Independent Review into standardised packaging of tobacco.*” Finally, plain packaging has become the internationally accepted terminology (having been used in Australia for the only legislation in force mandating these requirements: The Tobacco Plain Packaging Act 2011). For these reasons, JTI refers to plain packaging throughout this response.

38 JTI’s response to the DH’s Consultation on the Standardised Packaging of Tobacco Products, dated 3 July 2012 is available via: http://www.jti.com/files/4013/4149/4323/Packaging_Response.pdf.

39 See paragraphs 5.13 to 5.17 of this response as regards the issue of the legal validity of TPD2 in light of legal challenges which have recently been brought to it in the UK.

40 In June 2009, after an extensive public consultation on the issue in the context of the DH’s 2008 Future of Tobacco Control Consultation, the DH said that there was no evidence that plain packaging reduced smoking uptake amongst minors or

- helped people to quit. On 25 June 2009, the then Secretary of State for Health (Andy Burnham MP) stated: “No studies have been undertaken to show that plain packaging of tobacco would cut smoking uptake among young people or enable those who want to quit to do so. Given the impact that plain packaging would have on intellectual property rights, **we would undoubtedly need strong and convincing evidence of the benefits to health**, as well as its workability, before this could be promoted and accepted at an international level – especially as no country in the world has introduced plain packaging” (emphasis added). (Parliamentary Debate (26 June 2009), <http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s09.htm>.) This was after the then Secretary of State for Health (Alan Johnson MP) had told Parliament on 16 December 2008 that: “there is **no evidence base** that [plain packaging] actually reduces the number of young children smoking” (emphasis added). (Commons Debates (16 December 2008), Volume 485, Colum 945). On 10 May 2011 a DH official noted in correspondence with a counterpart at the Australian Department of Health and Ageing that: “there isn’t any hard evidence to show that [plain packaging] works”. This email was part of the material disclosed on 19 August 2011 pursuant to a Freedom of Information Act 2000 request by PMI (Ref TO00000633879).
- 41 See: <https://www.gov.uk/government/news/consultation-on-standardised-packaging-of-tobacco-products>. The then Secretary of State for Health said on 12 July 2013, upon the publication of the summary of responses to the DH’s 2012 consultation: “Obviously we take very seriously the potential for standardised packaging to reduce smoking rates, but in light of the differing views, we have decided to wait until the emerging impact of the decision in Australia can be measured, and then we will make a decision in England.” He further stated in Parliamentary Debate on 6 July 2013 (HC Deb 16 July 2013; col 893) that: “We are waiting to see how things develop in Australia and, as I say, good laws are based on good, sound evidence. That is the way forward.”
- 42 See the Prime Minister’s press conference in Downing Street on 17 July 2013: “The decision not to go ahead for the time being with plain paper cigarette packaging was a decision taken by me with the Health Secretary for the very simple reason that **there is not yet sufficient evidence for it and there is considerable legal uncertainty about it**. If we get more evidence and we can reduce the legal uncertainty then it may very well be a good idea and I’ll very happily look at it again” (emphasis added). Available via: <https://www.gov.uk/government/speeches/pm-and-prime-minister-letta-press-conference>. See also the following statement made in Parliament by the Prime Minister on the same day: “Let me be absolutely clear about this: **the decision not to go ahead for the time being was made by me... Funny enough, it is the same decision the previous Government made**. I have here the letter that the former Labour Secretary of State for Health wrote to another Minister, the right hon. Member for Dulwich and West Norwood (Dame Tessa Jowell), explaining why he was not going ahead. **He said this: “No studies have shown that introducing plain packaging of tobacco products would cut the number of young people smoking... Given the impact that plain packaging would have... we would need strong and convincing evidence” in order to go ahead. He did not go ahead...**” (HC Deb 17 July 2013; col 1088), (emphasis added).
- 43 See paragraph 4.3 of JTI’s 2012 consultation response.
- 44 However, for the purposes of the Consultation, JTI relies upon and incorporates (as a result of this cross-reference) all of the evidence, submissions and information submitted previously to the DH. It would be neither proportionate nor appropriate in the limited time available to respond to the Consultation to repeat that here.
- 45 Originally taken from “Reducing Regulation Made Simple”, HM Government (available via: <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/assets/biscore/better-regulation/docs/r/10-1155-reducing-regulation-made-simple.pdf>) This has now been replaced by HM Government’s Better Regulation Framework Manual, published 10 July 2013, available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31626/10-1155-reducing-regulation-made-simple.pdf.
- 46 See “One-in, one-out: Statement of New Regulation”, HM Government, April 2011, available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48179/2836-onein-oneout-statement-new-reg.pdf.
- 47 See “Principles of good regulation”, Better Regulation Task Force, available via: <http://webarchive.nationalarchives.gov.uk/20100407162704/http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf>.
- 48 HC Deb 3 Apr 2014; col 1019.
- 49 JTI does not agree with a number of the assertions made in the current Consultation and the 2014 IA. The fact that JTI does not respond to all of them in this response should not be treated as an acceptance of them.
- 50 This was previously referred to by the DH as “denormalisation” - “Excellence in tobacco control: 10 High Impact Changes to achieve tobacco control”, DH, May 2008. Available via: http://www.haringey.gov.uk/dh_excellence_in_tobacco_control_1_.pdf. “There are three key principles that underpin efforts to tackle the tobacco epidemic – a genuinely strategic approach to tobacco control, effective partnership working and a focus on denormalising smoking.” (page 4). “Smoking is the greatest cause of premature death in our country, making it a public health area of priority. If the principles of tobacco control are applied comprehensively then the potential is enormous. Smoking as a normal activity will be challenged and tobacco use denormalised” (page 11).
- 51 See paragraphs 9.31 to 9.32 of JTI’s 2008 consultation response.
- 52 See paragraphs 3.45 to 3.60 of JTI’s 2012 consultation response.
- 53 The issue of the ‘objectives’ listed in the consultation is also considered further in this response in the following contexts: plain packaging will not change actual smoking behaviour (section 2 of Annex 1); the amendments which were proposed

by Philip Davies MP to the relevant clause of the Children and Families Bill 2014 (see paragraph 6.13(b) of this response, and Annex 3); and the 2014 Impact Assessment (Annex 2).

54 As suggested by JTI both in correspondence with the DH (and other government departments) and in JTI's submission to the Regulatory Reform Committee's inquiry into Better Regulation on 13 June 2014. The involvement of departments such as BIS was (and remains) required to ensure that any such consultation can be an informed and meaningful exercise.

55 2012 IA, page 3.

56 Chantler Report, Annex A: method statement, page 41.

57 Chantler Report, paragraph 2.9, page 17.

58 Chantler Report, paragraph 1, page 3.

59 Letters to the Secretary of State for Health dated 10 January 2014 and 17 April 2014. Separately, JTI also wrote to the Prime Minister, the Chancellor of the Exchequer and BIS expressing these concerns.

60 See section 2.F of JTI's 2012 consultation response.

61 Page 1 (top left-hand corner) of the 2014 IA does not identify any other departments or agencies as being involved.

62 This Consultation, responses to which are not mandatory, is not an adequate substitute for pro-actively seeking the listed departments / agencies' views.

63 Such analysis is particularly important given: recent successes in combating illicit trade as a result of coordinated efforts between manufacturers, on the one hand, and HMRC and the UK Border Agency, on the other; and further funding requirements in light of an increase in illicit trade and the need for increased resources for pack authentication.

64 See: "*Unite Parliamentary Briefing: Standardised Packaging and the threat to UK jobs*", Unite, July 2014. See also Imperial Tobacco's announcement, available via: <http://www.imperial-tobacco.co.uk/index.asp?page=56&newscategory=11&year=2014&newsid=2000> in April 2014, that it intends to close its manufacturing plant in Nottingham, citing, amongst other things, "*increased regulation*" and "*growth of illicit trade*" as causes. This means that JTI's manufacturing plant in Lisnafillan will be the only tobacco manufacturing factory in the UK.

65 2014 IA, paragraph 120, page 30.

66 See "*A strategy for sustainable growth*", BIS, published July 2010. Available via: <http://www.bis.gov.uk/assets/biscore/corporate/docs/s/10-1058-strategy-for-sustainable-growth>.

67 In a letter sent to JTI during the Consultation (14 July 2014), in response to a letter from JTI (11 June 2014), the Minister of State for Business and Energy agreed that it is: "*correct to say that the proposal to require tobacco products to be retailed in standardised packs is of direct interest and concern to me and to BIS*" and that he, and Lord Curry (non-executive Chairman of the Better Regulation Executive) had been working with representatives of the DH in this respect.

68 See the Institute of Directors submission to the 2012 Consultation, available via: <http://www.iod.com/influencing/policy-papers/regulation-and-employment/consultation-on-standardised-packaging-of-tobacco-products>.

69 See paragraph 2.48(e) of JTI's 2012 consultation response.

70 See the report prepared, on behalf of JTI, by Dr Andrew Lilico, which was submitted as part of JTI's response to the 2012 Consultation, and which is available via: http://www.jti.com/files/3613/4149/4404/Dr_Lilico.pdf. This is especially the case since the tobacco control measures already in place in the UK have limited the means by which tobacco manufacturers are able to compete.

71 Some local authorities have relied on the Local Government Declaration on Tobacco Control, underpinned by Article 5.3 of the WHO Framework Convention on Tobacco Control (*FCTC*), to justify a blanket policy of refusing to engage with tobacco product manufacturers on any and all policy issues, development and implementation. Article 5.3 provides no such justification. Rather, it rightly seeks to protect the process of developing public health policies from undue influence and illicit behaviour. To achieve this, it encourages transparency, inclusivity and integrity in accordance with the UN and OECD-endorsed principles of good governance and Better Regulation. The DH itself recognised this when it met with JTI in 2013 in the context of the 2012 Consultation, noting that: "*Under article 5.3 of the [FCTC], DH is not prohibited from meeting with tobacco companies but meetings should take place under conditions of maximum transparency.*"

72 HM Treasury, The Green Book, Appraisal and Evaluation in Central Government, page 40. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220541/green_book_complete.pdf.

73 See the press release, issued by the RPC on 4 March 2014: <https://www.gov.uk/government/news/independent-watchdog-urges-government-to-hold-firm-on-its-commitments-to-better-regulation>.

74 See minutes of the oral evidence given by given by Anna Soubry MP (then Parliamentary Under-Secretary of State for Public Health) and Andrew Black (Programme Manager, Tobacco Policy, the DH) to the House of Commons European Scrutiny Committee 17 July 2013: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/c591-i/c59101.htm>.

75 In response to our letter of 17 April 2014, in relation to proposals to introduce plain packaging for tobacco products in the UK, BIS said our letter had been transferred to the DH: "*in view of that Department's responsibility for the matters raised in [it].*"

76 See Jane Ellison's letter to Sir Cyril Chantler setting out the Terms of Reference for the Chantler Review, dated 27 November 2013. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/ellison-letter.pdf>.

77 2012 IA, page 3.

78 JTI's submission to the Chantler Review, dated 10 January 2014 is available via:
[http://www.jti.com/files/1313/8979/4396/JTI - Submission to Sir Cyril Chantler Review.pdf](http://www.jti.com/files/1313/8979/4396/JTI_-_Submission_to_Sir_Cyril_Chantler_Review.pdf).

79 Chantler Report, paragraph 6.11, page 40.

80 Chantler Report, paragraph 18, page 6.

81 See "*Who funds research in the UK?: Cancer research in the UK is funded by drug companies, charities and the UK Government.*" Available via: <http://www.cancerresearchuk.org/cancer-help/trials/more/paying-for-trials>.

82 See for example: <http://www.blf.org.uk/Page/GSK-Partnership> and the statement by the British Lung Foundation that GlaxoSmithKline's support allows them to: "*influence the health agendas in England, Scotland, Wales and Northern Ireland to raise the profile of lung health and improve respiratory services.*"

83 See, for example, the letter dated 14 October 2011 from a group of NGOs, charities, researchers, industry representatives and MEPs to the European Commission President, José Manuel Barroso. Available via:
[http://smokefreepartnership.org/IMG/pdf/Tobacco Products Directive letter 141011.pdf](http://smokefreepartnership.org/IMG/pdf/Tobacco_Products_Directive_letter_141011.pdf).

84 See "*Advisers on e-cigarettes 'failed to declare their interests' in Big Pharma's products*", The Times, 26 August 2013. Available via: <http://www.thetimes.co.uk/tto/business/industries/consumer/article3852342.ece>.

85 See PHE's submission to the Chantler Review, January 2014:
[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270768/Independent review into standardised packaging of tobacco PHE response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270768/Independent_review_into_standardised_packaging_of_tobacco_PHE_response.pdf).

86 More generally, the House of Commons Health Committee has previously expressed concerns that: "*there is inadequate clarity about how [PHE] will approach crucial policy issues such as...standardised packaging of tobacco products. The public expects PHE to be an independent and forthright organisation that will campaign on behalf of those public health objectives and policies which it believes can improve the nation's health.*" (Minutes of House of Commons Health Committee's conclusions and recommendations on PHE, prepared 26 February 2014, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/840/84009.htm>.) Similarly: "*We are concerned that there is insufficient separation between PHE and the Department of Health. The Committee believes that there is an urgent need for this relationship to be clarified and for PHE to establish that it is truly independent of Government and able to speak 'truth to power.'*" (Minutes of House of Commons Health Committee's conclusions of PHE's independence, prepared 26 February 2014, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/840/84007.htm>.)

87 See pages 5 and 6 of PHE's consultation response, published on 6 August 2014 and available via:
<https://www.gov.uk/government/publications/standardised-packaging-of-tobacco-products-draft-regulations-consultation-phe-response>.

88 *Ibid*, page 6.

89 In this respect, see Annex 1, paragraphs 1.2 to 1.6.

90 Professors Devinney and Steinberg also individually met with the Chantler Review team to discuss their research / analysis on 28 February 2014 and 5 March 2014 respectively.

91 World Health Organization, International Agency for Research on Cancer, Volume 12, Methods for Evaluating Tobacco Control Policies (2008) available via: http://www.iarc.fr/en/publications/pdfs-online/prev/handbook12/Tobacco_vol12.pdf.

92 BIS, Better Regulation Framework Manual, page 4. Available via:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf.

93 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>). This document, which is authored by a prominent tobacco control advocate, is not referred to or relied upon by the DH in the Consultation and does not identify any evidence since the date of the Chantler Report. As such, this document is not addressed further in this response.

94 The status of the current position in Australia is referred to in respect of Question 1, but it is important also to make this clear in the context of the Question 2 request that respondents provide: "*any information, in particular any new or additional information since the 2012 consultation, relating to the wider aspects of standardised packaging*".

95 Additionally, a recent online report (April 2014) notes that: "*for the first full year of plain-packaging regulation, tobacco companies sold approximately 21.074bn cigarettes in Australia, a 0.3% increase on the number of cigarettes sold during 2012. Surprisingly, this was the first time in four years that the number of cigarettes sold within Australia has actually increased. Before plain packaging regulations were brought in, the volume of cigarettes sold in Australia declined year after year*" (emphasis added). See: <http://www.fool.com/investing/general/2014/04/14/new-data-from-australia-shows-big-tobacco-is-set-t.aspx>. Likewise, the evidence of the Australasian Association of Convenience Stores (AACS) provided to the Chantler Review stated that: "*All the while, however, the actual volume of tobacco sold by convenience stores in Australia remains stable, with some AACS members reporting an increase in tobacco sales...There is no evidence I am aware of that clearly demonstrates that plain packaging has led to fewer young people taking up smoking, or habitual smokers choosing to quit smoking. There were academic studies published prior to the introduction of plain packaging that suggested it would benefit retailers, however practical experience over 12 months has shown this to be false.*" (Written submission of the AACS to the Chantler Review) See also page 34 and pages 52-53 of the Philip Morris International submission to the Chantler Review: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Philip-Morris-International-29-January-2014.pdf>.

96 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/>.

97 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).

98 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).

99 See page 9 of: https://ris.govspace.gov.au/files/2012/04/PIR_table_required.pdf. December 2014 is the second anniversary of implementation of plain packaging in Australia.

100 An issue we consider in greater detail in this response at paragraphs 2.8 to 2.17.

101 “Tobacco tax gap estimates 2012-2013”, available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249543/131009_Publication_of_Tobacco_Tax_Gap_estimates_2012-13.pdf. According to HMRC’s current upper estimates, up to 13% of the market for cigarettes and 42% of the market for RYO are illicit, with the result that HM Treasury loses up to £2.9 billion a year from the illicit trade in tobacco products.

102 “Consultation on the future of tobacco control”, Department of Health, May 2008, available via: http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_085651.pdf.

103 “Tackling Tobacco Smuggling – building on our success”, April 2011, paragraph 1.2. ASH also told the Chantler Review: “[i]t tends to be smokers from lower socioeconomic groups that access illicit tobacco and therefore children from poorer groups who have more access to it...” (Minutes of Sir Cyril Chantler’s meeting with SmokeFree Action Coalition and others, page 62).

104 JTI 2012 consultation response, paragraphs 4.16 to 4.31.

105 Professors Zimmerman and Chaudhry, experts in the global illicit market, have co-authored (at the request of JTI) “The Impact of Plain Packaging on the Illicit Trade in Tobacco Product”, paragraph 432, available via: http://www.jti.com/files/5113/4150/5828/Impact_on_illicit_trade.pdf.

106 *Ibid*, page 2.

107 HMRC itself has acknowledged that plain packaging: “probably does enhance and diversify the existing risks the UK faces but it is very difficult to quantify any changes in risk.” See the note of Sir Cyril Chantler’s second meeting with Andrew Leggett, Deputy Director, and Judith Kelly, Tobacco Strategy and Policy Team, HM Revenue and Customs. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx> (page 36).

108 The 2014 IA, paragraph 19: “The intervention carries quantified costs... (Additional losses [beyond the £2.3 billion in Exchequer losses discussed in paragraph 116 of the 2014 IA] with an indicative value of around £2bn increase in non-UK duty paid cigarettes will be further explored...)”; paragraph 118: “We later provide an illustrative estimate that for cigarettes [an increase in illicit trade and/or cross border shopping] may be in the order of £2bn discounted over ten years”; and paragraph 142: “Estimates of the impact on cigarettes with these assumptions give around a £2bn reduction to the NPV estimate of this policy...”.

109 The data can be accessed via: <https://www.uktradeinfo.com/statistics/pages/taxanddutybulletins.aspx>. Click on “Tobacco Duties” (June 2014) under the heading “Bulletin Datasets”. The data is provided in tab 2 of the *Tobacco Bulletin June 2014*.

110 2014 IA, paragraph 141.

111 2014 IA, paragraphs 137 and 140.

112 The wording of the 2014 IA does not make clear what is meant by a 2% “transfer” from the UK duty paid to the non-UK duty paid market for cigarettes. For the purpose of responding to the Consultation, JTI has assumed it to mean that 2% of the UK duty paid market (which, according to the 2014 IA, represents 88% of the total cigarette market) would “transfer” to the non-UK duty paid market. 2% of 88% is 1.76%. On that basis, the non-UK duty paid cigarette market would increase by 1.76% to 13.76% of the total cigarette market as a result of plain packaging. According to HMRC’s mid-point estimates presented in their 2013 tax gap data, the non-UK duty paid proportion of the cigarette market represents 5.5 billion cigarettes (constituting 12% of the cigarette market). On that basis, 1% of the cigarette market would represent approximately 460 million cigarettes. Therefore, a 1.76% increase in the non-UK duty paid market would result in over 800 million additional cigarettes per year and over 8 billion additional cigarettes over ten years, being smoked in the UK as a result of introducing plain packaging. The terms “additional” and “more” are used to reflect JTI’s understanding of the term “transfer” as used by the 2014 IA (i.e. in addition to the amount of non-UK duty paid products available absent the policy, with an equal reduction in the UK duty paid products – with the displacement being from the UK duty paid to UK non-duty paid). See paragraphs 141, 142 and 181 of the 2014 IA.

113 The methodology for calculating the impact of a 2% “transfer” from the UK duty paid market to the non-UK duty paid market for cigarettes (as described in endnote 112 above) was used to calculate what this “transfer” might mean if applied to RYO products. The RYO-to-cigarette conversion used is based on UK smokers using an average of 0.4g of RYO tobacco to roll one cigarette. 2% of 58% (which, according to HMRC, is the size of the UK duty paid RYO market) is

1.16%. On that basis, the non-UK duty paid RYO market would increase by 1.16% to 43.16% of the total RYO market as a result of plain packaging. According to HMRC's mid-point estimates presented in their 2013 tax gap data, the non-UK duty paid proportion of the RYO market represents an equivalent of 11.8 billion cigarettes (constituting 42% of the RYO market). This would mean that 1% of the RYO market would represent approximately an equivalent of 280 million cigarettes. Therefore, a 1.16% increase in the non-UK duty paid market would represent an equivalent of over 300 million additional cigarettes per year, and an equivalent of over 3 billion additional cigarettes over ten years, being smoked in the UK as a result of plain packaging.

114 The 11 billion figure combines over 8 billion cigarettes being smoked as a result of plain packaging over a decade (see endnote 112 above) and an equivalent of over 3 billion cigarettes being smoked (converted from RYO using the conversion set out in endnote 113 above) as a result of plain packaging over a decade (see endnote 113 above).

115 The 2014 IA, paragraph 128.

116 The 2014 IA, paragraphs 25 and 26.

117 The 2014 IA, paragraph 137.

118 As shown above in endnote 112, a 1% increase in non-UK duty paid cigarette market (regardless of whether CBS or illicit trade) would represent an additional 460 million non-UK duty paid cigarettes over a year.

119 HMRC, "Man arrested in tobacco smuggling raids" (26 June 2014), accessed via: <http://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/man-arrested-in-tobacco-smuggling-raids-1013394>. In addition, one of the biggest seizures in 2013 seized 30.3 million cigarettes that arrived in three containers from China. See "Millions of smuggled cigarettes seized in wind turbine shipment" (7 March 2013), accessed via: <http://www.thecre.com/cc/?p=2292>.

120 A 1% increase in illicit cigarettes would represent additional 460 million illicit cigarettes – which is 14 times more in terms of the number of cigarettes than the 32 million cigarettes seized as a result of this seizure.

121 As shown above in endnote 113, a 1% increase in non-UK duty paid RYO market (regardless of whether CBS or illicit trade) would represent an equivalent of additional 280 million non-UK duty paid cigarettes over a year.

122 Combining an additional 460 million illicit cigarettes (see endnote 118 above) and an equivalent of 280 million illicit cigarettes (converted from RYO using the conversion set out in endnote 113 above) totals nearly 750 million additional illicit cigarettes.

123 In respect of the funding of terrorist activities, see, for example, written evidence from the Police Service of Northern Ireland provided to the House of Commons Select Committee on Northern Ireland Affairs: <http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmniaf/886/886we06.htm>.

124 "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.

125 "An analysis of smoking prevalence in Australia", London Economics, November 2013, page 1 (for Philip Morris International).

126 "Illicit tobacco in Australia", KPMG dated 3 April 2014. Available via: https://www.imperial-tobacco.com/assets/files/cms/KPMG_FY2013_Illicit_Trade_Report_FINAL_11_April_2014.pdf. As identified in that document, the report was prepared by KPMG at the request of Philip Morris Limited, British American Tobacco Australia and Imperial Tobacco Australia Limited. KPMG provides a detailed explanation of its methodology in Appendices 1 and 2 to that report.

127 "Corporate report, Britain Open for Business: The Next Phase", published 24 January 2014. Available via: <https://www.gov.uk/government/publications/britain-open-for-business-the-next-phase>.

128 *Ibid.*

129 The response of 'N/A' to the question in the 2014 IA of whether plain packaging "goes beyond minimum EU requirements?" is both incorrect and misleading.

130 "Fallon: No more 'gold plating' of EU laws", BIS Press release, issued on 25 February 2013. Available via: <https://www.gov.uk/government/news/fallon-no-more-gold-plating-of-eu-laws>.

131 See the RPC's opinion of the 2014 IA, published 25 July 2014, available via: <https://www.gov.uk/government/publications/impact-assessment-opinion-standardised-packaging-of-tobacco-products>.

132 See the Institute of Directors' submission to the 2012 Consultation, available via: <http://www.iod.com/influencing/policy-papers/regulation-and-employment/consultation-on-standardised-packaging-of-tobacco-products>.

133 See the September 2013 report: "Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union", a joint project between the European Patent Office and the Office for Harmonization in the Internal Market. Available via: http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf.

134 See the ICC's 2014 report, "The ICC Intellectual Property Roadmap: current and emerging issues for business and policymakers", available at: <http://www.iccwbo.org/products-and-services/trade-facilitation/ip-roadmap/>.

135 Taken from a speech by the Secretary of State for BIS, Vince Cable MP, to the Alliance for Intellectual Property on 17 October 2013. Available via: <http://www.allianceagainstiptheft.co.uk/dev/downloads/pdf/Cableextracts.pdf>.

- 136 See “*Banking on IP: An Active Response*”, the IPO’s March 2014 report, available via: <http://www.ipo.gov.uk/ipresearch-bankingip-2014.pdf> where the IPO set out that: “*Intellectual property matters. Whereas, in the not too distant past, the majority of business investment was in people or physical things like premises and machinery, today the majority of business investment is in intangible goods, in ideas and creativity. Making sure that our entrepreneurs, innovators and creators can translate their investment in the creation of intellectual property assets into value is key to the UK’s long term growth prospects.*”
- 137 See “*The Role of Government in Promoting and Protecting Intellectual Property*”, the All-Party Parliamentary IP Group, October 2012 report, available at: <http://www.allpartyipgroup.org.uk/pdfs/The%20role%20of%20Government%20in%20promoting%20and%20protecting%20IP.pdf>.
- 138 See the IP Report available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318338/IP_crime_highlight_report.PDF. This report was published ahead of the International IP Enforcement Summit held in London in 2014.
- 139 See a press release by the Secretary of State for BIS, published on 11 June 2014. Available via: <https://www.gov.uk/government/news/government-committed-to-tackling-ip-crime>.
- 140 “*Tobacco Regulation: The Plains are Coming*”, Exane BNP Paribas, as reported in The Irish Times on 21 July 2014, <http://www.irishtimes.com/business/sectors/retail-and-services/tobacco-giants-may-sue-over-plain-packaging-1.1872475>. Separately, JTI notes, but disagrees with, the opinion of a Citi research paper dated 17 July 2014, available via: <https://ir.citi.com/AmJ5AjCP5eMaMqRFMDZdT0970wmlPJELAPbTaGBCALA%3D>.
- 141 See recital 29, available via the European Commission’s website: http://ec.europa.eu/internal_market/indprop/tm/index_en.htm.
- 142 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>.
- 143 *Ibid.*
- 144 On 17 June 2014, Ireland notified the European Commission of its draft plain packaging legislation under the Technical Standards Directive (98/34/EC).
- 145 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>.
- 146 See endnote reference 141 (recital 10).
- 147 See endnote 74.
- 148 Paragraphs 18 and 19 of the Secretary of State’s Summary Grounds for contesting the claims.
- 149 See TRIS notification 2014/277/IRL, which states: “*Issue of a detailed opinion by: BALGARIJA, PORTUGAL, SLOVENSKO. The issue of a detailed opinion extends the standstill period*”. Available via: http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&iYear=2014&inum=277&lang=EN&sNLang=EN.
- 150 The full judgment of *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012), is available via: <http://www.austlii.edu.au/au/cases/cth/HCA/2012/43.html>.
- 151 *Ibid.*, paragraph 81, *per* Gummow J.
- 152 *Ibid.*, paragraph 101, *per* Gummow J, who held that: “*there is sufficient impairment, at least of the statutory intellectual property of the plaintiffs, to amount to a "taking", but there is no acquisition of any property.*”
- 153 See footnote 8 of the Opinion of the EU Committee on Legal Affairs available via: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0276+0+DOC+XML+V0//EN>.
- 154 See paragraphs 6.21 to 6.33 of JTI’s 2012 consultation response.
- 155 The expert opinion of Professor Gervais on the interpretation of TRIPS and the Paris Convention, prepared at the request of JTI, was annexed to JTI’s 2012 consultation response. Available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.
- 156 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 significant number of WTO members have repeatedly argued against plain packaging legislation, claiming that it infringes TRIPS, the Paris Convention and / or TBT requirements.
- 157 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=&subjectid=&searchpage=&&catid=122285,122596,122861,123036,123123,123310,123394,123416,123411,123412,123426,123607,123606,123605,123618,123617,123619,123634&languageuichanged=true#.
- 158 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>.
- 159 See “*Intellectual property meeting mulls Irish tobacco plan, drug tariffs, sport, non-violation*”, 10 and 11 October 2013, available via: http://www.wto.org/english/news_e/news13_e/trip_10oct13_e.htm#plainpackaging.
- 160 See, for example, MARQUES’ submission to the EU Commission’s proposal for a revised TPD of 26 April 2013, available via: <http://www.marques.org/positionpapers/default.asp>, “*such restrictions [contained by TPD2] on both figurative and*

word trade marks would be in **direct conflict with Article 20 of TRIPS** which protects trade marks against being “unjustifiably encumbered by special requirements, such as ... use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings...Furthermore, TRIPS requires that any encumbrance must be demonstrably justified to protect public health and nutrition. In this context, it should be considered that there appears to be **no authoritative or unequivocal evidence that introducing standardised packaging would help diminish tobacco consumption**...There is therefore no justification for the severe restrictions of use or the entire removal of trade marks on tobacco packaging” (emphasis added).

161 For example, paragraph 5.7 of the Consultation Document says: “...the draft regulations specify the same colours as those required in Australia (Pantone 448C for packaging and Pantone Cool Grey 2C for any allowed text).”

162 In this respect, see, for example, paragraph 2.27 of JTI’s 2012 consultation response and paragraph 7.2 of JTI’s 2008 consultation response.

163 “Improving Regulation”, an independent report on the analysis supporting regulatory proposals, January-December 2011, published by the RPC via:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252699/improvingregulationrpreportmarch2012.pdf.

164 The RPC’s 2012 opinion explains that: “If an IA receives an Amber flag, this means we have areas of **concern with the quality of analysis and evidence presented**. These issues should be addressed prior to the IA being finalised so as to improve its contribution to the final decision made. On this understanding, we judge the IA to be ‘Fit for Purpose” (emphasis added).

165 See the RPC opinion issued in respect of the 2012 Impact Assessment, available via:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260631/RPC-Published-Opinions-2012.pdf, page 94.

166 2012 IA, page 3.

167 See RPC’s response to ‘Understanding the Impact of Regulatory Policy Committee Amber Opinions’ research, published 12 June 2014. Available via: <https://www.gov.uk/government/publications/rpc-response-to-understanding-the-impact-of-regulatory-policy-committee-amber-opinions-research>. The RPC’s opinion (see endnote 131) also expressly recognises the 2014 IA as being ‘fit for purpose’ only “provided the Department addresses the points set out in this opinion.”

168 See endnote 131.

169 Watts, M. (1992). “What is a Market Economy? U.S. Information Agency”. In this publication, which a US academic wrote for the US Department of State and which has since been translated into Russian, Polish, Korean and more than thirty other languages, it was stated: “Market economies may be practical, but they also rest upon the fundamental principle of **individual freedom: freedom as a consumer to choose among competing products and services... To begin with, no government ministry decides how many shirts or blouses to manufacture, or what styles and colors. Anyone -individual or company - can decide to produce and sell shirts and blouses in a market economy, and many will do just that if they believe they can sell these products at prices high enough to cover their production costs - and earn more making such clothing than they can doing something else. This leads to direct competition between different firms making and selling these products, and that competition is one of the basic reasons why there are generally so many different styles, fabrics, and brands of clothing for consumers to choose from...**” (emphasis added). Available via:

[http://www.google.co.uk/url?url=http://guangzhou.usembassy-china.org.cn/uploads/images/8gf3puqY0bmOJc11MVDCZg/What Is a Market Economy.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=9arfU5DAPOSQ7Ab0woD4Cw&ved=0CBQQFjAA&usg=AFQjCNHH5m5BAxDBJnPdORCrU8nn4jPf8A](http://www.google.co.uk/url?url=http://guangzhou.usembassy-china.org.cn/uploads/images/8gf3puqY0bmOJc11MVDCZg/What%20Is%20a%20Market%20Economy.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=9arfU5DAPOSQ7Ab0woD4Cw&ved=0CBQQFjAA&usg=AFQjCNHH5m5BAxDBJnPdORCrU8nn4jPf8A).

170 See paragraph 4.24 of this response and also, for example: “The economic importance of brands – seven reasons why brands really matter”, British Brand Groups: <http://www.britishbrandsgroup.org.uk/library/download/462e21762ce5f>; and “Importance of branding to the UK economy”, Intellectual Property Awareness Network: <http://www.ipaware.net/node/41>.

171 See, respectively, “PM speech at Open Government Partnership 2013”, 31 October 2013, <https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013>; the Prime Minister was unequivocal about the benefits of free markets when campaigning for the leadership of the Conservative Party in 2005, available via: <http://www.theguardian.com/politics/2005/nov/08/toryleadership2005.conservatives>; “The importance of Scotland to the UK: David Cameron’s speech”, 7 February 2014, <https://www.gov.uk/government/speeches/the-importance-of-scotland-to-the-uk-david-camerons-speech>; and the report of the Conservative 2012 conference held in Birmingham, 7 October – 10 October 2012: <http://www.theguardian.com/politics/2012/oct/10/david-cameron-leader-aspiration-nation> and <http://www.telegraph.co.uk/news/politics/conservative/9598534/David-Camerons-Conservative-Party-Conference-speech-in-full.html>. Emphasis added in quotes.

172 As explained above, many of the most serious failings of the 2014 IA are due to the DH failing to commission the independent expert reviews on the wider aspects of the policy that JTI has repeatedly called upon it to do.

173 2014 Consultation, paragraph 1.1, page 2.

174 HC Deb 28 November 2013; col 409.

175 See the unrevised transcript of evidence taken before the Select Committee on Science and Technology, 25 June 2014. Available via: <http://www.parliament.uk/documents/lords-committees/science-technology/behaviourchange/behaviourchange/04ucST240614.pdf>.

176 HC Deb 10 Feb 2014; col 605.

177 See the letter from Professor Dame Sally Davies to Jane Ellison, dated 2 April 2014, available via:
[http://data.parliament.uk/DepositedPapers/Files/DEP20140559/Chief Medical Officer to Parly USec Public Health Chantler Review.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP20140559/Chief_Medical_Officer_to_Parly_USec_Public_Health_Chantler_Review.pdf).

178 HC Deb 10 Feb 2014; col 602.

179 HC Deb 3 April 2014; col 1122.

180 HC Deb 3 April 2014; col 1029.

181 See endnote 74.

182 HC Deb 3 April 2014; col 1019.

183 See, for example, questions from Fiona Bruce MP: “*I strongly support the Minister’s statement and proposals. Does she agree that if 4,000 children a year can be discouraged from taking up smoking there will be a double public health win—not only better health outcomes for those 4,000, but the release of funds for the health treatment of others in their generation for illnesses and disease? Those funds would otherwise have to be used, in time, to treat many of those 4,000 for smoking-related diseases*” (HL Deb 3 April 2014, vol 753: col 1024) and Luciana Berger MP: “*As Sir Cyril says, if we can reduce that figure by even 2%, 4,000 fewer children will take up smoking each year. For that reason, I strongly welcome the fact that Sir Cyril’s review confirms what public health experts have been arguing for some time: standardised packaging makes cigarettes less attractive to young people and could help to save lives*” (HL Deb 3 April 2014, vol 753; col 1019.).

184 These figures were also repeated, absent any meaningful context, by Sir Cyril Chantler in the BBC2 documentary “*Burning Desire: The Seduction of Smoking*,” originally broadcast on Thursday 29 May 2014: “*The 2% reduction in the 200,000 or so young people who start smoking each year would be 4,000 young people not starting to smoke each year which, of course, would translate eventually into a huge saving in terms of lives.*”

185 Chantler Report, paragraph 18, page 6.

186 Chantler Report, paragraph 6.11, page 40.

187 See ASH media release, published 16 July 2014, available via: <http://www.ash.org.uk/media-room/press-releases/huge-drop-in-australian-smoking-rates-attributed-to-standardised-packs>.

188 For JTI’s press release, see: http://www.jti.com/files/7414/0595/4753/JTI_Australia_ASH_Final_180714.pdf. See also the letter from Mr Daniel Torras (JTI’s UK Managing Director) to the Financial Times on the same issue: <http://www.ft.com/intl/cms/s/0/1abf3096-08f8-11e4-8d27-00144feab7de.html#axzz39REdyoVW>.

189 As we noted in that letter, consistent with principles of Better Regulation this present Consultation should have been for a minimum 12 week period. Indeed, the Cabinet Office’s own “*Consultation Principles: guidance*” recognises that: “*Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response... For a new and contentious policy, 12 weeks or more may still be appropriate.*” The unfairness of such a short consultation period is exacerbated by the fact that Sir Cyril Chantler had nearly three times as long to produce his report (27 November 2013 to 31 March 2014 being nearly 18 weeks), and which, unlike the present exercise, was only required to consider one (albeit important) aspect of the implications of proceeding with plain packaging.

190 2014 Consultation, page 2.

191 See the summary of responses to the 2012 Consultation, available via: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212074/Summary of responses to consultation - standardised packaging tobacco.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212074/Summary_of_responses_to_consultation_-_standardised_packaging_tobacco.pdf). Separately, it is apparent from a response received to a FOIA request made by JTI (ref: DE00000832529) that in respect of the 2012 consultation, TONIC, the company which the DH requested carry out a review of the responses: “*was asked by the Department to consider the responses to the consultation and produce a summary report of the key themes arising from this, rather than making a judgement on the quality of the evidence provided*” (emphasis added).

192 See endnote 191 (page 13 of that document). Separately, the way the DH relies on consultation responses differs to how they have done so previously. In the summary report to the 2008 Consultation, the DH relied upon the fact that 98% of respondents were in favour of plain packaging to underline their intention to publish a consultation on plain packaging in 2012. It has not been made clear why the DH has shifted from relying on numbers to advance their position to ignoring their relevance now. The same logic dictates that the fact that the clear majority of respondents (over two-thirds) were, in 2012, opposed to plain packaging underlines why the DH should not now depart from its July 2013 stated position on this policy.

193 See the DH’s news release: “*How standardised tobacco packaging would work in practice.*” Published 26 June 2014, available via: <https://www.gov.uk/government/news/how-standardised-tobacco-packaging-would-work-in-practice>.

194 See endnote 191, page 8 and the distinction drawn between “*Detailed responses that addressed multiple consultation questions*” (2444 responses) and “*Campaign responses*” (665,989 responses).

195 This is an example of a response submitted to the 2012 Consultation. Available via: <https://www.gov.uk/government/consultations/standardised-packaging-of-tobacco-products>.

196 *Ibid.*

197 The statement of Secretary of State Jeremy Hunt MP, is available via: <https://www.gov.uk/government/news/consultation-on-standardised-packaging-of-tobacco-products>.

198 See the DH press release: <https://www.gov.uk/government/news/independent-review-of-standardised-packaging-for-tobacco>.

199 Sir Cyril Chantler also sought assistance from: Dr Yanzhong Wang and Professor Janet Peacock (both from King's College, London) and Professor Catherine Pope (University of Southampton), in order to assess the systematic review of the evidence on the public health effects of plain packaging, initially commissioned by the DH as part of the 2012 Consultation (but as updated) i.e. the Stirling review; and Mr James Dollis and Mr Mark Ransford, in order to work on price and illicit trade issues.

200 Chantler Report, paragraph 1.10, page 12. As noted in the method statement, the Chantler Review Team also visited Australia to take account of the experience of plain packaging in that country.

201 JTI's key regulatory submissions are available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

202 The DH also held separate meetings with other members of the TMA in or around this time. Despite being the lead department in proposing numerous pieces of tobacco control legislation, JTI understands that this was the first time in several years that the DH had met with any TMA member on such issues. Inevitably, it is very difficult to develop legislative proposals that are necessary, proportionate, evidence-based and in line with Better Regulation principles if a regulator refuses to engage directly on a regular basis with members of the industry it regulates.

203 See <https://www.gov.uk/government/news/government-response-to-tobacco-standardised-packaging-review>.

204 See endnote 56.

205 See "*Behaviour change: the principles for effective intervention*", NICE Guidance, published October 2007 available via: <http://www.nice.org.uk/guidance/ph6/resources/guidance-behaviour-change-the-principles-for-effective-interventions-pdf>.

206 *Ibid*, page 6.

207 *Ibid*, paragraph 2.16.

208 Note of meeting between Sir Cyril Chantler and Professor Steinberg, 5 March 2014. Transcript available via: <http://www.kcl.ac.uk/health/packaging-docs.aspx>.

209 Emphasis added. Chantler Report, paragraph 14, page 5.

210 Chantler Report, paragraph 4.22, page 30.

211 Webb, T.L., and Sheeran, P. (2006). "*Does Changing Behavioral Intentions Engender Behavior Change? A meta-analysis of the experimental evidence*". *Psychological Bulletin*. Vol. 132, No.2, pages, 249-268.

212 *Ibid*, page 260.

213 Chantler Report, paragraph 4.21, page 29.

214 In these articles, non-conscious processes are also called "*implicit attitudes*", "*automatic processes*" or "*automaticity*", depending on the source.

215 Webb et al. (2006), page 263.

216 Sheeran, P., Gollwitzer, P.M. Bargh, J. A. (2013). "*Non-conscious Processes and Health*", *Health Psychology* 2013, Vol. 32, No. 5, pages 460-473.

217 Sheeran et al. (2013), page 464.

218 *Ibid*.

219 Marteau TM, Hollands GJ, Fletcher PC, (2012). "*Changing human behavior to prevent disease: the importance of targeting non-conscious processes*". *Science*. 337, pages 1492-5.

220 *Ibid*, page 1494.

221 Chantler Report, paragraph 4.22, page 30.

222 Marteau et al. (2012), page 1494.

223 *Ibid*.

224 The priming studies are not relevant to determining the effect of standardised packaging on actual behaviour because they do not include interventions that alter the environment, comprising the sensory qualities or visual design of the product that is actually consumed and its packaging. The corollary of reducing consumption in the absence of such interventions, for example, by way of "*intermediate outcomes*", is also not discussed, nor can it be in these types of studies.

225 *Ibid*.

226 Chantler Report, paragraph 3.18, page 22.

227 Chantler Report, paragraph 4.22, page 30.

228 Robinson TN et al, (2007). "*Effects of Fast Food Branding on Young Children's Taste Preferences. Archives of Paediatric and Adolescent Medicine*". Vol 161, No.8.

229 *Ibid*, page 796.

230 Harris JL, Bargh JA and Brownell KD, (2009). "*Priming Effects of Television Food Advertising on Eating Behaviour*". *Health Psychology*. Vol 28, No 4, pages 404-413.

231 *Ibid*, page 410.

232 Marteau TM, Hollands GJ, Fletcher PC, (2012). "*Changing human behavior to prevent disease: the importance of targeting non-conscious processes*". *Science*. 337, page 34.

233 Chantler Report, paragraph 4.22, page 30.

234 Marteau et al. (2012), page 34.

235 Hollands et al. (2013), abstract from article via: <http://www.biomedcentral.com/1471-2458/13/1218>.

236 Chantler Report, page 4.

237 Chantler Report, paragraph 4.22, page 30.

238 Young, J. et al., “Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis.” *Med J Aust* 2014; 200 (1): 29-32.

239 Zacher, M. et al., “Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips.” *Addiction*. 2014 Apr;109(4):653-62. doi: 10.1111/add.12466. Epub 2014 Feb 25.

240 Wakefield, M et al. “Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study”. *BMJ Open* 2013;3:e003175 doi:10.1136/bmjopen-2013-003175.

241 See Sir Cyril’s Chantler’s note of his meeting with Professor Devinney, 28 February 2014. Available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx> (page 28).

242 Chantler Report, paragraph 18, page 6.

243 Chantler Report, paragraph 14, page 5.

244 Chantler Report, paragraph 6.2, page 38. The quote continues: “It strongly supports the intermediate outcomes identified, and, taking into account the wider evidence around marketing, and drawing on modern behavioural psychology, there is a clear plausible link to behaviour.”

245 Chantler Report, paragraph 12, page 5.

246 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://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx> (page 4).

247 Professor Devinney’s 2014 report, paragraph 4.4, page 27. Available via: http://www.jti.com/download_file/1246/629/.

248 See endnote 241 (page 27).

249 See endnote 247, paragraph 4.10(b).

250 “Evidence vital to the tobacco debate”, Dr Neil McKeganey, Letters to the Editors, Scotland on Sunday, 27 April 2014.

251 Chantler Report, box 1, page 23. Further, JTI notes that some lobbyists (including an executive agency of the DH) have even tried to suggest that it will take “many years” to discern the impact of plain packaging. The PHE submission to the Chantler Review states, at page 12: “Given that standardised packaging has been introduced in only one country for a period of just over 13 months, it is inevitable that the evidence supporting the case for this approach is based upon measures of process rather than measures of outcome. Changes in the initiation rates of smoking among children and young people will take **many years** to be properly discerned, and have wide confidence intervals that are a consequence of limitations upon survey size. Similarly, changes in overall prevalence of smoking require long periods of observation” (emphasis added), available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270768/Independent_review_into_standardised_packaging_of_tobacco_PHE_response.pdf. See also endnote 89 of JTI’s Chantler Submission.

252 Chantler Report, box 4, page 36. Subsequent to the Chantler Report, PMI has, for example, reported in its 2014 Second-Quarter Results Conference Call July 17, 2014 as follows: “...[In] Australia... the combination of a certain commoditization of the market, induced by plain packaging, large excise tax increases, and heavy price discounting, particularly at the bottom of the market, has accelerated down-trading to lower price, lower margin brands, or even illicit products. The super-low price segment has grown from 6.3% in 2011 to 28.3% in the first half of this year, when the effective price gap between a premium brand, such as Marlboro, and a super-low price brand, such as Bond Street, widened to about eight Australian Dollars per pack of 25 cigarettes, or about 36%. This compares to a gap of about 26% in 2011.” Available via: <http://www.sec.gov/Archives/edgar/data/1413329/000141332914000036/a2014-07x16x2014xjixsecond.htm>.

253 Chantler Report, paragraph 4.23, page 30.

254 See endnote 56.

255 Chantler Report, paragraph 1.19, page 13.

256 Chantler Report, paragraph 10, page 4.

257 Maynard, M. et al., (2014). “Plain packaging of cigarettes and smoking behavior: study protocol for a randomized controlled study”, *BioMed Central, Trials* 2014, 15:252.

258 Chantler Report, paragraph 1.20, page 13. JTI considers it notable that Sir Cyril Chantler refers to the “**best available evidence**” (emphasis added), which is clearly more qualified than any assessment of “the best evidence” (the latter being more conducive to satisfying the Government’s Better Regulation requirement for “robust and compelling” evidence).

259 Chantler Report, paragraph 4.17, page 28.

260 See endnote 241 (page 26).

261 Bonnefoy et al. November 2007. “*Constructing the evidence base on the social determinants of health: a guide.*” Available
via: http://www.who.int/social_determinants/knowledge_networks/add_documents/mekn_final_guide_112007.pdf.

262 *Ibid*, paragraph 9.1.1.

263 *Ibid*.

264 Chantler Report, Annex E: Stirling Review and Update : Qualitative studies. Analysis by Professor Catherine Pope,
Southampton University, page 56.

265 *Ibid*, page 57.

266 *Ibid*.

267 Chantler Report, paragraph 4.7.

268 See the Cochrane Collaboration website, available via: <http://www.cochrane.org/about-us>.

269 See endnote 241.

270 A number of third party statements have previously called into question the science of the Cochrane Collaboration. See for
example Shrier, I. (2003). “*Cochrane reviews: new blocks on the kids*”, British Journal of Sports Medicine, 37:473-474 and
Groves, T. (2014) “*How bloggers responded to the updated Cochrane reviews on Tamiflu and Relenza*”, British Medical
Journal, 24 April 2014.

271 Chantler Report, paragraph 4.8, page 26.

272 At paragraph 1.13 of his report (page 12), Sir Cyril Chantler notes that: “*a number of papers referenced in the tobacco
industry’s submissions were considered in detail after identification of those that appeared most relevant to the task. The
voluminous literature on tobacco control was also scrutinised to the extent that time allowed, including material sourced
from references in submissions, published papers and previous reviews.*” It is not made clear how the Chantler Review
team assessed which papers were considered “*most relevant to the task*” or whether the Chantler Review team took a
similar approach when assessing submissions from proponents of plain packaging.

273 Professor Steinberg’s Letter to Sir Cyril Chantler dated 7 January 2013, page 9. See also Professor Laurence Steinberg
(2010): “*Adolescent Decision Making and the Prevention of Underage Smoking*”, annexed to JTI’s 2012 Consultation
response, pages 28-29.

274 Chantler Report, paragraph 4.6, page 26.

275 Chantler Report, paragraph 4.14, page 27.

276 See endnote reference 241, page 28.

277 See endnote 124.

278 “*An analysis of smoking prevalence in Australia*”, London Economics, November 2013, page 1.

279 See endnote 273, page 29.

280 *Ibid*.

281 In respect of the issue of whether plain packaging has caused an increase in youth smoking, see paragraph 2.29 of Annex 1
to this response.

282 See endnote 90 and Professor Steinberg’s Report referred to at endnote 273.

283 Chantler Report, paragraph 6.2, page 38.

284 See endnote 241, page 28.

285 Hatchard, J. et al. (2014). “*Representation and Misrepresentation of Scientific Evidence in Contemporary Tobacco
Regulation: A Review of Tobacco Industry Submissions to the UK Government Consultation on Standardised Packaging*”,
PLOS.

286 Chantler Report, paragraph 4.15, page 28.

287 Chantler Report, paragraph 3.16, page 22.

288 For example: (a) the statement by Ronald Ridderbeekx (paragraph 3.1) refers only to brand switching activities between
existing adult smokers; (b) the 1992 PMI report on marketing perceptions (paragraph 3.2) refers to adult female smokers
(as an aside, JTI queries: (i) how relevant the views expressed in a document that is over 20 years old can be, not least
because of the extent and scope of regulatory change in the UK since then; and (ii) the applicability of historic documents
belonging to one manufacturer, to other manufacturers); (c) the Kotnowski and Hammond review (paragraph 3.3) considers
documents which discuss particular segments of the adult smoking population; and (d) the statement by the former JTI
executive (paragraph 3.3) again refers simply to the launch / rejuvenation of a new product, and is clearly referable to brand
switching amongst existing adult smokers.

289 See Chantler Report, paragraph 4.22, page 30. The Chantler Review Team met with: (a) Kate Waters “*to gain insight into
‘how marketing works’; how it is approached by marketing departments/agencies, and where the role of packaging fits in
this field of expertise*”; and (b) Andy Knowles “*to better understand the purpose of packaging, and its relationship to
marketing*”. These discussions are not discussed or acknowledged in the Chantler Report.

290 Chantler Report, paragraph 3.9, page 20.

291 The Chantler Report variously and wrongly confuses and / or conflates the concepts of “*branding*”, “*packaging design*”
(paragraph 6.10), “*product design*” (paragraph 3.6) and “*advertising and promotion*” (paragraph 3.7), despite these being
specialised areas that work in different ways.

292 Chantler Report, paragraph 3.22, page 24.

293 In this context, it is important to differentiate between products (such as cigarettes or tea) and brands (such as Camel or
Twinings).

294 Chantler Report, paragraph 7, page 4.

295 Capella ML, Taylor, CR and Webster, C. (2008). “*The effect of cigarette advertising bans on consumption*”, Journal of
Advertising, Vol. 37, Issue 2, 7.18.

296 Grabowski, H. (1978), “*The effects of advertising on intra-industry shifts in demand*”, Explorations in Economics Research,
Vol. 3, 675-701, Lambin, J. (1976), “*Advertising, Competition and Market Conduct in Oligopoly Over Time*”, Amsterdam:
North-Holland Publishing Co, as cited in Mullond JP (1989), “*The Effect of Advertising on the Level and Composition of
Cigarette Consumption*”, 13 November 1989.

297 See paragraph 3.8, FTC document.

298 Chantler Report, paragraph 8, page 4.

299 *Ibid.*

300 Chantler Report, paragraph 7, page 4.

301 See, for example, Lancaster, M, and Lancaster, A. (2003), “*The economics of tobacco advertising: spending, demand and
the effects of bans*”, International Journal of Advertising 22 and Duffy, M (1996), “*Econometric studies of Advertising,
Advertising Restrictions and Cigarette Demand: A Survey*”, International Journal of Advertising, Vol 15, Issue 1, 1.23.

302 Gallup Org. (1993), “*Smoking Prevalence, Beliefs and Activities, by Gender and Other Demographic Indicators*”.

303 See paragraph 2.11 of JTI’s Chantler Submission, and paragraph 3.8 of the FTC document.

304 For example, Nelson, JP (2003), “*Youth smoking prevalence in developing countries, effects of advertising bans*”, Applied
Economic Letters, Vol. 10, 805-811, Lancaster and Gotthoffer (2000) “*The Economics of Tobacco Advertising: Spending,
Demand and the Effects of Bans*”, Proceedings of the American Academy of Advertising, Newport, Rhode Island, April 14-
17, 200, Duffy, M (1996), “*Econometric studies of Advertising, Advertising Restrictions and Cigarette Demand: A Survey*”,
International Journal of Advertising, Vol 15, Issue 1, 1.23, and Stewart MJ (1993), “*The Effect on Tobacco Consumption of
Advertising Bans in OECD countries*”, International Journal of Advertising, 12, 155-180.

305 The transcript of the relevant part of the hearing is available via:
<http://www.austlii.edu.au/au/other/HCATrans/2012/91.html>.

306 JTI’s 2012 consultation response, paragraphs 4.8 and 4.9.

307 Indeed a letter dated 16 December 2013, written by the Parliamentary Under Secretary of State at the DH, shows that Sir
Cyril Chantler had not planned to consider illicit trade at all: “*You ask for the review of Sir Cyril Chantler is undertaking on
whether the introduction of standardised packaging is likely to have an effect on public health, to be extended to include
the possible impact on the illicit tobacco trade. I am afraid this is not possible.*” This letter of response to the Common
Sense Alliance was disclosed in response to a Freedom of Information request, published on the DH website. Available
via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310952/FOI_response_letter.pdf.

308 The risk that the illicit trade will be made worse by the introduction of plain packaging has been recognised by the 2012
Consultation and the accompanying 2012 IA: “*there is a risk that plain packaging may lead to some reversal of the existing
downward trend in the illicit trade in tobacco products*”; and “*it may be argued that plain packaging would be easier and
cheaper to copy, so increasing the supply of illicit tobacco.*” See the 2012 IA, paragraphs 76 and 79.

309 See endnote reference 105.

310 Submission by Iggesund Holmen Group, dated 6 January 2014; meeting with representatives from API Group, Essentra,
Chesapeake and Weidenhammer and their slides; submission of European Carton Makers Association; and former Scotland
Yard Detective Chief Inspector (Will O’Reilly). All available via: <http://www.kcl.ac.uk/health/packaging-docs.aspx>.

311 See, for example the report “*Better Regulation and Certain Tobacco Control Measures*” [http://www.jti.com/how-we-do-
business/resources/](http://www.jti.com/how-we-do-business/resources/) which was prepared by Professor Martin Cave OBE, in 2010 at the request of JTI. Professor Cave is a
regulatory economist specialising in competition law and in the network industries, including airports, broadcasting,
energy, posts, railways, telecommunications and water. He has published extensively in these fields, and has held
professorial positions at Warwick Business School, University of Warwick, UK, and the Department of Economics, Brunel
University, UK. He is now Visiting Professor at Imperial College Business School. He has been a Deputy Chair of the
Competition Commission from January 2012. As explained in paragraph 1.2 of his report, Professor Cave is an expert in
regulatory economics who has specialised knowledge in the design of regulatory policies to achieve economic (and also
social) objectives, including expertise in the field of IAs, having prepared (on behalf of a regulator) and assessed, both from
an academic perspective and on behalf of those to be regulated, such impact assessments. In 2009 he was awarded the
OBE for public service.

312 The statement at paragraph 23 of the 2014 IA that: “*The freedom to have branded tobacco, therefore, carries a cost to
others; and society arguably need not accord value to a freedom that involves inflicting harm on others*” is a powerful
illustration of the manner in which the authors of the 2014 IA are seemingly content not to give meaningful consideration
to the costs of plain packaging.

313 See endnote 131.

314 “*IA Toolkit: How to do an Impact Assessment*”, HM Government (August 2011), page 19.

315 See endnote 311, page 15.

316 2014 IA, paragraphs 149 and 154, pages 37 and 28 respectively.

317 The Green Book, rule 2.14, page 6.

318 2014 IA, page 1.

319 2014 IA, paragraph 149.

320 Health and Social Care Information Centre “*Smoking, Drinking and Drug Use Among Young People in England – 2013*”, 4 July 2014, page 53.

321 2014 IA, paragraph 53.

322 JTI recently entered into agreement to acquire Zandera Ltd., a leader in e-cigarettes best known for its E-Lites brand. See: <http://www.jti.com/media/news-releases/jt-acquires-leading-e-cigarette-brand-e-lites/>.

323 “*E-cigarette uptake*”, A report commissioned by PHE, Professor Linda Bauld, Kathryn Angus and Dr Marisa de Andrade. Available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311491/Ecigarette_uptake_and_marketing.pdf.

324 “*Electronic cigarettes*”, A report commissioned by PHE, Professor John Britton and Dr Ilze Bogdanovica. Available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311887/Ecigarettes_report.pdf.

325 2014 IA, paragraph 203, page 51.

326 See paragraph 6.16. Since the date of JTI’s 2012 consultation response, HM Government also legislated to introduce a proxy purchase offence. It is unclear how, if at all, any effect of this policy (if any) has been factored into the 2014 IA’s baseline analysis.

327 2014 IA, paragraph 149, page 37.

328 Henriksen et al. (2004), “*Association of retail tobacco marketing with adolescent smoking*”, American Journal of Public Health, Dec 2004. Vol 94, No 12; 2081-2083.

329 A further factor severely limiting the relevance of Henriksen’s California based critique of “*retail tobacco marketing*” to the UK is that tobacco product manufacturers have effectively been stopped from advertising their products in the UK for over a decade (this point is explained more generally at paragraph 2.24 of Annex 1).

330 2009 IA, paragraph 48, page 17.

331 See, notably, the reports by Dr Andrew Lilico prepared at the request of JTI: (i) “*Economic Analysis of a Display Ban and/or a Plain Packs Requirement in the UK*” dated 2 September 2008; (ii) “*The impact of restrictions on the display of tobacco products – a supplemental report*” dated 18 October 2009; (iii) “*Economic Analysis of a Display Ban Requirement in England*” dated 28 April 2010; (iv) “*Economic Analysis of Restrictions on the Display of Tobacco Products – 2009 Canadian Annual Smoking Data*” dated 30 November 2010; and (v) “*Economic Analysis of a Display Ban Requirement in England – Supplemental Report*” dated 11 January 2011. Dr Lilico is an expert in microeconomic analysis and regulatory impact assessment. Dr Lilico’s September 2008, October 2009 and November 2010 reports are available via: <http://www.jti.com/how-we-do-business/key-regulatory-submissions/>.

332 2014 IA, paragraph 153 page 38.

333 TPD2 Impact Assessment, 19 December 2012, page 114.

334 The European Commission states, at page 113 of the 2012 TPD2 IA, that the Australian impact assessment estimated that its proposals: “*would result in a 1.3% decline in smoking prevalence rate per annum (12.3% decrease in 10 years) and a 3% decrease in tobacco consumption per capita per annum (26.3% decrease in 10 years).*” In fact, these are the baseline figures cited by the Australian impact assessment. See further, *Cost-benefit analysis of proposed new health warnings on tobacco products*, Applied Economics (Canberra: Applied Economics; 2003), page 14.

335 “*The Introduction of Picture Warnings on Tobacco Packs – Final Regulatory Impact Assessment*”, UK Department of Health (London: UK DoH; 2007).

336 The DH assumed in 2007 that the introduction of pictorial warnings would result in a 0.5% decrease in smoking prevalence. This figure was duplicated from a 2002 DH assumption as to the effect of *written* warnings that, in turn, was derived from a 2001 DH assumption made in relation to the *advertising* ban. See footnote 2 of the 2007 DH “*Final Regulatory Impact Assessment*”.

337 2014 IA, paragraph 151, page 37.

338 See paragraphs 3.37 to 3.41 of JTI’s 2012 consultation response and paragraphs 4.25 to 4.30 of JTI’s Chantler submission.

339 See endnote 247.

340 JTI’s 2012 consultation response, paragraph 3.41.

341 It is our understanding that these are the views of Dr Hora (despite his name being redacted by the DH). This is based on the fact that he was, and still is, the Director, Center for Risk and Economic Analysis of Terrorism Events at the University of Southern California, and he says “*my earlier work is sited [sic]...*” in paragraph 125 of Annex 2 of the 2012 IA, which references Dr Hora and Dr van Winterfeldt’s work.

342 2014 IA, paragraph 135, page 34.

343 2014 IA, paragraph 20, page 7.

344 *Ibid.*

345 2014 IA, summary table, pages 45 to 47.

346 2014 IA, page 46.

347 See endnote 311.

348 JTI's 2012 consultation response, paragraph 6.7.

349 2014 IA, paragraph 22, page 7.

350 2014 IA, paragraph 90, page 24.

351 *Ibid.*

352 See "Ashes to Ashes" Convenience Store news article, published 22 May 2014. Available via:
<http://www.conveniencestore.co.uk/advice/your-business/ashes-to-ashes/357764.article>.

353 HL Deb 6 May 2009; Col 570.

354 See Asda's history via their website: <http://your.asda.com/about-asda/the-history-of-asda>.

355 Qatar Holding LLC is a wholly owned subsidiary of the Qatar Investment Authority (*QIA*) and acts under QIA's direction and control. See further: <http://www.j-sainsbury.co.uk/investor-centre/share-price/major-shareholders/>.

356 JTI's 2012 consultation response, paragraph 5.37(a). See further Dr Lilico's 2012 Report, page 3, available via:
http://www.jti.com/files/3613/4149/4404/Dr_Lilico.pdf.

357 See paragraph 17(c) of JTI's 2012 consultation response.

358 2014 IA, paragraph 84, page 23.

359 See endnote 140.

360 See the MARS submission to the 2012 Consultation, pages 1 and 4.

361 2014 IA, paragraph 22, page 7.

362 See BIS's published policy: Reducing the impact of regulation on business, updated on 10 July 2013. Available via:
<https://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business/supporting-pages/operating-a-one-in-two-out-rule-for-business-regulation>.

363 2014 IA, paragraph 112.

364 See Statistical bulletin: Labour Market Statistics, released June 2014. Available via:
<http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/june-2014/statistical-bulletin.html>.

365 "Unite Parliamentary Briefing: Standardised Packaging and the threat to UK jobs", Unite, July 2014. See also endnote 64.

366 2014 IA, page 1.

367 See JTI's 2012 consultation response, paragraphs 5.18 to 5.20.

368 Dr Lilico's 2012 Report, Summary, point 5 and 6.

369 2014 IA, paragraph 1. See also paragraph 245 of 2014 IA.

370 FTC Document, paragraph 3.76. Available via:
http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_085651.pdf. See also page 3 of the 2014 IA.

371 See Better Policy Making: Ofcoms approach to Impact Assessment. Available via:
<http://www.ofcom.org.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment/>.

372 See endnote reference 311, paragraph 4.13, page 20.

373 2014 IA, paragraph 24, page 8.

374 See, for example the WHO Alcohol fact sheet, updated May 2014. Available via:
<http://www.who.int/mediacentre/factsheets/fs349/en/>.

375 2014 IA, paragraph 261, page 69.

376 2014 IA, paragraph 266, page 69.

377 JTI recognises that many people report difficulty quitting smoking. No matter how smoking is described, people can stop smoking if they are determined to do so. No one should believe that they are so attached or 'addicted' to smoking that they cannot quit. See further: <http://www.jti.com/how-we-do-business/smoking-and-health/addiction/>.

378 The Green Book, paragraph 5.25, page 21.

379 See "GSK plc announces major three-part transaction with Novartis to drive sustainable sales growth, improve long-term earnings and delivering increasing returns to shareholders", GSK media release, 22 April 2014. Available via:
<http://www.gsk.com/media/press-releases/2014/gsk-announces-major-three-part-transaction-with-novartis.html>.

380 For example, British American Tobacco plc and Imperial Tobacco Group plc are listed on the London Stock Exchange.

381 The DH could, additionally, also have asked the tobacco manufacturers it met in 2013 (including JTI) about the known extent of their UK and non UK-based institutional investors.

382 See endnote 127.

383 See http://ec.europa.eu/internal_market/top_layer/living_working/services-establishment/index_en.htm and Article 49
Treaty on the Functioning of the European Union.

384 See http://ec.europa.eu/internal_market/capital/index_en.htm and Article 63 Treaty on the Functioning of the European
Union.

385 2014 IA, paragraph 157.

386 2014 IA, page 1.

387 The Green Book, paragraph 5.8.

388 See endnote 386.

389 See endnote 191.

390 2014 IA, paragraph 176, page 48. Also see paragraph 126, page 32: “*The potential impact on the UK duty unpaid market
remains unknown and unquantified. If the illicit market increased significantly it could significantly increase the costs of
standardised packaging policy.*”

391 2014 IA, paragraph 26, page 8.

392 2014 IA, paragraph 136, page 34.

393 2014 IA, paragraphs 117 and 118, page 30.

394 2014 IA, paragraphs 136 and 137, page 34.

395 See endnote 126.

396 *Ibid*, page 6.

397 Australian Customs and Border Protection Service 2012-2013 Annual Report, Table 30, accessed via:
<http://www.customs.gov.au/aboutus/annualreports/2013/p3i.html>.

398 JTI Chantler Submission, paragraphs 7 and 8 of the Schedule. ASH has postulated that illicit traders may be smuggling
packs in plain packaging: “*because people know that’s what it should look like, and if it looks branded, then it will expose it
to looking more like it may be a smuggled pack and therefore, from the supplier’s side, they want their product to go under
the radar*”. See Smokefree Action Coalition meeting with the Chantler Review Team, page 53, available
via: [http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/SmokeFree-Action-
Coalition-27-January-2014.pdf](http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/SmokeFree-Action-
Coalition-27-January-2014.pdf).

399 2014 IA, paragraph 125.

400 See, for instance, paragraphs 129 and 137 of the 2014 IA. The 2014 IA refers to the Chantler Report’s definition of
counterfeit: “*very high quality copies of the pack, but distinguishable from legal duty free through the lack of identifiable
production/security markings*”. There are four issues with this categorisation: (a) as demonstrated in Appendix E of
Professors Zimmerman and Chaudhry’s Report, available via:
http://www.jti.com/files/5113/4150/5828/Impact_on_illicit_trade.pdf, counterfeit packs exhibit a wide spectrum of varying
levels of sophistications; (b) while a counterfeit pack of course would not contain a genuine and, therefore, “*identifiable*”
production/security markings, it is simply not the case that all counterfeits contain no production/security markings; (c) it is
unclear why the Chantler Report distinguishes “*legal duty free*” packs from other types of counterfeits. If this distinction is
made under the assumption that counterfeits are designed to imitate legitimate products manufactured for duty free sale,
this is not the case. In fact, counterfeits of a popular ‘illicit whites’ brands, such as Jin Ling, have been detected; and (d)
the reference to the “*identifiable*” markings seems to imply that they somehow assist in the identification of counterfeits
from legitimate products. This is in line with the arguments often made by tobacco control advocates, which have no basis
on reality. See paragraphs 3.11 to 3.14.

401 The Chantler Report relied on the same assumption. Sir Cyril Chantler rightly raised the point that plain packaging could
increase the demand for illicit products but quickly dismissed the potential problem by concluding that: “*restrictions placed
on supply by border controls*” provides a solution and added that: “[i]llicit tobacco is not a normal market – more people
would buy illicit cigarettes today if they could, but they cannot because supply is limited by effective enforcement.”

402 See pages 6, 13 and 14 of the minutes of Sir Cyril Chantler’s meeting with ASH on 27 January 2014. Available via:
[http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/SmokeFree-Action-
Coalition-27-January-2014.pdf](http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/SmokeFree-Action-
Coalition-27-January-2014.pdf).

403 2014 IA, paragraph 132.

404 The Tobacco Products (Manufacture, Presentation and Sales) (Safety) (Amendment) Regulations 2007. Available via:
http://www.opsi.gov.uk/si/si2007/uksi_20072473_en_2.

405 The 2014 IA states that “*against*” the argument that plain packaging would be easier and cheaper to copy “*it is also clear
that counterfeiters are already able to copy tobacco packaging on the market in the UK at present*”, paragraph 132, page
33.

406 As was explained in the submission by packaging manufacturers, amongst other participants, at meetings held as part of the
Chantler Review (which appear to have been ignored in their entirety). See the submission by Iggesund Holmen Group, 6
January 2014. Available via: [http://www.kcl.ac.uk/health/Packaging-review/packaging-review-
docs/submittedevidence/Iggesund-Holmen-Group-Submission.pdf](http://www.kcl.ac.uk/health/Packaging-review/packaging-review-
docs/submittedevidence/Iggesund-Holmen-Group-Submission.pdf). As explained by a tobacco packaging supplier,
paperboard manufacturers produce and dispose of materials under strict regulations. Plain packaging will make a broader
range of less regulated and more widely available packaging material so become suitable for the tobacco packaging
process.

407 “Investigation: We infiltrate smuggling gang”, The Sun, 4 June 2014.

408 Draft Regulations, Part 2, regulations 3(1) and 7(1); Schedule 1, regulation 1(2)(e); Schedule 3, regulation 1(2)(e).

409 See endnote 105, paragraphs 404 and 409.

410 The 2014 IA mentions the cost of printing machines in the context of the proposed measure’s impact on cost of manufacturing packaging for legitimate manufacturers (see paragraph 94 of the 2014 IA) but fails to consider what impact this may have on illicit traders. According to 2014 IA, a gravure machine costs over £6 million, whereas, an offset printer costs significantly less: £2 million for a new machine and £0.5 million for a second-hand machine.

411 See endnote 398.

412 2014 IA, paragraph 132.

413 *Ibid.*

414 *Ibid.*

415 *Ibid.*

416 “Tobacco smuggling”, House of Commons Home Affairs Committee dated 14 June 2013. Available via: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhaff/200/200.pdf>.

417 *Ibid.*, paragraph 17.

418 See paragraphs 7.6 to 7.15 of JTI’s 2012 consultation response.

419 2014 IA, paragraph 120, page 30.

420 See endnote 105, paragraphs 57 to 64.

421 *Ibid.*, paragraphs 214 to 275.

422 *Ibid.*, paragraphs 404 to 411.

423 See endnote 416.

424 2014 IA, paragraph 132, page 34.

425 JTI’s 2012 Consultation response, paragraph 4.7. See also paragraph 23 of JTI’s written evidence to Home Affairs Select Committee for the Tobacco Smuggling Inquiry, page 100. Available via: <http://www.parliament.uk/documents/commons-committees/home-affairs/Tobacco-written-evidence.pdf>.

426 See TMA’s publication of EU cigarette prices on their website, available via: <http://www.the-tma.org.uk/tma-publications-research/facts-figures/eu-cigarette-prices/>.

427 See the Irish Tobacco Manufacturers’ Advisory Committee website, available via: <http://www.itmac.ie/non-duty-paid/what-is-it/>.

428 See endnote 416.

429 2014 IA, paragraph 131, page 33.

430 See endnote 416.

431 2014 IA, paragraph 38, page 10.

432 Meeting with representatives from API Group, Essentra, Chesapeake and Weidenhammer and their slides; submission of European Carton Makers Association; former Scotland Yard Detective Chief Inspector (Will O’Reilly). All available via: <http://www.kcl.ac.uk/health/Packaging-review/packaging-review-docs/meetingsandbriefings/Notes-of-UK-based-meetings.docx>.

433 2014 IA, paragraph 137, page 35.

434 Chantler Report, paragraph 5.6, page 33.

435 See endnote 126.

436 See endnote 107.

437 2014 IA, paragraph 182, page 48.

438 See endnote 397.

439 2014 IA, paragraph 137, page 34.

440 2014 IA, paragraph 129 page 33.

441 The Chantler Review meeting with the Australian Government Department of Health, Canberra (11 March 2014), page 6. See also: ASH “The illicit market in Australia is very different to [the UK]” (The Chantler Review meeting with SmokeFree Action Coalition, page 64); and Cancer Council Victoria “illicit tobacco use is much more common in the UK than in Australia...”. All available via: <http://www.kcl.ac.uk/health/packaging-docs.aspx>.

442 See endnote 105, paragraphs 214 to 270.

443 The Sydney Morning Herald, “Tobacco industry claims on impact of plain packaging go up in smoke”, 12 March 2014. Available via: <http://www.smh.com.au/federal-politics/political-news/tobacco-industry-claims-on-impact-of-plain-packaging-go-up-in-smoke-20140311-34kfc.html>.

444 2014 IA, paragraph 41, page 10.

445 2014 IA, paragraph 42, page 11 and see endnote 105, paragraphs 222 to 225.

446 See schedule to JTI's 2012 consultation response.

447 Peterborough Evening Telegraph, "HMRC raid uncovers £120k of illegal cigarettes", 16 December 2011.

448 JTI places a health warning on all of its cigarette packs – even if it is not required to do so by law. Our position on health warnings is set out at: <http://www.jti.com/how-we-do-business/regulating-tobacco-products/size-health-warnings/>.

449 "Illicit cigarettes hidden in shop", Liverpool Express, 1 May 2014; "Swindon Polish shop owner sold illegal tobacco", Swindon Advertiser, 20 May 2014; "Sniffer dog finds illegal tobacco in James Bond style secret lair under Wakefield store's floor", The Gazette, 24 May 2014.

450 2014 IA, paragraphs 20 and 140.

451 Chantler Report, paragraph 2.3(a).

452 2014 IA, paragraph 277.

453 HMRC data re RYO is only available from 2000/2001 onwards.

454 See endnote 108.

455 2014 IA, paragraph 136, page 34.

456 Tobacco tax gap estimates 2012-2013, HMRC, Table 1.2. Accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249543/131009_Publication_of_Tobacco_Tax_Gap_estimates_2012-13.pdf. See also paragraph 129 of the 2014 IA.

457 See JTI's submission to the Chantler Review, Section 5, page 23. Available via: http://www.jti.com/download_file/1247/629/.

458 See endnote 92.

459 Sutcliffe K, Brunton G, Twamley K, Hinds K, O'Mara-Eves AJ, Thomas J (2011) "Young people's access to tobacco: a mixed-method systematic review", page 4. London: EPPI-Centre, Social Science Research Unit, Institute of Education, University of London, which is available via: <http://eppi.ioe.ac.uk/cms/LinkClick.aspx?fileticket=1PIIjvuy3Y%3D&tabid=3301>.

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

461 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.

462 See paragraphs 7.6 and 7.12 of JTI's 2012 consultation response.

463 JTI's 2012 consultation response, paragraphs 7.9-7.15.

464 See Tobacco Control Survey, England 2012/13: A report of council trading standards service activity. Available via: <http://www.derby.gov.uk/media/Trading-Standards-Institute-Tobacco-Control-Survey-2012-13.pdf>.

465 Young Persons Alcohol and Tobacco Survey 2013, Trading Standards North West.

466 A group of 500 randomly selected independent retailers across the UK were interviewed by Cheetham Bell JWT, on behalf of JTI, by telephone between 21 October 2013 and 1 November 2013.

467 Department of Justice Northern Ireland consultation "Extension of Unduly Lenient Sentencing Provisions to Fraudulent Excise Evasion For Fuel and Tobacco", May 2013, paragraphs 2.2-2.3 Available via: <http://www.dojni.gov.uk/index/public-consultations/current-consultations/unduly-lenient-sentencing-for-excise-fraud.pdf>.

468 See endnote 461. See also paragraphs 7.35 to 7.36 of JTI's 2012 consultation response.

469 See PHE press release: "Stoptober challenge reaches new high as country's biggest mass quit attempt", published 29 October 2013. Available via: <https://www.gov.uk/government/news/stoptober-challenge-reaches-new-high-as-countrys-biggest-mass-quit-attempt>.

470 See "American teens are less likely than European teens to use cigarettes and alcohol, but more likely to use illicit drugs", Michigan News, June 2012, available via: <http://ns.umich.edu/new/releases/20420-american-teens-are-less-likely-than-european-teens-to-use-cigarettes-and-alcohol-but-more-likely-to-use-illicit-drugs> and "Why do Europeans smoke more than Americans", David M. Cutler and Edwards L. Glaeser, NBER Working Paper No. 12124, March 2006, available via: <http://www.nber.org/papers/w12124.pdf>.

471 See page 8 of Volume 2 of Equality Act 2010 guidance for English public bodies (and non-devolved bodies in Scotland and Wales). Available via: http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/PSED/equality_analysis_guidance.pdf.

472 See "Equalities Analysis: Standardised Packaging", June 2014, page 14: "The policy has the potential to advance equality of opportunity by reducing health inequalities as set out above...". Available via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323404/equalities_analysis.pdf.

473 2014 IA, paragraph 157, page 38 and paragraph 44, page 11. The DH also states in paragraph 10, page 6 of the 2014 IA that: "There is likely to be a number of reasons why people from less affluent backgrounds are less successfully able to quit, including levels of addiction and the socially reinforcing nature of smoking in groups and communities where smoking rates are high." There is no reference to packaging.

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- 474 See paragraphs 4.4 to 4.9, and 4.16 to 4.30 of JTI's 2012 consultation response regarding illicit trade. See paragraphs 5.21 to 5.37 of JTI's 2012 consultation response regarding down-trading.
- 475 See section 5 of Annex 1 to this response in relation to illicit trade. HMRC recognises in its April 2011 publication, *"Tackling Tobacco Smuggling – building on our success"*, that: "[u]nregulated distribution networks associated with smuggling make tobacco more accessible to children and young people and perpetuate health inequalities across socio-economic groups." Research commissioned by ASH also found that: "one in four of the poorest smokers buy smuggled tobacco compare to one in eight of the most affluent" – *Tobacco Smuggling*, ASH, April 2011, page 3.
- 476 The 2014 IA was not published in languages other than English (although the Consultation Document was).
- 477 See endnote 472, page 8. The DH also states in paragraph 42, page 11 of the 2014 IA that: "*If display of branded packets induces take-up within the home and explains the link between parental smoking and take-up, standardised packaging may be helpful in tackling the difference in acculturation to smoking across socio-economic groups.*"
- 478 *Ibid*, page 16.
- 479 *Ibid*.
- 480 *Ibid*, page 11.
- 481 2014 IA, paragraph 41, page 10.
- 482 See endnote 472, page 11.
- 483 *Ibid*, page 9.
- 484 JTI's submission to the Regulatory Reform Committee's inquiry into Better Regulation on 13 June 2014.