



Bad for business; bad for consumers; good for criminals

Standardised packaging is unjustified, anti-competitive and anti-business

A response to the UK Department of Health consultation on standardised packaging of tobacco products

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<http://www.imperial-tobacco.com>

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1. Executive summary

Imperial Tobacco welcomes the opportunity to respond to the *Consultation on standardised packaging of tobacco products* (the "**consultation**").¹

Imperial Tobacco supports sound, evidence-based, reasonable and practicable regulation of tobacco products and encourages the Government to respect the principles of adult choice, freedom of competition and international law when doing so.

The introduction of legislation that prevents the owner of a lawful product from differentiating their product from those of their competitors, depriving them of the ability to exploit their intellectual property, would be unprecedented in the UK and would require the clearest and most cogent justification.

One would expect, therefore, the consultation to set out a rigorous and comprehensive assessment, supported by solid, credible evidence that standardised packaging will achieve the Government's stated objectives and that the benefits of introducing standardised packaging will outweigh the costs.

Any introduction of standardised packaging would be bad for business, bad for consumers and good for criminals for the following reasons.

i. No credible evidence or research

The consultation fails to provide any credible evidence or research that standardised tobacco packaging will achieve the Government's stated objectives. The research which is relied upon is speculative and inconclusive and fails to provide the "*robust and compelling case*" that is required by the Government's Better Regulation Agenda.²

Instead the consultation relies on "*subjective judgments*" from anonymous "*experts*" about their views on the likely impact of standardised packaging. These judgements have not been made available as part of the consultation and cannot form the basis for an evidential justification of standardised packaging. It is valid to question the independent nature and objectivity of such research and its underlying raw data. Proponents of standardised or plain packaging ignore the substantial body of research which runs contrary to their objective.

The consultation fails to provide any explanation of how standardised packaging would address the real issues behind smoking initiation and activity by young people and attempted quitters. It is wholly inadequate to try to argue that unprecedented legislation cannot be, by its very nature,

¹ [Department of Health consultation on standardised packaging of tobacco products, 16 April 2012](#)

² [BIS general principles of better regulation](#)

supported by credible evidence and research. Moreover, it is precisely because of the unprecedented nature of any such legislation that a "*robust and compelling case*" is absolutely vital.

ii. Will increase the trade in illicit tobacco

Standardised packaging would provide a stimulus for the illicit trade of tobacco products - which already costs the Exchequer billions of pounds each year - by creating a "*Counterfeiters' Charter*", aiding and accelerating the spread of counterfeit tobacco products and the trade in illicit tobacco by making it simpler to copy legitimate packaging and also by creating an unfulfilled supply vacuum for branded products.

The illicit tobacco market undermines Government and industry efforts by making it easier for children and adults to access illegal tobacco products. Illicit and counterfeit products usually undermine and circumvent legislation on ingredients, smoke emissions and reduced fire risk cigarettes and may not carry mandated English language health warnings.

A reduction in legitimate sales at the expense of an increase in illicit tobacco sales will further reduce future excise and VAT payments to the Exchequer to the detriment of the British taxpayer whilst failing to achieve any public health objectives.

iii. Will put the Government in breach of national, European and international law

Standardised packaging would be illegal under national, European and international law and would expose the Government to a bill for compensation for deprivation of the manufacturers' intellectual property rights. Tobacco manufacturers hold billions of pounds worth of registered trade marks.

There is no obligation on Parties to the World Health Organization Framework Convention on Tobacco Control ("**FCTC**") to implement standardised plain tobacco packaging.

The legislation in Australia is being challenged in the national courts and via International Tribunals. Ukraine, Honduras and the Dominican Republic have already filed Requests for Consultation with the World Trade Organization ("**WTO**"). Irrespective of the outcome of these challenges, the applicable legal frameworks in the UK and Australia are different.

iv. Is anti-business, anti-competitive and anti-consumer

Standardised packaging will reduce competition, lengthen retail transaction times, confuse retailers and adult consumers, create store security problems and reduce legitimate retail sales and profits across the legitimate tobacco retailing sector at a time of severe economic difficulties. It is our view that the Government should seek and request an independent

authority to undertake a detailed review of the likely impact of standardised packaging on the market and consumer behaviour.

v. The consultation process is fundamentally flawed

There is a very real concern that the Government is paying lip-service to this consultation and that it is determined to introduce standardised packaging as part of an attack on tobacco companies and their manufacture, including in the UK, of a lawful product.

The consultation asks respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. Yet it is well known that many organisations and charities that actively pursue a tobacco control agenda and receive funding from the Government (or provide funding to individuals and organisations as part of their activities) are not required to disclose any vested interests.

The Government should conduct a root-and-branch review of how it continues to fund such lobbyists if the public are to have any faith in the political and legislative process.

vi. Goes against the Governments own principles and objectives

Standardised packaging would conflict with the Government's stated objectives of promoting economic growth; promoting freedom of choice and personal responsibility; reducing regulation and helping small businesses. Considering all of the issues and flaws summarised above, standardised packaging appears to be yet another example of tobacco control lobbyists seeking to influence Government to further extend the intrusion of the State into adults' private lives and individual choices. It is another deliberate attempt to stigmatise and bully adults who choose to purchase tobacco products.

In summary, the consultation is seriously deficient in a number of important respects. It has completely failed to make a convincing case, supported by credible evidence, for the introduction of any form of standardised packaging, including failing to understand the reasons why people smoke. In addition it fails to consider the legal implications of such an approach and the unintended consequences of introducing such a proposal. The concept of standardised packaging should therefore be rejected.

2. Introduction

2.1 Company background

Imperial Tobacco Group PLC (“**ITG**”) is a FTSE top 25 company, the world’s fourth largest international - and second largest European - tobacco company. ITG manufactures and sells a range of cigarettes and other tobacco products. ITG has sales in over 160 countries worldwide and is the world leader in the premium cigar, fine-cut (roll-your-own) tobacco and rolling papers sectors.

Imperial Tobacco UK (“**ITUK**”, and, together with ITG, “**Imperial Tobacco**”) is the Bristol-based trading operation of ITG which distributes Imperial Tobacco’s products to the UK market. ITUK is market leader, holding approximately 45 per cent market share. ITUK’s leading UK cigarette brands include Lambert & Butler, JPS, Richmond, Embassy and Regal. ITUK also distributes tobacco products on behalf of Philip Morris Ltd.

Imperial Tobacco has its headquarters in Bristol with manufacturing and distribution facilities in Nottingham. Imperial Tobacco directly employs over 1,600 people in the UK and last year collected around £5.8 billion for the Exchequer in duties and other taxes. Imperial Tobacco has around 26,000 shareholders with 53 per cent of issued shares held in the UK. Over 34,000 individuals are members of the company pension fund, and it is estimated that the tobacco industry indirectly supports the livelihoods of over 66,000 people elsewhere in the economy³.

2.2 Background to the consultation

The consultation fails to mention the fact that the Government has previously considered, and consulted on, standardised packaging.

In particular, in May 2008, the UK Government launched a consultation on a range of different tobacco control options entitled “*A Consultation on the Future of Tobacco Control*”.⁴ This set out to deliver a national strategy on tobacco control focused on reducing “...*health inequalities caused by smoking...*” and taking action on “...*the perpetuation of smoking and poor health into future generations...*” by seeking ways to deter the “...*uptake of smoking by young people.*”

Amongst the options presented was “...*the potential for plain packaging of tobacco products*”. This was the first time that a proposal for standardised packaging (as it is now referred to) had been made by the UK Government.

³ [Cogent factsheet, published Q2 2012](#)

⁴ [Consultation on the Future of Tobacco Control, Department of Health, May 2008](#)

Imperial Tobacco responded to that consultation and carefully commented on the evidence advanced in favour of standardised packaging. We examined the factors that encourage young people to smoke; explained the unintended consequences of benefitting illicit trade and the detrimental impact on business; and set out some of the legal arguments against standardised packaging.⁵

The Department of Health (“DH”) acknowledged that:

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

As set out in our answer to question 14 of Appendix A on page 64, nothing has changed in terms of the research evidence on which the Government is seeking to rely in this consultation: that evidence remains purely speculative.

Indeed, this was acknowledged by the DH in an email dated 10 May 2011, obtained under the Freedom of Information Act, in which the DH stated: *“there isn’t any evidence to show that [standardised packaging] works”*.⁶

In 2008, the DH also acknowledged that standardised packaging could make life more difficult for retailers; benefit the illicit trade in tobacco products; and encourage young people to smoke through an enhanced perception of rebelliousness, as well as setting a precedent for the alcohol and fast food sectors. Again, in our view, nothing has changed and it is wholly inadequate to try to argue that unprecedented legislation cannot be, by its very nature, supported by credible evidence and research. Moreover, it is precisely because of the unprecedented nature of any such legislation that a *“robust and compelling case”* is absolutely vital.

2.3 The existing regulatory context

The proposal to introduce standardised packaging ignores the existing regulatory context, which includes:

- the ban on advertising;
- one of the most punitive tobacco tax regimes in the world;
- the ban on smoking in public places;

⁵ [Imperial Tobacco Group plc and Imperial Tobacco UK: Joint submission to the Department of Health Consultation on the Future of Tobacco Control, September 2008](#)

⁶ Email correspondence obtained by Phillip Morris International Limited pursuant to a Freedom of Information Act request

- the use of pictorial health warnings;
- the ban on tobacco vending machines; and, most recently,
- the ban on the display of tobacco at the point of sale (despite the Coalition parties having opposed it in Opposition on the grounds of a lack of evidence, which hasn't changed).⁷

The common denominator in all of these regulatory measures is that they do not address the reasons why people start or continue to smoke. This consultation is no different. As outlined in section 3.3 and Appendix C, it ignores all of the well-established research on the main reasons for smoking initiation by young people and the factors that influence quitters, and completely fails to provide any analysis of how standardised packaging would address those reasons.

It is incumbent on the Government to undertake a rigorous and comprehensive assessment of the impact of "*the existing tobacco control measures*" and to assess the introduction of standardised packaging in that context. However, the existing tobacco control measures have not been properly evaluated - either in the consultation or otherwise - for their effectiveness or for delivering the outcomes or benefits that were originally expected or promised. It is therefore impossible for the Government to assess whether any further tobacco control measure would have an appreciable effect on improving public health over and above existing measures.

It is our strongly held view that the Government needs to develop a rational and appropriate framework within which legitimate consumer demand for tobacco and nicotine products is met and real public health goals achieved, rather than continuing to pursue an irrational approach that appeases a small minority of vested interests but achieves no public health benefit.

Please see the response to question 3 of Appendix A on page 34 for further information.

⁷ <http://www.telegraph.co.uk/news/politics/3463980/Tories-to-oppose-tobacco-restrictions.html>;
http://www.24dash.com/news/Central_Government/2008-12-09-Tobacco-display-ban-nanny-state-going-too-far-Lamb

3. No credible evidence or research

The consultation suffers from a number of significant defects which make it unreasonable, disproportionate and exposed to legal challenge.

The Systematic Review⁸ does not provide any evidence to justify the introduction of standardised packaging. This issue is addressed more fully in our response to question 14 of Appendix A, page 64. In summary, the Systematic Review:

- is not independent. Its authors have well-established links with, and receive funding from, organisations that actively pursue a tobacco control agenda and/or have been well known advocates of standardised packaging for many years. Indeed, 20 of the 37 studies included in the Systematic Review include work by the authors (and their colleagues);
- fails to demonstrate a causal link between tobacco packaging and smoking behaviour (including initiation, prevalence and consumption);
- does not demonstrate, therefore, that standardised packaging is necessary to achieve the Government's public health objectives by affecting smoking behaviour; and
- does not comply with the Government's own guidelines and standards. The conclusion reached was that "*there was consistency in study findings regarding the potential impacts of plain packaging. This consistency of evidence can provide confidence about the observed potential effects of plain packaging. If and when introduced, existing evidence suggests that plain packaging represents an additional tobacco control measure that has the potential to contribute to reductions in the harm caused by tobacco smoking*". That, manifestly, does not provide the standard of "*robust and compelling*" evidence that standardised packaging will have any impact on smoking behaviour that is required by the Government's Better Regulation Agenda.

3.1 Subjective opinions

Presumably in recognition of the deficiencies in the Systematic Review and in order to produce "*a quantified estimate of the impact of standardised packaging on smoking behaviour*", the Impact Assessment proposes to rely on a project being undertaken by the Policy Research Unit

⁸ [Plain tobacco packaging : A systematic review](#)

on Behaviour and Health which "*will seek to elicit subjective judgements from three groups of internationally renowned experts on tobacco control*" as to "*what they believe to be the likely impact of standardised packaging on the number of adult smokers and the number of children trying smoking*".

Subjective judgements about the "*likely impact*" will provide opinion, not evidence. It cannot properly form the basis for any Government action, let alone something as draconian and unprecedented as standardised packaging. The principles of procedural fairness require that those judgements, and the identity of the experts, with all relevant accompanying information, are made available for assessment and comment. To not do so suggests that the panel has been formed for the sole purpose of producing a pre-determined outcome.

Please see our response to question 14 in Appendix A on page 64 for further information.

3.2 No consideration of alternatives

The consultation does not consider the possibility of alternatives to standardised packaging, saying only that these will be considered if responses to the consultation suggest an alternative approach. It is, however, incumbent on the Government to assess the best and least restrictive way of achieving its policy objectives and any assessment of standardised packaging must be made in that context.

Please see the response to question 14 in Appendix A on page 64 for further information.

3.3 Why young people smoke

The Impact Assessment states that the objective of standardised packaging would be to deter young people from starting to smoke and to support adult smokers who want to quit (and prevent relapses among those who have quit).

However, the consultation ignores well-established research on the main reasons for smoking initiation by young people⁹ and the factors that influence smokers who are trying to quit (as detailed in our comprehensive submission to the 2008 consultation). Accordingly, the consultation fails to provide any explanation of how standardised packaging would address the real issues behind smoking initiation and activity by young people and attempted quitters.

⁹ A summary of research on why young people start smoking can be found at Appendix C on page 78

The reality is that:

- young people do not decide to smoke on the basis of tobacco branding and packaging; and
- branding and packaging do not cause smoking initiation or relapse by quitters.^{10; 11}

Every year a survey entitled "*Smoking, drinking and drug use among young people in England*" is undertaken on behalf of the NHS Information Centre.¹² It details and explains the influences on youth smoking and the factors associated with regular smoking among young people.

Packaging and branding do **not** feature. By contrast, sex, age, the propensity to drink and take drugs, the influence of family and friends, truancy and socio-economic status are identified as the basis for why young people start smoking.

The survey also captures information on how young people access cigarettes:

- 69% report being given them (58% by friends);
- 45% bought them from a shop; and
- 41% bought them from other people (23% from someone other than family or friends).

Other surveys¹³ also show that:

- 50% of the tobacco bought by 14 to 15 year olds is illegal;
- 1 in 4 young smokers are regularly offered illegal tobacco, which is far more often than adults; and
- 1 in 7 young smokers have gone to a private address (or a "**fag house**"¹⁴) to buy illegal cigarettes.

Standardised packaging would make matters worse by increasing the illegal, unregulated market in tobacco products, through which young people buy illicit tobacco from criminals in fag houses and/or on street corners at pocket money prices.

¹⁰ M E Goldberg, J Liefeld, K Kindra, J Madill-Marshall, J Lefebvre, N Martohardjono & H Vredenburg, When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products, Expert Panel Report to Health Canada, Ottawa, 1995.

¹¹ [Tobacco packaging regulation: An international assessment of the intended and unintended consequences, Deloitte, May 2011](#)

¹² [NHS: Smoking, drinking and drug use among young people in England in 2010](#)

¹³ [NEMS market research surveys 2009 and 2011 for the North of England Tackling Illicit Tobacco for Better Health Programme](#)

¹⁴ See for example: [This is Nottingham, March 2010](#)

The same is true of relapse by smokers who have, or are trying to, quit smoking. The Government's own statistics clearly show the reasons why people say they start smoking again.¹⁵ The main reasons in order of importance are:

- as a coping mechanism for stress;
- because they enjoy smoking;
- because their friends smoke; and
- because they missed the habitual aspects of smoking.

The main factors in youth smoking are:

- *rebelliousness*
- *risk-taking*
- *family structure*
- *peer pressure*
- *socioeconomic status*
- *educational success*

Packaging and branding do not induce relapse by people who have, or are trying to, quit smoking.

Standardised packaging will not, therefore, achieve the Government's policy objectives. People smoke because they choose to do so. They do not start or continue smoking because of the packaging or branding of tobacco products. Branding helps their choice by identifying different products. Standardised packaging will not stop people from smoking.

Please see response in Appendix C on page 78 for further information.

The consultation completely ignores the reasons why young people start smoking and why people who quit smoking relapse.

Findings clearly show that education and enforcement of existing laws to reduce young people's access to tobacco products are far more likely to have an impact on smoking prevalence than standardised packaging.

The consultation avoids an assessment of whether standardised packaging would be effective or proportionate; this ignorance is a critical failing.

¹⁵ [Statistics on Smoking: England, 2011](#)

4. Will increase the trade in illicit tobacco products

“Tobacco smuggling is organised crime on a global scale with huge profits ploughed straight back into the criminal underworld, feeding activities like drug dealing, people smuggling and fraud.”

John Whiting, HMRC Assistant Director of Criminal Investigations, August 2011

“Plain packaging risks fuelling tobacco smuggling.....measures that appear to benefit the criminal community must be given serious consideration before being taken any further.”

Michael Waller, former Detective Superintendent; M. McAdam, former Detective Chief Superintendent (plus 22 other former senior police officers), The Times, June 2012

“...it is a sad fact that although tobacco duty raises around £9 billion a year, duty fraud costs the UK more than £2 billion a year and undermines the efforts by the Department of Health to reduce smoking prevalence. Trade in illicit tobacco makes cheaper tobacco more readily available to the youngest and most vulnerable people in society.”

Chloe Smith MP, Economic Secretary to the Treasury, March 2012

Latest Government figures suggest that around 17 per cent of all cigarettes and 53 per cent of all rolling tobacco consumed in the UK is non-UK duty paid.¹⁶ The third largest supplier of tobacco in the UK is not a legal, regulated company, but criminals. HMRC estimates the cost to the UK taxpayer at up to £3 billion a year,¹⁷ or £8.2 million every day of the year.

The trade in illicit tobacco deprives the Government of tax revenues; creates uncontrolled, unregulated, unaccountable markets; and circumvents regulatory controls, including where and to whom tobacco is sold (including importantly the young). Surveys show that 50 per cent of the tobacco bought by 14 to 15 year olds is illegal.¹³ The illicit trade also damages legitimate retail and manufacturing businesses.

There is a serious risk that the introduction of standardised packaging will benefit organised crime and the illicit trade in tobacco. It will, undoubtedly, make it cheaper and easier to produce counterfeit standardised tobacco packaging, which will increase profit margins for criminals, providing them with an incentive to increase their market share.

Standardised packaging would make it easier and cheaper to produce counterfeit products for smuggling. Counterfeiters would only need one printing "blank", as the packaging of the

¹⁶ [HMRC Measuring Tax Gaps 2011](#)

¹⁷ *Ibid.*

different brands will become so similar that only a simple modification - to the name - will be needed to use the same packaging for every brand of cigarette.

There is no consumer demand for standardised packaging and demand for branded packs will not simply disappear as a result of legislation introducing standardised packaging. Branded illicit products could become preferable to consumers than de-branded legal products. As a result, standardised packaging would lead to an unfulfilled supply vacuum for branded products and the consequential development of even more market share under the control of organised crime.

Kieran McDonnell, President of the National Federation of Retail Newsagents, warns of:

"...the dangers of moving the control of this market from responsible retailers to the wholly unscrupulous criminal fraternity who cynically exploit any opportunity to make money."

"We are very concerned that this proposal could become a gift to the counterfeiter. Counterfeit cigarettes are already a huge and growing problem and anything that makes it easier will certainly see an escalation of the volumes of counterfeit cigarettes in distribution."

Since there is no experience of standardised packaging anywhere in the world there is no hard evidence as to its effects. However, common sense dictates that the risks are serious and that standardised packaging would damage legitimate businesses (retailers and manufacturers) as well as Government revenues, while increasing opportunities and rewards for criminals.

The Parliamentary Under-Secretary of State for Health, Anne Milton, recently stated to Parliament that existing packs are "very easy to forge".¹⁸ That is not the case.

Existing brands are regularly developed to keep pace with consumer demand. A large number of component materials are needed to form a genuine cigarette pack. The constant evolution of brand design including colour, embossing, foils, opening mechanisms, and pack sizes all serve to make it more difficult and more expensive for counterfeiters to seek to imitate legal products.

The 5 leading packaging companies are also convinced that counterfeiting would be made easier:

"On the basis of our technical expertise, we know that unbranded packets and containers will be significantly easier to counterfeit and lead to a growth in illicit cigarettes and a move away from the legitimate product manufactured in UK factories."

API Group, Parkside, Chesapeake, Weidenhammer, Amcor

Our forensics team sees large volumes of illicit product on a daily basis. We regularly see considerable effort made to copy our genuine products. However, due to the complexity of

¹⁸ [Anne Milton, Parliamentary Under-Secretary of State for Health, House of Commons Debate, 17 April 2012](#)

designs consumers can often detect genuine from fake using the naked eye. This ability would be lost in a standardised pack environment.

Standardised packaging would also make enforcement more difficult and costly:

- the cheaper counterfeit products become to produce, the less the impact of seizures on the criminal, with larger volumes being produced and pushed into the market as the relative risk declines;
- “*illicit white*”¹⁹ branded products become preferable in terms of price and appearance, so volumes will increase creating greater enforcement complexities;
- confused and unenforceable markets will develop. Standardised packaging could theoretically create a market with legal genuine standardised packs; legal genuine branded travel retail packs; counterfeit standardised packs; illegal genuine branded packs; counterfeit branded packs; illicit whites (branded); illicit whites (unbranded). The result: five of the seven channels/options available to consumers would be run by organised crime;
- domestic counterfeit operations can be expected to be created, allowing easier access to retail supply chains;
- with no clear differentials between brands and provenance, detection opportunities will be reduced resulting in increased enforcement and prosecution costs; and
- any attempted price increase on legitimate domestic products through higher taxation to compensate for a decline in domestic sales to illicit products would only increase the profits of criminals.

Covert track and trace systems - often presented by tobacco control lobbyists as a solution to the impact that standardised packaging would have on the illicit trade - are not an adequate or comprehensive solution because:

- covert markings are not applied by the manufacturers of counterfeit products or illicit whites;
- they are only used on genuine products, and can only be read by hand-held electronic readers; and

¹⁹ Low cost cigarettes legally produced by small independent tobacco companies but sold illegally outside their intended market(s).

- neither the general public nor retailers have access to readers, making covert markings an irrelevant system for consumers to be able to distinguish between genuine and illicit product.

Please see our response to question 9 in Appendix A on page 58 for further information.

The enforced removal of branding would create further demand for criminals to sell illicit products:

- it would make it easier for them to counterfeit products with both standardised and branded packaging;
- it would take away consumers' ability to authenticate products themselves; and
- it would increase enforcement complexity and costs.

5. Is in breach of national and EU law and international treaties

Standardised packaging would directly conflict with existing and harmonised national, European and international laws which protect, as a fundamental right, the enjoyment of property, including intellectual property.

An additional consequence would be to undermine the authority of the EU to defend and promote the protection of intellectual property, both within the EU and beyond.

The International Trademark Association makes clear that trade marks are:

“...not only words, names, and logos, but can also be colours or the very shape or design of the package itself. Any graphical component that adds to the distinctiveness of a product can be registered as a trade mark. A trade mark is regarded as an “object of property” and trade mark owners are entitled to have their trade marks accorded the consideration and protection due to all objects under national and international law.”²⁰

Standardised tobacco packaging would be contrary to:

- the right to property;
- the right to the free movement of goods;
- the right to conduct a business; and
- the right to freedom of speech.

Each of these rights is subject to protection under national, European and international law. While these rights are not absolute, the Government cannot, and has not, shown that standardised packaging is a justified interference with those rights.

In particular, standardised packaging would:

- breach the protections afforded by the European Convention on Human Rights, the Charter of Fundamental Rights and the law of the European Union;
- breach UK obligations under international treaties, including:
 - the Agreement on Trade Related Aspects of Intellectual Property;
 - the Paris Convention for the Protection of Industrial Property; and
 - the Technical Barriers to Trade Agreement.

²⁰ <http://www.inta.org/Advocacy/Documents/November52008.pdf>

The introduction of standardised tobacco packaging could result in legal action by Imperial Tobacco and other tobacco companies to protect their intellectual property and fundamental rights.

Moreover, the deprivation of property rights would require the payment of compensation reflecting the value of Imperial Tobacco's intellectual property rights, a claim which could be expected to run to billions of pounds. The UK Government would also face the possibility of enforcement action at an EU and international level.

Please see our response to question 6 in Appendix A on page 46 for further information.

5.1 The European context

The consultation fails to acknowledge or take account of developments in other jurisdictions that are important and relevant to UK policy.

The European Commission's Directorate General for Health and Consumer Protection issued a consultation paper on the revision of the Tobacco Products Directive in September 2010.²¹ It included some ideas around contents, ingredients, labelling and packaging. There were 85,000 responses to that consultation, the vast majority strongly opposed to the idea of any plain or standardised packaging. Business Europe wrote a letter to European Commission President Jose Manuel Barroso opposing the idea of any standardised packaging and called attention to the grave concern expressed by major industries in this regard.

The UK is currently alone among the EU Member States in consulting on standardised packaging, and any introduction would cause significant legal issues in terms of the single market and the harmonised regime for protecting intellectual property.

The content of textual health warnings on tobacco products has only recently been amended by an EU Directive.²² It makes little sense to consider standardised packaging when the effects of those recent changes have not been reviewed.

5.2 The international context

The Government in Australia has passed legislation to introduce plain packaging. These laws will come into effect on 1 October 2012 for cigarettes and from 1 December 2012 for other tobacco products.

²¹ http://ec.europa.eu/health/tobacco/consultations/tobacco_cons_01_en.htm

²² [Commission Directive 2012/9/EU](#)

The legislation in Australia is being challenged in the national courts and via International Tribunals. Ukraine, Honduras and the Dominican Republic have filed Requests for Consultation (“**RfC**”) with the WTO. If the issue is not resolved across the negotiating table, after 60 days the complainant’s can ask the WTO to set up a panel of adjudicators to judge the case. Irrespective of the outcome of these challenges, the applicable legal frameworks in the UK and Australia are different.

5.3 FCTC guidelines

As reiterated during all the Conferences of the Parties to date, FCTC guidelines are non-binding proposals. The guidelines do not extend to the binding obligations of the FCTC and they do not constitute a subsequent agreement on the interpretation of the FCTC. This is the basis on which the guidelines are adopted.

Furthermore, the guidelines to FCTC Articles 11 and 13 are not only non-binding, they are also highly aspirational. The guidelines were adopted by individuals acting under the auspices of a public health convention, where it is openly stated that other rights and considerations are not taken into account at that level; it is for Governments to take those other national interests into account at a later date.

The consultation implies that the guidelines to FCTC Articles 11 and 13 have already resolved issues such as proportionality, basic rights and less restrictive measures. This is completely inaccurate.

The UK consultation on standardised packaging makes no sense in the current EU and international regulatory context.

Standardised packaging would put the UK in the position of breaching important international Treaties, laws and agreements.

Standardised packaging would be illegal under national, European and international law.

The deprivation of property rights would require the payment of compensation reflecting the value of Imperial Tobacco’s intellectual property rights, a claim which could be expected to run to billions of pounds.

6. Is anti-business, anti-competitive and anti-consumer

Branding and intellectual property are an integral part of a lawful and free market economy. Standardised packaging is therefore anti-business, anti-competitive and anti-consumer

Packaging contains and protects a product. It also provides a mechanism for disseminating information, including information required by law (for example, in the context of tobacco products, health warnings).

However, packaging also provides a crucially important mechanism for the manufacturer of a lawful product provide information to consumers; to develop their brand and to exploit their intellectual property. The importance of branding and intellectual property cannot be overstated:²³

- **They provide information about the product to consumers** including about its quality, origin and brand values; and
- **They enable a manufacturer to differentiate their product from their competitors** which, simply put, enables consumers to make an informed choice about which products they want to buy.

Standardised packaging takes away this source of information from consumers, and thereby prevents competition between manufacturers in terms of the quality of their products. The information processing capacities are one of the most important, if not the most important, features of markets. Any reduction in the information available harms consumers and competition and impedes the normal functioning of markets. Indeed, Governments, regulators and competition authorities routinely seek to improve the information available to consumers so as to enable consumers to make informed choices about the products and services which most closely meet their requirements.

This policy measure is unprecedented and will have a seismic impact. Imperial Tobacco has invested in and owns over 1,000 trade mark registrations, or applications for registrations, effective in the UK. The owners of a lawful product would be unable to use their intellectual property or to differentiate their products from those of their competitors. The adverse impact on the UK economy in terms of consumer choice, competition and innovation, and the effect on the illicit market, will be huge as is discussed below.

These concerns are shared by others. Leading business groups such as the Confederation of British Industry²⁴ (“**CBI**”), the International Chamber of Commerce UK²⁵ (“**ICC**”), the British

²³ See generally, [Packaging in a Market Economy, June 2012, Dobson and Yadav, 28 June 2012](#)

²⁴ CBI communication to ASH APPG, January 2012

Brands Group²⁶ (“**BBG**”) and many others²⁷ have expressed significant concerns about the precedent that standardised packaging would set, its potential impact on markets, and the message it would send to companies looking to invest in the UK.

Peter Lawrence, former head of the UK Patent Office's designs and trade marks division, says:

*"The UK has fought hard at international level to ensure that all countries respect trade mark rights, and for the UK to take action to deprive brand owners of the right to use their marks would be an unfortunate precedent to say the least."*²⁸

"Our ability to sell our goods and services across the world is critically dependent on IP - it is a critical raw material for our modern economy."

Vince Cable, speech to The British Film Institute, May 2011

"Brand marketing is hugely important. It's important to any industry sector. It's about differentiating between one product and another."

Henry Ashworth, Chief Executive, The Portman Group, Health Select Committee hearing, May 2012

"IP's contribution to the UK's economy is therefore both substantial and vital. Its wider impacts on society, in terms of culture, education and basic human rights such as freedom of expression, are no less important."

George Osborne, Vince Cable & Jeremy Hunt, August 2011

The imposition of standardised packaging would have serious implications for competition, consumer choice, and innovation in the legal tobacco products market and for the economy as a whole.²⁹

The removal of branding and intellectual property will create a situation whereby many consumers will choose brands on price alone, which in turn could result in falling prices. This will have a number of consequences which the Government does not intend and does not want.

²⁵ <http://www.international-chamber.co.uk/press/72-icc-stresses-need-for-wider-perspective-on-plain-packaging>

²⁶ John Noble, Director of the BBG, Marketing Magazine, 13 April 2012

²⁷ Including the European Communities Trade Mark Association; US Chamber of Commerce; TransAtlantic Business Dialogue; Emergency Committee for American Trade; National Association of Manufacturers; Union of European Practitioners in Intellectual Property; Marques; the United States Council for International Business and the National Foreign Trade Council.

²⁸ <http://www.packagingnews.co.uk/news/plain-packs-for-tobacco-will-damage-business-says-former-patent-chief/>

²⁹ A recent survey conducted by GfK NOP found that the general public do not believe tackling smoking rates should be the main priority for the Government. In particular, almost half of respondents thought that the Government should be focusing on reviving the economy. Standardised packaging is directly in conflict with that policy.

"The removal of brand imagery from packaging shifts consumer preferences away from premium brand products towards low-range cheaper brands."

London Economics report, January 2012

"When price is the only signal in the market consumer preferences shift towards low-range cheaper brands."

London Economics report, January 2012

Choices driven by price would lead to falling prices across the range of tobacco products; the potential elimination of premium branded products; and an acceleration of down-trading. This will lead to higher consumption, including among young people and those in poorer socio-economic groups. Attempts to offset this by even higher taxation would increase the profit margins of illicit tobacco products and lead to an increase in the illicit trade, damaging yet further legitimate businesses (manufacturers and retailers) as well as Government revenues.

Choices driven by price would also lead to the market becoming ossified. Access for new products would be very difficult because there would be no means of informing consumers about their new products. Incentives for companies to invest in product development would also be severely reduced. As a result, consumers would have less choice and less access to new products.

Standardised packaging can also be expected to compromise the ability of smaller retailers to compete because:

- tobacco makes an important contribution to the profitability and viability of smaller retailers, representing around 30 to 40 per cent of their turnover;³⁰
- retailers earn higher margins on premium brands than on economy brands; and
- it is likely to lead to more consumers switching to buying from large grocery retailers, reducing the viability of small independent retailers for whom turnover from tobacco products is proportionately much more significant.

The Impact Assessment accompanying the consultation dramatically underplays the potential impact on the market. Peter Lawrence, former head of the UK Patent Office's Designs and Trade Marks Division, recently said this in relation to the consultation and the importance of trade marks in economies:

"Trade marks underpin modern economies by helping consumers make their choices and bring rewards to firms that successfully meet their desires. When

³⁰ See for example: [NFRN response to the 'Future of Tobacco Control' consultation](#)

Governments seek to intervene in this way, they risk undermining this fundamental aspect of how markets operate.”²⁸

The omission of any consideration of the impact standardised packaging would have on market dynamics has also been picked up in a report recently published by the British Brands Group, which states that:

“...the dynamics of industry competition and how consumer behaviour will evolve over time appear to have been largely neglected aspects.”²³

In light of all of the points raised above, it is our view that the Government should seek and request an independent authority to undertake a detailed review of the likely impact of standardised packaging on the market and consumer behaviour.

Please see the response to question 5 in Appendix A on page 38 for further information.

Standardised packaging would destroy intellectual property and prevent a manufacturer from differentiating their products.

The Government should seek and request an independent authority to consider and report on the implications of introducing standardised packaging.

7. The consultation process is fundamentally flawed

The unprecedented introduction of standardised packaging for a lawful product would be an extremely significant step for any Government to take. The Government should, therefore, take particular care to ensure that the consultation process is sufficiently fair and robust to enable a proper and informed assessment of the case for standardised packaging.

This would be consistent with the general principles of procedural fairness, and it is also reflected in the Government's own Better Regulation Agenda which provides that:

*"There will be a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made."*²

No credible case is made for standardised packaging; certainly not a "*robust and compelling*" case.

7.1. Open mind?

There is a very real concern that the Government is paying lip-service to this consultation and that it is determined to introduce standardised packaging as part of an attack on tobacco companies and their manufacture, including in the UK, of a lawful product.

For example, in an interview with *The Times* to coincide with the announcement of the consultation, the Health Secretary, Andrew Lansley stated that:

*"We don't want to work in partnership with the tobacco companies because we are trying to arrive at a point where they have no business in this country."*³¹

In response to a letter from Imperial Tobacco seeking clarification of his remarks, Mr Lansley said his comments had been taken out of context. However, we still have concerns that the Health Secretary has not sought to proactively or publicly set the record straight. In our view this undermines the DH's claims that it has an "*open mind*" on this consultation.

7.2 Vested interests of tobacco control

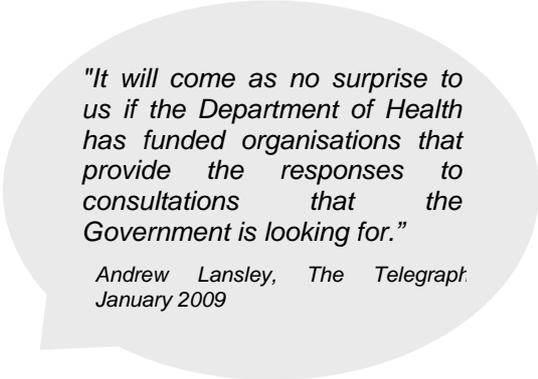
The consultation asks respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. Yet it is well known that many organisations and charities which actively pursue a tobacco control agenda and will be expected to respond to the

³¹ [Andrew Lansley, 13 April 2012](#)

consultation receive funding from the Government, and provide funding to individuals and organisations as part of their activities. If understanding links is truly important to the integrity of the consultation, disclosures should surely be made by both sides of the debate.

7.3 Bias and a lack of transparency

More than £440,000 has been provided in the South West region,³² and up to £5 million nationally,³³ by the Government on campaigns to promote standardised packaging during the consultation period. This information was only disclosed through Freedom of Information (“FOI”) requests and not, as one would expect, voluntarily by the DH.



"It will come as no surprise to us if the Department of Health has funded organisations that provide the responses to consultations that the Government is looking for."

*Andrew Lansley, The Telegraph
January 2009*

Unfortunately, the use of FOIs has appeared to be the only way to achieve any degree of transparency of tobacco control's relationships, funding, research and lobbying activities. This is both worrying and disappointing and - assuming the Government are still fully committed to transparency for lobbying - a needless burden on the public purse.

Government funding of lobbyists to help promote their agenda through “*public support*” is so common, and so concerning, that the Institute of Economic Affairs has produced a detailed report which questions the vast sums of taxpayer funds being used by the Government to lobby itself on a wide range of issues - including tobacco control.³⁴

The Government should conduct a root-and-branch review of how it continues to fund such lobbyists if the public are to have any faith in the political and legislative process.

The fairness and genuineness of this consultation must be called into question.

The Government should voluntarily declare how much taxpayer-funded lobbying there has been, and continues to be, on tobacco control policy-related issues.

The Government should conduct a root-and-branch review of how it continues to fund such lobbyists if the public are to have any faith in the political and legislative process.

³² [Matthew Elliott, Chief Executive of The TaxPayers' Alliance, Mail Online blog, 26 January 2012](#)

³³ <http://dickpuddlecote.blogspot.co.uk/2012/04/government-lobbying-government.html>

³⁴ [IEA 'Sock Puppets' report, 11 June 2012](#)

8. Goes against the Government's own principles and objectives

The total lack of credible evidence demonstrating that standardised packaging would achieve the Government's objectives (see section 3.3, page 11 above) means that its imposition would breach the Government's own principles on regulation.

8.1 Reducing regulatory burden

The Government's published strategy³⁵ is to reduce the overall volume of new regulation "by introducing regulation only as a last resort." The Government has set out a clear policy² to regulate only:

- after it has demonstrated satisfactory outcomes can't be achieved by alternative, self-regulatory, or non-regulatory approaches. **This is not done, or even attempted, in the consultation nor the Impact Assessment;**
- where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches. **Neither the consultation nor the Impact Assessment demonstrate this by any margin, let alone a clear one. In fact the overall costs and benefits are not even quantified in the Impact Assessment;** and
- where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate, accountable, consistent, transparent and targeted. **Neither the consultation nor the Impact Assessment demonstrate that the policy would be any of these, and especially not proportionate or targeted.**

The British Retail Consortium has called this latest proposal, especially on the back of the display ban, "crazy",³⁶ also arguing that it ignores the Government's own principles on better regulation.

8.2 Inconsistency of regulatory approach to different industry sectors

It is striking that the DH has taken a different approach in relation to alcohol. In oral and written evidence to the House of Commons Health Committee,³⁷ the DH has suggested that there is

³⁵ <http://www.bis.gov.uk/policies/bre>

³⁶ http://www.brc.org.uk/brc_news_detail.asp?id=2186

"very limited" evidence to demonstrate the effectiveness of standardised packaging for alcohol products, and are not therefore pursuing it as a potential policy option at this time.

Given the fact that the DH has already admitted that there is no evidence that standardised packaging for tobacco products would work,⁶ a similar conclusion could have been quickly and easily reached without the need to embark on a costly consultation exercise.

Please see the response to question 11 in Appendix A on page 63 for further information.

The proposal clearly breaches the Government's own strategy and principles on regulation in every respect. No policy should be taken forward when this is the case.

	Government's policies/priorities	Standardised packaging
Promoting growth	Supporting intellectual property rights ³⁸	Destroys intellectual property rights
	Encouraging investment into the UK ³⁹	Discourages investment into UK: brand owners will be concerned at the willingness of Government to destroy brands and use of trademarks
	Supporting small businesses ⁴⁰	Damages small independent retailers by encouraging the increase of illicit trade in tobacco products which drives down legitimate sales
	Encouraging innovation ⁴¹	Reduces or eliminates innovation, by making it almost impossible to differentiate products and brands
	Widening consumer choice ^{39; 46}	Reduces consumer choice, by making it almost impossible to differentiate products and brands
	Increasing competition ^{39; 42}	Reduces consumer choice, by making it almost impossible to differentiate products and brands
Reducing the deficit	Removing unjustified and unnecessary regulation ^{2; 43}	Adds further unjustified and unnecessary regulation with no evidence of success
Protecting society	Protecting government revenues and reducing the tax gap ⁴⁴	Increases the illicit trade, thereby reducing Government revenue and increasing the tax gap
Empowering individuals	Reducing organised crime ⁴⁵	Creates a counterfeiter's charter, potentially leading to more organised crime and criminal activity
	Giving people more freedom and control over their own lives ⁴⁶	Stigmatises and bullies adults who choose to purchase tobacco products and smoke

³⁷ [Oral evidence taken before the Health Committee, 12 June 2012; DH written memorandum, 15 June 2012](#)

³⁸ [Government Response to the Hargreaves Review of Intellectual Property and Growth](#)

³⁹ [HM Treasury / BIS Plan for Growth, March 2011](#)

⁴⁰ [Ibid. Plus: The Red Tape Challenge; speech to the Federation of Small Businesses Annual Conference in Scarborough by Vince Cable, 23 March 2012; speech to the Federation of Small Business Conference in Liverpool by Mark Prisk, 18 March 2011](#)

⁴¹ [BIS Innovation and Research strategy for growth](#)

⁴² [Government Response to Consultation: Growth, Competition and the Competition Regime, March 2012](#)

⁴³ [The Red Tape Challenge; letter from the Prime Minister to Government Ministers on cutting red tape, 7 April 2011](#)

⁴⁴ [HM Treasury press release: £900 million to tackle non compliance in the tax system, 20 September 2010](#)

⁴⁵ ['Local to global: reducing the risk from organised crime', Home Office, 28 July 2011](#)

⁴⁶ [The Coalition: Our programme for Government, May 2010](#)

8.3 Bullying adults who make the choice to smoke

The Government's actions do not match their words:

"...there has been the assumption that central Government can only change people's behaviour through rules and regulations. Our Government will be a much smarter one, shunning the bureaucratic levers of the past..."

David Cameron & Nick Clegg, foreword to the Coalition Programme for Government, May 2010

"I joined this party because I believe in freedom."

David Cameron, Conservative Party Conference, October 2005

"The era of big, bossy, state interference, top-down lever pulling is coming to an end."

David Cameron, June 2008

"For too long new laws and regulations have taken away people's freedoms, interfered in everyday life, and made it difficult for businesses to get by. The state has crept further and further into people's homes, the places they work, their private lives. That intrusion is wrong; it's illiberal; it's disempowering and it's going to change."

Nick Clegg, speech on Freedom in the UK, July 2010

Standardised packaging is another attempt to stigmatise and bully adults who choose to purchase tobacco products and extend the influence of the State into their private lives and individual choices. The Secretary of State for Health has recently said that:

"There is no responsible level of tobacco consumption" and that he wants tobacco companies to have "no business in the UK".

By implication, the Secretary of State for Health is saying that adults who choose to smoke are irresponsible. This is difficult for us to understand and is an extremely surprising position for any Government to be adopting. Tobacco is a legal product, enjoyed by around 10 million adults in the UK. This equates to around 20 per cent of the adult population and is not an insignificant minority. These adults make an informed choice to smoke; they smoke for many and varied reasons and despite the continual stream of unreasonable and disproportionate tobacco control regulations imposed upon them (as outlined in section 7) and propaganda to the contrary they do not wish to give up.

The Government continually seeks to interfere in smokers' lives and often pursues regulatory proposals for tobacco that are not supported by any credible evidence, such as standardised packaging. It is a bullying attitude and we object to smokers being treated in this way.

And the evidence suggests it won't stop at tobacco products either. It is clear that the tobacco control template is being explored for other lifestyle choices,⁴⁷ despite claims from tobacco control lobbyists to the contrary.⁴⁸

It should not be the role of Government to bully adults who decide to pursue a legal activity on the basis of informed choice.

Standardised packaging of tobacco products is a dangerous precedent and presents a “*slippery slope*” for other businesses and sectors.

Evidence suggests that the tobacco control template is being already being explored by public health advocates for other lifestyle choices including alcohol.

9. Conclusion

The consultation is seriously deficient in a number of important respects. It has failed to make a convincing case, supported by credible evidence, for the introduction of any form of standardised packaging, including failing to understand the reasons why people smoke. In addition it fails to consider the legal implications of such an approach and the unintended consequences of introducing such a proposal. The concept of standardised packaging should therefore be rejected.

⁴⁷ [UK Centre for Tobacco Control Studies Annual Report, March 2012](#) (pages 4; 14)

⁴⁸ [Smokefree Action Coalition Briefing, December 2011](#)

Appendix A - Imperial Tobacco's answers to the consultation document questions

1. Which option do you favour?

Imperial Tobacco favours the first option: to do nothing about tobacco packaging (i.e., maintain the status quo for tobacco packaging).

In outline:

- **There is no credible or reliable evidence** demonstrating that standardised packaging would achieve the Government's stated objectives of reducing smoking prevalence among young people or assisting smokers who have, or are trying to, quit. (Please see section 3.3, page 11 above and Appendix C, page 78 below).
- The authors of the Systematic Review - despite being well-known tobacco control advocates and in many cases reviewing their own work - do not show that standardised packaging would meet the Government's stated objectives. The Systematic Review provides no evidential basis for standardised packaging. (Please see section 3, page 10 above and our response to question 14, page 64 below).
- In fact, the reasons why young people start smoking are well documented and have nothing to do with packaging or branding. The main factors in youth smoking initiation are:
 - rebelliousness;
 - risk taking;
 - family structure;
 - peer pressure;
 - socio-economic status; and
 - educational success.

Appendix C provides more detail.

- Likewise, packaging and branding do not influence the decision of existing smokers to quit, or to relapse after they have tried to quit. The reasons adults cite for smoking again after a cessation are, in order of importance:
 - as a coping mechanism for stress;

- because they enjoy smoking;
 - because their friends smoke; and
 - because they missed the habitual aspects of smoking.¹⁵
- **Standardised packaging would boost illicit trade.** Organised criminals already cost approximately £3 billion per annum to the UK taxpayer. (Please see our response to question 9, page 58 below).
 - **Standardised packaging would breach national, EU and international laws.** (Please see our response to question 6, page 46 below).
 - The introduction of standardised packaging makes no sense in the existing regulatory context. The Government has introduced a number of far reaching tobacco control measures, the last of which - the display of tobacco products in retail outlets - will not fully come into force until 2015. The Government needs to undertake a comprehensive and considered analysis of the effect of the existing regulatory framework before it considers standardised packaging. (Please see section 2.3, page 8 above and our response to question 3, page 34 below).
 - **Standardised packaging would have significant detrimental effects on trade, competition and innovation in the market.** (Please see our response to question 5, page 38 below).
 - **The consultation process is fundamentally flawed.** There is a very real concern that the Government is paying lip-service to this consultation and that it is determined to introduce standardised packaging as part of an attack on tobacco companies and their manufacture, including in the UK, of a lawful product. The consultation asks respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. Yet it is well known that many organisations and charities that actively pursue a tobacco control agenda and receive funding from the Government (or provide funding to individuals and organisations as part of their activities) are not required to disclose any vested interests. The Government should conduct a root-and-branch review of how it continues to fund such lobbyists if the public are to have any faith in the political process.

- **Standardised packaging would be contrary to a number of the Government's stated priorities and policies**, as well as the principles of regulation which the Government has committed to,² which include regulating only:
 - after it has demonstrated satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches;
 - where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches; and
 - where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate, accountable, consistent; transparent and targeted.

(Please see our response to question 11, page 63 below).

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

Imperial Tobacco does not believe that standardised packaging should be introduced at all for the reasons explained in this submission and summarised in the response to question 1 above.

There is no credible evidence to indicate that people take up smoking or continue to smoke because of tobacco packaging (please see section 3.3, page 11 above). The data relied on by the Government is the product of selective and questionable research methods and, even at its highest, does not present the clear and compelling evidence base that would be required to justify the introduction of standardised packaging (see our response to question 14, page 64 below). Proponents of standardised packaging ignore the substantial body of research which runs contrary to their objective and the significant detrimental consequences that would follow the introduction of standardised packaging.

Imperial Tobacco does not, therefore, agree with the approach set out in paragraphs 4.6 and 4.7 of the Consultation.

3. Do you believe that standardised tobacco packaging would contribute to improving public health over and above existing tobacco control measures, by one or more of the following: discouraging young people from taking up smoking; encouraging people to give up smoking; discouraging people who have quit or are trying to quit smoking from relapsing; and/or reducing people's exposure to smoke from tobacco products?

No.

The starting point in considering this question must be to undertake a proper assessment of the "*existing tobacco control measures*" and of their effect. The Impact Assessment accompanying the consultation states that standardised packaging must be based on benefits "*over and above existing tobacco control measures*".

Against a long-term trend of declining smoking prevalence, the Government has introduced:

- the ban on advertising;
- one of the most punitive tobacco tax regimes in the world;
- the ban on smoking in public places;
- the use of pictorial health warnings;
- the ban on tobacco vending machines; and, most recently
- the ban on the display of tobacco at the point of sale (despite the Coalition parties having opposed it in Opposition on the grounds of a lack of evidence, which hasn't changed⁷). The ban on the display of tobacco products will not come into force for small stores until April 2015.

The common denominator in all of these regulatory measures is that they do not address the reasons why people start or continue to smoke. This consultation is no different. It ignores all of the well-established research on the main reasons for smoking initiation by young people and the factors that influence quitters, and completely fails to provide any analysis of how standardised packaging would address those reasons.

It is incumbent on the Government to undertake a rigorous and comprehensive assessment of the impact of "*the existing tobacco control measures*" and to assess the introduction of standardised packaging in that context. However, the existing tobacco control measures have not been properly evaluated - either in the consultation or otherwise

- for their effectiveness or for delivering the outcomes or benefits that were expected or promised.

Furthermore:

- none of the tobacco control Impact Assessments make any reference to the success (or otherwise) of previous policies; presumably because the required analysis has not been undertaken or such evidence does not exist.
- previous Impact Assessments (e.g. Smokefree Aspects of the Health Bill⁴⁹) have attempted to set out clear measures of success, but these have not been met.
- in relation to the introduction of pictorial health warnings, the Impact Assessment gave an open-ended time frame for its impact. Given that this was a major health advertising campaign, a startling result would have been expected and a clear time frame for the impact should have been defined. Advertising agencies are familiar with such expectations. A study undertaken seven to nine months after the introduction of picture health warnings concluded that:

“...there were very few smoking-related behaviour changes observed after the pictures were introduced, despite high levels of awareness of such warnings.”⁵⁰

As there is no evidence of their efficacy so far, it is difficult to demonstrate how an increase in the effectiveness of such warnings would be identified if branding were to be banned;

- the vending machine Impact Assessment states that:
“17% of regular smokers aged 11 to 15 report that cigarette vending machines are their usual source of tobacco”.⁵¹

Further on in the Impact Assessment the figure changed to 7.5%. In any event, Government policy has had little impact on the average number of cigarettes smoked by eleven to fifteen year olds. The mean average of cigarettes consumed per day is similar to 2003 levels;¹²

- the standardised packaging Impact Assessment sets out a retrospective definition of a measureable objective for the display ban: “The full effect of the ending of tobacco displays is projected to be a fall in smoking prevalence among 11-15 year-olds from

⁴⁹ [Partial regulatory impact assessment - smokefree aspects of the Health Bill, May 2010](#)

⁵⁰ [Evaluating the impact of Picture Health Warnings on Cigarette Packets, PHRC Short Report 12, June 2010](#)

⁵¹ [Impact Assessment for the prohibition on the sale of tobacco from vending machines, May 2012](#)

5% to 4.2%”.¹² This figure does not appear in the display ban Impact Assessment; and

- the ban on the display of tobacco products will not come into force for small stores until April 2015. It is extraordinary that the Government is apparently seriously considering the introduction of standardised packaging before this measure has been fully implemented, let alone before a proper assessment of the impact of this measure has been undertaken.

In summary, there is no analysis of the success or effectiveness of prior policies, and proper post-implementation reviews of existing tobacco regulation has not been undertaken.

The premise of this question is therefore flawed: there has not been any proper evaluation of the existing tobacco control measures, and it is therefore impossible to assess whether any further tobacco control measure would have an appreciable effect on improving public health over and above existing measures.

Contribution to improving public health?

There is no evidence whatsoever that standardised packaging will contribute to improving public health or will affect smoking behaviour at all. By depressing prices and effectively promoting the non-UK duty-paid tobacco trade (with tobacco prices being lower in many other countries and illicit tobacco sold at lower prices than UK duty-paid products), there is a real risk of consumption increasing. The consultation ignores the established research as to the reasons why people smoke and continue smoking, which do not include packaging and branding (see section 3.3 above, page 11 and Appendix C, page 78 below for more information).

The evidence base that the Government puts forward is also seriously flawed and/or incomplete (see our response to question 14, page 64 below).

- 4. Do you believe that standardised packaging of tobacco products has the potential to reduce the appeal of tobacco products to consumers; increase effectiveness of health warnings; reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking; and affect the tobacco-related attitudes, beliefs, intentions and behaviours of children and young people?**

No.

There is no evidence that demonstrates that standardised packaging would achieve any or all of these aims (which differ from the stated policy objectives). The Systematic Review and Impact Assessment do not show that smoking behaviour and consumption would change as a result of the introduction of standardised packaging; still less does it provide a sufficient evidence base to justify such a draconian policy (see our response to question 14, page 64 below).

While there is research to show that awareness of health warnings is already high,⁵⁰ research and prevalence statistics suggest that the *effectiveness* of health warnings is highly questionable.^{52; 53} There is no evidence to suggest that standardised packaging would make any difference to either the awareness or effectiveness of health warnings on the *behaviour* of consumers.

The latest Eurobarometer on "*Attitudes of Europeans towards Tobacco*"⁵⁴ also shows that the vast majority of UK consumers - 99 per cent and 96 per cent respectively - do not consider the shape or colour of the pack to indicate levels of harm.

Even research in the Systematic Review suggests that tobacco packaging does not mislead smokers about health risks. Hammond's 2009 UK study, "*Cigarette pack design and perceptions of risk among UK adults and youth*",⁵⁵ found that most subjects, both adults and youth, found no difference between plain (standardised) and branded packs in terms of health risks.

Research by Cancer Research UK,⁵⁶ contrary to supporting a case for standardised packaging, shows that among the 15 year olds they surveyed:

"there was little awareness of different styles of tobacco packaging apart from the key brand";

"participants were seeing most of the packs used in the focus groups for the first time";

"the pack appeared peripheral compared with the cigarette in youth smoking"; and participants gave no indication they suspected the plain pack that was eventually shown to them as "anything but a genuine pack."

⁵² [P. Basham and J. Luik, 'Health Warnings on Consumer Products: Why Scarier is Not Better', January 2012](#)

⁵³ [The emotional impact of European tobacco-warning images, December 2011](#)

⁵⁴ [Attitudes of Europeans Towards Tobacco, May 2012](#)

⁵⁵ ['Cigarette pack design and perceptions of risk among UK adults and youth', December 2009](#)

⁵⁶ [The packaging of tobacco products, Cancer Research UK, March 2012](#)

All of which serves to illustrate how packaging and branding are not important elements in young people's decisions to smoke.

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

Yes.

The crucial importance of considering the impact of standardised packaging on trade and competition

An obvious starting point would be to ask why this issue, which is largely unaddressed in the Impact Assessment, is relevant to the broader policy issues raised in the Consultation. The answer to this question is two-fold.

First, the Impact Assessment acknowledges that for the policy "*...to be justified the impact on smoking behaviour and consequent improvement in health needs to be sufficiently large to justify the related costs*" (page 3). However, there is no such cost-benefit analysis, which would require a full assessment of the likely costs, including the adverse effects on manufacturer and retailer competition and those associated with an increase in legal and illicit trade.

Second, turning to the hypothetical benefits, standardised packaging is a market-wide measure aimed at reducing tobacco use, with the Government identifying the importance of reducing tobacco use by young people and that smoking prevalence is greater amongst poorer socio-economic groups (page 1). Market measures have to be assessed by reference to their impact on competition and trade. However, the Consultation and Impact Assessment do not consider how the introduction of standardised packaging is likely to reduce the value and importance of brands to consumers, nor do they consider properly how the consequential commoditisation of the tobacco market is likely to depress wholesale and retail tobacco prices and increase legal and illicit trade.

Imperial Tobacco's response to this question is divided into four parts:

Part A outlines some of the key features of the UK tobacco market, which is necessary to provide a market context to assess the wide ranging market-wide impacts and to inform the necessary cost-benefit analysis;

Part B assesses how the consequential commoditisation of the tobacco market and increase in trade are likely to depress wholesale and retail tobacco prices;

Part C considers the adverse effects of standardised packaging on competition and those associated with an increase in legal and illicit trade; and

Part D sets out Imperial Tobacco's conclusions.

Part A - The key features of the UK tobacco market

There are a number of key features of the UK tobacco market which are relevant to the assessment of the competitive and trade effects of standardised packaging:

- whilst tobacco duties are very high in the UK - for example, they account some 78 per cent of the average recommended retail price (“RRP”) of a packet of 20 cigarettes - there is a substantial degree of variation in prices between tobacco products. This price variation is attributable to a combination of:
 - price and non-price (brand and innovation) competition between manufacturers; and
 - different retailers having different business models, with some retailers competing on price (particularly the large grocery retailers) and some competing more on the basis of convenience (particularly smaller convenience retailers);
- considering competition between manufacturers first, a striking feature of the tobacco market is that consumers are offered a wide, competitive choice of brands, ranging from premium brands to economy brands, thereby meeting consumers' diverse preferences. For example, large grocery retailers currently sell their cheapest packet of 20 cigarettes for around £5.45 and their most expensive packet for around £7.75 (over £2 more). The relative price differences between low priced and premium brands would be even greater if tobacco duties were disregarded;
- apart from offering consumers' choice, branding also strengthens manufacturers' incentives to innovate - both by the provision of new products with distinctive characteristics and developments to existing products - because the benefits of innovation by a brand owner will be reaped by that brand owner;
- there is a substantial convenience element to tobacco retailing. In contrast to a wide range of other products, the large grocery retailers account for only around 30

per cent of the total volume of UK duty paid cigarette sales.⁵⁷ This is despite the fact that many convenience retailers sell tobacco products at prices above RRP's and the large grocery retailers sell tobacco products at prices below RRP's;

- tobacco products make a significant contribution to the profitability of many smaller retailers at a time when they are under intense competitive pressure due to the growth of the large grocery retailers;
- however, the large grocery retailers have been recognised as possessing substantial buyer power (hence the Groceries Supply Code of Practice) and this has been a factor leading to the large grocery retailers winning market share from smaller retailers; and
- reflecting the high level of taxation, the UK government derives over £12 billion in tax revenues from consumers' purchases of UK duty paid tobacco products. However, high taxes also render viable substantial illicit and cross-border trade in tobacco products, with HM Revenue and Customs estimating that 17 per cent and 53 per cent of cigarettes and hand-rolling tobacco consumption in the UK respectively is not UK duty paid.¹⁶

Part B - Impact of standardised packaging on wholesale and retail prices

This section will address the impact of standardised packaging on competition and trade in the tobacco market. The principle effect of the introduction of standardised packaging is likely to be to depress the wholesale and retail prices of tobacco brands, particularly those of premium brands:²³

- standardised packaging will remove the ability for manufacturers to differentiate their brands. This will lead to increased competition on price and the prices of premium products converging towards those of economy brands;
- standardised packaging can also be expected to lower pre-tax wholesale and retail prices due to its impact on competition in retailing and manufacturer-retailer bargaining because:
 - retailers achieve higher profit margins on premium brands;
 - the buyer power of the large grocery retailers will increase due to a reduction in consumer demand for, and loyalty to, specific brands. This will

⁵⁷ ITUK estimates based on customer EPOS data y/e 2010/2011

- increase the ability of large grocery retailers to secure lower wholesale prices in return for stocking manufacturers' products; and
- consumers are likely, with the loss of brand loyalty, to respond to widening differences in the retail prices of the large grocery retailers and convenience retailers by switching to purchasing from the large grocery retailers. This trend will be increased by the possible closure of smaller retailers due to the decline in their profitability from lost sales of tobacco products; and
- standardised packaging can be expected to increase consumers' ability and incentives to purchase legitimate non-UK duty paid and illicit tobacco products, which are substantially cheaper than UK duty paid products. Standardised packaging will make it easier for illicit suppliers to copy packaging (covert markings are irrelevant to illicit products which are not sold legally in shops), and consumers will no longer be able to buy clearly branded duty paid products in the UK. This will increase competition with legitimate retail and wholesale prices and further increase the buyer power and price advantages enjoyed by the large grocery retailers.

The consultation does not consider in any meaningful way how these effects will affect tobacco consumption patterns. For example, it does not consider whether, if standardised packaging is introduced:

- the market-wide changes outlined below could result in the higher consumption of tobacco by smoking adults; and
- lower priced tobacco products would be more affordable for young or poorer consumers.

The Impact Assessment appears to recognise this difficulty (paragraph 67) but does not reach any conclusion.

The Government has indicated that it would use the tax system to counter any reduction in prices in the market. However, there are two difficulties with using the tax system in this way.

First, the large price differences which currently exist in the UK market between premium and economy brands and between large grocery retailers and convenience retailers have nothing to do with the tax system. They are the product of manufacturer brand competition and retailers competing differently on price and convenience. Changes to tax rates cannot address these market factors. The Government cannot increase taxes in a differential way to increase the price of those brands which have

ceased to command a premium due to the introduction of standardised packaging and whose price has fallen further than other brands. Nor can the Government increase tobacco taxes purely for the large grocery retailers. All the Government can do is increase already high taxes across the board, disproportionately raising the prices of the cheapest products.

Second, high taxation is already a key factor driving the illicit market, and taxation increases coupled with standardised packaging are likely to increase the size of the illicit market. Experience in other jurisdictions (such as the Republic of Ireland) have shown that high taxes on tobacco does not reduce consumption and instead lead to the unintended consequence of an increase in cross-border and illicit trade. For example, a February 2011 report on the "*Economics of Tobacco, Modelling the Market for Cigarettes in Ireland*" by Padraic Reidy and Keith Walsh of the Republic of Ireland Revenue Commissioners found that the demand for duty paid cigarettes in the Republic of Ireland had become highly price-sensitive,⁵⁸ probably due to consumers switching to non-duty paid cigarettes:

"The most likely substitutes in the case of taxed cigarettes are non-Irish taxed cigarettes (i.e. purchased legally outside Ireland and brought into the country) or untaxed cigarettes (produced in or smuggled into Ireland and purchased illegally).

It is recognised that the consumption of untaxed cigarettes has become an increasingly important issue. Revenue estimates that currently around 20 per cent of cigarettes consumed in Ireland are not Irish taxed and this figure has been increasing in recent years. It is driven by several factors but the main cause is the price differential between cigarettes on the Irish market and elsewhere.

Given the current high cigarette price level in Ireland, the incentive for substitution to untaxed tobacco is greater in Ireland than it otherwise would be. This probably explains the high price elasticity estimate - higher prices will likely increase untaxed consumption."

Part C - The adverse effects of standardised packaging on competition and trade in tobacco markets

The extremity of the measures contemplated and the value of competition

⁵⁸ The report found that: "*The consumption variable in this study is the consumption of taxed cigarettes. So the price elasticity estimated refers to taxed cigarettes: a 1 per cent increase in price leads to a 3.6 decrease in consumption of taxed cigarettes. The most reasonable theory to explain such a large decrease in taxed consumption is that only part of the reduction is caused by lower smoking levels, the remainder must be caused by smokers switching to substitute cigarettes.*"

Standardised packaging can be expected to have substantial adverse effects on competition in the UK tobacco market. However, before addressing these points, it is appropriate to have regard to the extremity of the measures contemplated and the value of competition.

The Government is contemplating introducing a measure which does not currently apply to any other legal, consumer goods sold in the UK or anywhere else throughout the world. All other consumer goods are branded, with brands owned either by retailers or manufacturers.

Standardised packaging is being considered in the context of a market where competition and trade are already distorted by a vast array of measures, including restrictions covering all aspects of display, promotion, advertising, and access to products, as well as very high taxes, with many of these measures being introduced or tightened very substantially in recent years.

This measure is also wholly contrary to general Government policy which is to promote competition, including through reforming competition law to promote enterprise and fair markets, with this being a priority emphasised in the 2012 Queen's Speech. It is against this background that the anti-competitive effects of standardised packaging should be judged.

A reduction in non-price competition and harm to consumer choice

As identified in Part B above, standardised packaging can be expected to reduce, if not eliminate, non-price competition on brands between tobacco manufacturers since packaging is now virtually the only way in which manufacturers can differentiate their brands. In turn this will lead to even greater price competition, lower prices and convergence in the prices of premium and economy or value products.

Because packaging is an essential means of facilitating brand switching by existing adult smokers, the introduction of standardised packaging is likely to lead to market ossification (and brand consolidation) as tobacco companies will have no means of encouraging consumers to change brands and/or consumers will find it too difficult to identify alternative brands.

Price competition - not a benefit

The Impact Assessment identifies "*an additional benefit is the possible enhancement of price competition between tobacco companies*" (page 3). As explained above, increased price competition will not bring benefits to the tobacco market. Imperial Tobacco does not

understand how the destruction of brand value and choice can be categorised as "economic benefits" (page 3). This is particularly in circumstances where consumers already have the option of purchasing lower priced tobacco products and there is a general trend of consumers trading down to lower priced brands due to very high taxes. The likely effect is lower prices and more smoking.

Adverse impact on innovation

The Impact Assessment suggests that manufacturers may respond to standardised packaging through product innovation and that product innovation "*may enable companies to recover some of the brand equity lost with standardised packs*" (paragraph 70). This is extremely difficult to understand.

As noted above, the impetus for product innovation exists in a competitive market where a manufacturer has the ability to communicate the distinct characteristics of their product to adult consumers and to benefit from innovation. However, standardised packaging will remove this ability and with it the impetus for product innovation.

To put the point more simply: even assuming that there are viable opportunities for innovation in a standardised packaging environment (and the opportunities put forward by the Government are not viable for the reasons set out below), there would be no mechanism for ITUK to draw any such innovation to the attention of consumers.

One suggestion for innovation made in the Impact Assessment is to vary the appearance of the cigarettes themselves. It is not at all clear what the Government has in mind and it is therefore difficult for ITUK to address this proposal. However, the Consultation assumes that no branding will be permitted on individual tobacco products themselves. This hypothetical innovation may well be prohibited by any legislation that is introduced.

It is also absurd to suggest that legislation that introduced standardised packaging would permit innovation in terms of including adhesive inserts to stick on packs which allowed consumers to cover up health warnings (paragraph 71).

Variation in pack size is also a feature of the existing market. Imperial Tobacco cannot see, and the consultation does not explain, how there is any opportunity for innovation in this respect, especially in circumstances where tobacco companies will have no means of closely associating any innovation with their brands.

Impact on retailers and retail prices

As explained in Part B, standardised packaging will adversely affect retailers' margins, because retailers' margins are materially higher on premium, higher priced brands than low priced brands.

These effects will be particularly severe for small retailers who are already facing survival issues given the increasing competitive strength of the large grocery retailers. Standardised packaging is likely to increase the buyer power of the large grocery retailers by reducing the consumer demand for them to stock a wide range of tobacco brands, thereby increasing their ability to de-list brands unless manufacturers lower their wholesale prices.

In such circumstances, standardised packaging can be expected to increase the proportion of tobacco sold by the large grocery retailers, with this depressing retail prices as the large grocery retailers sell tobacco products at substantially lower prices than small, convenience retailers.

As regards the harm to smaller retailers, the Impact Assessment fails to consider this issue, but refers vaguely to transition costs (paragraph 80); Imperial Tobacco has no idea what alternative products smaller retailers could sell instead which they do not already offer. The closure of small local retailers is a serious public policy issue, particularly in rural areas and for poorer households lacking access to a car.

Impact on illicit trade and cross-border shopping

The Impact Assessment acknowledges that:

"standardised packs may provide an additional possibly powerful incentive to cross-border shopping" (paragraph 76); but

"that any greater ease of copying standardised packaging would need to be balanced against the fact that illicit trade may become less profitable if the price of premium brands falls as a result of standardised packaging (paragraph 78). However, the point about pricing must be judged against the background that over 90% of the price of the lowest priced cigarettes sold by the large grocery retailers is accounted for by duty and VAT; this will always create opportunities for illicit trade."

Imperial Tobacco's response to question 9 of Appendix A covers illicit trade in more detail. However, it is striking that bar the above brief reference to incentives to increase cross-border shopping, there is no consideration of the role of consumers' preferences for UK brands in limiting both illicit trade and legitimate cross-border shopping. The risks of cross-border and illicit trade rising are substantially increased by these proposals since a

significant element of consumers' reluctance to purchase substantially cheaper non-UK duty paid products is because they attach value to purchasing clearly branded UK tobacco products. Standardised packaging is precisely aimed at denying consumers the ability to purchase clearly branded products.

Part D - Conclusions

In Imperial Tobacco's view, it is difficult to envisage how the introduction of such a draconian measure could be:

- reasonable, having regard to a full consideration of the costs of standardised packaging, including its anti-competitive effects on manufacturers and retailers and its effects of sponsoring cross-border and illicit trade (including the loss of tax revenues);
- proportionate, having regard to whether there are less costly ways of realising the identified policy objectives. The Consultation does not address this issue at all, and ignores, for example, alternative ways of limiting the access of young smokers to tobacco, such as rendering proxy purchasing illegal or the further development of age-related ID cards schemes; and
- effective, in terms of achieving the stated objectives of reducing tobacco consumption, particularly by the young and poor socio-economic groups. It is quite clear that the evidence for any public health benefits can at best be described as very limited, with there being no consideration of whether these benefits will be appreciable in the context of all the other anti-tobacco measures which have been introduced recently (for example, the requirement for products to not be displayed by retailers which further reduces the visibility of brands). In particular, Imperial Tobacco would question whether the hypothetical benefits of this market-wide measure are likely to be realised given the anti-competitive effects of depressing wholesale and prices and sponsoring cross-border and illicit trade. It seems likely that increasing the scale of illicit trade will only increase the access of the young to tobacco products on a wholly unrestricted basis.

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

Yes. The attempt to introduce standardised tobacco packaging would be unlawful and would, therefore, certainly "*have legal implications*".

In particular, standardised tobacco packaging would be contrary to:

- the right to property;
- the right to the free movement of goods;
- the right to conduct a business; and
- the right to freedom of speech.

Each of the above rights is variously subject to protection under national, European and international law. While Imperial Tobacco acknowledges that these rights are not absolute, the Government has not shown, and will not be able to show, that standardised packaging is a justified interference with these rights.

Consequently, requiring standardised tobacco packaging would put the Government in breach of its legal obligations and will result in legal action on a domestic and European level, as well as exposing the Government to a compensation bill. Imperial Tobacco will certainly take all necessary steps to protect its intellectual property, in which it has invested billions of pounds, and fundamental rights. The Government may also face enforcement action at an international level.⁵⁹

The Right to Property

The right of the owner of any product that is lawfully manufactured and sold to acquire, own and exploit intellectual property connected to that product is enshrined in law. In particular, it is recognised that trade marks enable a manufacturer to impart information to customers about the product and, beyond that, to distinguish their product from those of their competitors by communicating the qualities and essential characteristics of their product.⁶⁰

That channel of communication is made more important by the existing regime of controls on tobacco advertising and the introduction of a ban on the display of tobacco products at point of sale in almost all retail outlets in England.⁶¹ As a result, Imperial Tobacco's use of intellectual property on packaging constitutes the last significant means by which Imperial Tobacco can communicate with adult smokers and attempt to differentiate its products from those of its competitors on grounds other than price.

The importance of trade marks to tobacco manufacturers has already been recognised by the Court of Justice of the European Union (“**CJEU**”) when considering a challenge to the

⁵⁹ Ukraine, Honduras and the Dominican Republic have already taken steps to initiate the World Trade Organisation dispute resolution process against Australia, the first country to attempt to introduce standardised packaging.

⁶⁰ Among other relevant cases, see Case 487/07 L'Oreal SA v Bellure NV.

⁶¹ Imperial Tobacco understands that it is also proposed to introduce display bans in Scotland, Wales and Northern Ireland.

European Tobacco Products Directive (Directive 2001/37/EC). It was a key aspect of the Court's finding that the effect of the Directive was to restrict the available space on the cigarette packs and that tobacco manufacturers could continue to use their trade marks. Thus, the Court held that "*the restrictions on the trade mark right ... do not constitute a disproportionate and intolerable interference, impairing the very substance of that right*". In contrast, standardised packaging would completely restrict the use of the trade mark for its intended purpose: to inform and communicate with adult customers, thus impairing "*the very substance of the right*".⁶²

The status of Imperial Tobacco's intellectual property under domestic and European law

Under European law, a comprehensive and harmonised regime has been established for the protection of intellectual property rights at a national and Community wide level.⁶³ That regime would be completely undermined by the attempted introduction of standardised packaging because it would establish a different regime in the UK for trade marks that apply to tobacco products in comparison to other products, and a different regime in the UK in comparison to other Member States.

Imperial Tobacco holds a number of non-word trade marks which it will be unable to use in any meaningful, consumer-facing way as a result of the introduction of standardised packaging. Not only would the proposed standardised packaging requirement deprive Imperial Tobacco of the substance of these intellectual property rights, they are also likely to be lost as a matter of form. This is because it is an essential pre-requisite that a registered trade mark be put to "*genuine use*":

*"It follows from that concept of 'genuine use' that the protection that the mark confers and the consequences of registering it in terms of enforceability vis-à-vis third parties cannot continue to operate if the mark loses its commercial raison d'être which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings."*⁶⁴

Indeed, the requirement that a trade mark be put to use is a fundamental feature of UK trade mark law. The proposed standardised packaging requirement would deprive the relevant non-word marks of their commercial raison d'être and leave them vulnerable to revocation for non-use.

⁶² Case C-491/01 The Queen and Secretary of State for Health, ex parte British American Tobacco (investments) Ltd and Imperial Tobacco Ltd supported by Japan Tobacco Inc. and JT International SA [2002] ECR I-11453, paras 149-153.

⁶³ Directive 2008/95/EC approximating the laws of the Member States relating to trade marks and Council regulation No 207/2009 on the Community Trade Mark.

⁶⁴ Silberquelle GmbH v Maselli-Strickmode GmbH [2009] ETMR 28.

The protection of Imperial Tobacco's intellectual property under ECHR and EU law

As a matter of substance, the proposed standardised packaging requirement would breach the European Convention on Human Rights ("**ECHR**")⁶⁵ and the Charter of Fundamental Rights of the European Union (the "**Charter**").

Article 1 of the First Protocol ECHR ("**A1P1**") provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A1P1 comprises three distinct rules. The first rule, which is of a general nature, states the principle of peaceful enjoyment of property. The second rule covers the deprivation of possessions and subjects it to certain conditions. The third rule recognises that States are entitled, among other things, to control the use of property in the general interest.⁶⁶

Intellectual property such as trade marks are "*possessions*" within the meaning of A1P1.⁶⁷

Since the ECHR guarantees rights which are "*practical and effective*",⁶⁸ it is necessary to consider the substance of the action that is taken, and its effects, when determining whether there has been a deprivation of possessions falling within the second rule in A1P1.⁶⁹

As noted above, as a result of existing tobacco control mechanisms, the last remaining opportunity for Imperial Tobacco to use its trade marks in any meaningful way is on its packs. The proposed standardised packaging requirement directly and wholly prevents Imperial Tobacco from using its relevant intellectual property in this way:

"No branding, advertising or promotion [is] to be permitted on the outside or inside of packs, or attached to the package, or on individual tobacco products themselves. For this purpose, 'branding' includes logos, colours or other features associated with a tobacco brand."

⁶⁵ **Spjorng and Lonroth v Sweden** (1982) 5 EHRR 35; **R (Nicholds & Ors) v Security Industry Authority** [2006] EWHC 1792 (Admin); **James v UK** (1986) 8 EHRR 123; **Allard v Sweden** (2004) 39 EHRR 14; and **Hentrich v France** (1994) 18 EHRR 440.

⁶⁶ **Spjorng and Lonroth v Sweden** (1982) 5 EHRR 35, at para. 61.

⁶⁷ **Anheuser-Busch Inc v Portugal** (2007) 44 EHRR 42 (Ch), para. 43 (2007) 45 EHRR 36 (Grand Chamber) para. 78.

⁶⁸ **Airey v Ireland** (1979) 2 EHRR 305.

⁶⁹ **Păduraru v Romania** (2012) 54 EHRR 18 para. 74 .

This amounts to a clear deprivation of the property itself.

In any event, an interference with the peaceful enjoyment of possessions must strike a “*fair balance*” between the demands of the public or general interest of the community and the requirements of the protection of the individual’s fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use.⁷⁰ Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance, and, in particular, whether it imposes a disproportionate burden on the applicant.⁷¹ A deprivation of possessions without payment of an amount reasonably related to their value cannot be justified under A1P1.⁷²

In terms very similar to those in A1P1, Article 17(1) of the Charter provides that:

"Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

Article 17(2) specifically provides for the protection of intellectual property and the Explanations to the Charter note that this reflects "... *its growing importance and Community secondary legislation. Intellectual property covers ... patent and trade mark rights and associated rights*".

Since 1 December 2009, the Charter has “the same legal values as the Treaties” (Article 6(2) Treaty on the Functioning of the European Union). The CJEU has, in applying Article 17 of the Charter, adopted an approach similar to that of the European Court of Human Rights in relation to A1P1.⁷³

The protection of Imperial Tobacco’s intellectual property under international law

The introduction of standardised packaging would also amount to a breach of the Government’s international treaty obligations under:

- the Agreement on Trade Related Aspects of Intellectual Property (“**TRIPs**”); and

⁷⁰ **Gladysheva v RuFormer King of Greece v Greecessia** [2012] HLR 19, para. 66.

⁷¹ (2001) 33 E.H.R.R. 21 at para. 89.

⁷² **Gladysheva v Russia** [2012] HLR 19, para. 67, **Papachelas v Greece** (2000) 30 EHRR 923 at para. 48 and **R(SRM Global Master Fund LP) v Treasury Commissioner** [2009] EWCA Civ 788 at para. 73.

⁷³ Case C-360/10 **SABAM v Netylog NV** (judgment dated 16 February 2012) at paras 41-44.

- the Paris Convention for the Protection of Industrial Property (the "**Paris Convention**"),

Article 20 of TRIPS provides:

"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as ... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."

Standardised packaging falls squarely within the prohibition set out in Article 20: the use of Imperial Tobacco's trade marks would be unjustifiably encumbered by special requirements. The special requirements imposed by standardised packaging would include both use in a special form and use in a manner detrimental to the mark's capability to distinguish its products. For the reasons set out below, standardised packaging cannot be regarded as creating a "*justified*" encumbrance on the use of trade marks.

Imperial Tobacco acknowledges that Article 8 of TRIPs provides that:

"Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

However, Article 8 does not provide for an exception from any of the substantive obligations of the TRIPS Agreement as it applies only to measures which are "*consistent with the provisions of [TRIPS]*". Nor, for the reasons set out below, could it be shown that standardised packaging is "*necessary*" to protect public health. Accordingly, the Government could not invoke Article 8 in order to justify standardised packaging.

Article 15(4) of TRIPs and Article 7 of the Paris Convention prohibit the nature of goods or services forming an obstacle to the registration of a trade mark. As noted above, it is a requirement of registration and continued registration that a trade mark be put to use. Standardised packaging would therefore have precisely the effect prohibited by Article 15(4) and Article 7: tobacco-related trade marks would be deprived of registration, purely as a result of the nature of the goods to which they relate.

As Peter Lawrence, former head of the UK Patent Office and current Vice-President of the OHIM⁷⁴ has stated:

"...the UK has fought hard at international level to ensure that all countries respect trade mark rights".²⁸

In this context, introducing standardised packaging in breach of these international treaties would severely hamper the UK's ability to advocate the importance of respecting intellectual property rights in other parts of the world. More immediately, breach of these international treaties would also likely lead to WTO complaints against the UK.

The Right to Free Movement of Goods

The free movement of goods is a fundamental principle of European law protected and promoted by Article 34 of the Treaty on the Functioning of the European Union ("TFEU") which provides that:

"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".

The meaning of "*measures having equivalent effect*" has been defined broadly by the CJEU as trading rules "*which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade*".⁷⁵

Standardised packaging would fall within the scope of Article 34 TFEU.⁷⁶ As noted above, following the introduction of bans on display at point of sale, the content of packaging is the last significant mechanism by which a tobacco manufacturer may communicate with adult smokers in order to differentiate their products from those of their competitors and, therefore, is critical to the ability of new products and manufacturers from other Member States to enter the UK market.

The Right to Conduct a Business

The right to conduct a business under domestic and European law

The right to conduct a business is also an established principle of European law and recognised in Article 16 of the Charter:

⁷⁴ Office of Harmonization of the Internal Market - the official trade marks and design office of the European Union.

⁷⁵ ECJ, Case 8/74 **Procureur du Roi v Dassonville** [1974] ECR 837.

⁷⁶ Case C-110/05 **Commission v Italy** ("*Italian Trailers*") [2009] ECR 519, Case C-142/05 **Åklagaren v Mickelsson and Roos** [2009] ECR I-04 273 at paras 24 and 26, **R(Petsafe Ltd, The Electronic Collar Manufacturers Association) v The Welsh Ministers** [2010] EWHC 2908 (Admin).

"The freedom to conduct a business in accordance with Community law and national laws and practices is recognised."

The Explanations which accompany the Charter state that this is based on CJEU case law which has "*recognised [the] freedom to exercise an economic or commercial activity*" and Article 4(1) and (2) TFEU which "*recognises free competition*".⁷⁷ This includes the manner in which a company operates and its role as a competitor in a free market economy. There can, therefore, be no doubt that standardised packaging would constitute a breach of Article 16 of the Charter, given that packaging will be the last significant means for tobacco manufacturers to differentiate their products from other manufacturers' products to the benefit of adult smokers.

The right to conduct a business under international law

Standardised packaging would also constitute a breach of the obligations of the UK under the WTO's Technical Barriers to Trade Agreement. In particular, Article 2.2 obliges signatories to ensure that:

"... technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective.... Such legitimate objectives are, inter alia: ... protection of human health or safety."

The introduction of standardised packaging imposes technical regulations which create unnecessary and unjustified obstacles to international trade and which are more restrictive than necessary to achieve the Government's objective. Indeed, as discussed below, there is no credible evidence that standardised packaging will achieve the Government's stated objectives.

The Right to Freedom of Expression

Freedom of expression is a fundamental right that is recognised as an essential element of a democratic society.

Article 10 ECHR protects both the right to impart information and the right to receive it:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not

⁷⁷ Charter Explanations, OJ 2007 C 303/23.

prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

It includes the right of commercial entities which manufacture and sell a lawful product to impart and receive information about the nature and essential characteristics of that product. This includes, but is not limited to, the right to communicate, in the form that it chooses,⁷⁸ such fundamental matters as: what the product is; who makes it; where it originates from and how it differs from its competitors.⁷⁹ Standardised packaging, therefore, strikes at the very essence of the right to commercial freedom of expression.

Moreover, as already noted, the right to commercial expression through packaging is of the utmost importance in a situation where it is the last significant mechanism by which Imperial Tobacco has the ability to communicate to its consumers.

The right to freedom of expression is also protected in European and domestic law by Article 11 of the Charter:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Justification

Imperial Tobacco acknowledges that the majority of the legal restrictions and rights referred to above are not absolute. In particular, depending on the legal provision, interference with those rights can in principle be justified by reference to the protection of public health. The precise nature of the tests varies according to the legal context. Imperial Tobacco also accepts that the protection of health is a legitimate objective.

⁷⁸ **Women on Waves v Portugal**, Application No. 31276/05, 3 February 2009.

⁷⁹ **Markt Intern Verlag GmbH v Germany** (1989) 12 EHRR 161, [26]; **Casada Coca v Spain** (1994) 18 EHRR 1, [35]; and **Stambuk v Germany** (2003) 37 EHRR 42, [39].

However, in respect of each of the legal measures of protection set out above, the burden would be on the Government to show that standardised packaging was justified. For the reasons set out below and elsewhere in this submission, standardised packaging fails all the tests for justification.

In summary:

- it is lawful to manufacture and sell tobacco products;
- the ability to differentiate the nature and characteristics of products, and to communicate those differences to consumers, is an essential pre-requisite to the creation and functioning of a lawful competitive market;
- standardised packaging would completely remove the last significant means by which Imperial Tobacco and other tobacco manufacturers can impart information to adult smokers about their products, including as regards their quality, origin and brand values;
- standardised packaging would be unparalleled: there is no market for lawful products that has imposed such a restriction;
- there is no credible evidence that standardised packaging would achieve the Government's stated objectives;
- there are less restrictive alternatives and alternative tobacco control measures already introduced, but not yet fully in force, with the aim of meeting the objectives that are being pursued. In particular, in all material respects, the Government's stated aims behind the introduction of both the ban on tobacco vending machines and the ban on the display of tobacco products were the same as its stated policy objectives for standardised packaging. It is incumbent on the Government to assess the impact of the tobacco control measures it has already introduced⁸⁰ before it considers standardised packaging; and
- standardised packaging would have significant negative and unintended consequences, including in relation to illicit trade, costs for manufacturers and retailers, and trade and competition.

Compensation

As explained above, standardised packaging would amount to a deprivation of property for the purposes of A1P1 and Article 17 of the Charter, because Imperial Tobacco would be

⁸⁰ As noted above, the ban on the display of tobacco will not be brought into force for small shops until 2015.

deprived of the ability to exploit its intellectual property rights so as to inform and communicate with its consumers. Accordingly, even if it was justified, the Government would be obliged to pay compensation reflecting the value of Imperial Tobacco's intellectual property rights, both now and in terms of lost future profits. An absence of proper compensation would render the standardised packaging requirement unlawful.

In addition, in respect of breaches of the ECHR, an action for damages would lie under section 8(2) of the Human Rights Act 1998 (the "**1998 Act**"). When deciding whether an award of damages is necessary to afford just satisfaction for violations of an ECHR right, the domestic court must look to the jurisprudence of the European Court of Human Rights: s. 8(4) of the 1998 Act.

The fundamental principle in the jurisprudence of the European Court of Human Rights underlying the award of compensation is that the applicant should, so far as possible, be placed in the same position as if his ECHR rights had not been infringed. Where the breach of an ECHR right has caused significant pecuniary loss, this will usually be assessed and awarded.⁸¹

In respect of breaches of EU law, an action for damages would lie against the UK (and the Secretary of State in particular).⁸² The legal framework for and consequent legal foundation for the legislation currently being challenged in Australia is different from that in the UK.

In summary, as a matter of ECHR and EU law, the Government would face significant legal claims for compensation. These claims could be for billions of pounds.

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

Standardised packaging would impose very significant costs on both tobacco manufacturers and packaging manufacturers (see our response to question 5, page 38 above), although it is impossible to quantify the costs without specific detail of what precisely will be required if "*standardised packaging*" is introduced.

The Impact Assessment seeks to suggest that standardised packaging would "save" manufacturers money by forcing them to abandon and not to develop their brands. This is

⁸¹ **Anufrijeva v Southwark London Borough Council** [2004] QB 1124 at para. 59 *per* Lord Woolf MR.

⁸² Joined Cases C-6/90 and C-9/90 **Francovich and Others** [1991] ECR I-5357, para. 35; Joined Cases C-46/93 and C-48/93 **Brasserie du Pêcheur and Factortame** [1996] ECR I-1029, paras 31 and 51; Case C-445/06 **Danske Slagterier** [2009] ECR I-2119, paras 19 and 20; Case C-568/08 **Combinatie Spijker Infrabouw**, judgment of 9 December 2010, para. 87.

a fundamentally flawed proposition. Principally, it ignores the crucial importance of brands and intellectual property rights in a free market economy. In the context of the existing regulatory restrictions, tobacco packaging represents the most significant mechanism by which manufacturers may differentiate their products from those of their competitors. The loss of the ability to exploit branding and intellectual property rights in this way would impose extremely significant costs on tobacco manufacturers as well as discouraging, if not eliminating, innovation.

Further, whatever money is spent on changes to packs and the machinery required to produce them will be a loss to the supply chain - machine manufacturers, packaging companies and other entities involved in brand development. The enforced destruction of the premium market will inevitably have an impact on profit margins throughout the supply chain.

Another huge cost to the industry - and the Government - will be the significant increase in the illicit trade of tobacco products that would result from the introduction of standardised packaging.

All of the above will have consequential effects on investment and jobs throughout the economy, although this is impossible to quantify at present. Please see the response to question 9 of this Appendix for further discussion of this issue.

In summary, there will be very significant costs for manufacturers.

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

Standardised packaging would have huge costs for retailers, particularly small independent retailers. Please also see our response to question 5, page 38 above.

Around 30 to 40 per cent of small retailer revenue comes from tobacco products.³⁰ Tobacco products are also a driver of footfall for small retailers, with customers visiting a retailer to purchase tobacco products but then purchasing other products as well. In addition to loss of revenue as a result of an increase in the illicit trade, standardised packaging would have the effect of removing incentives for developing and maintaining premium brands in the market, for which smokers are prepared to pay more. As outlined in response to question 5, if standardised packaging were to be introduced, manufacturers would inevitably compete on price, leading to a depression of all prices. Therefore, the

increased profit margins premium products generate for retailers would be removed from the supply chain.

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

Yes, without question. There is no experience of standardised packaging anywhere in the world, meaning there is no real world data in this area. However, we are in no doubt that the introduction of standardised packaging would:

- provide a significant boost to organised crime groups and the illicit trade in tobacco, as it would give them the market for branded products to themselves; would make it easier for them to counterfeit standardised packs; and would make it more difficult for consumers to identify illicit products;
- damage legitimate businesses (retailers and manufacturers), by strengthening the market share of illicit tobacco products;
- reduce Government revenues further (currently estimated to be as much as £3 billion a year); and
- create an uncontrolled, unregulated, unaccountable market that circumvents regulatory controls, including where and to whom tobacco is sold (including, importantly, young people).

We will consider four points:

1. What are the main reasons why a market for illicit/smuggled tobacco products exists in the UK and will they be strengthened or weakened by the introduction of standardised packaging?

The single most important factor contributing to the market in illicit/smuggled tobacco products in the UK is the high excise duty rates.

First, the high duty rates make legitimate tobacco products expensive for consumers. This, coupled with the current economic climate, means that those on lower incomes are more likely to down-trade from legitimate tobacco products to illicit/smuggled tobacco products, whose price would typically be between 40 per cent and 60 per cent of the price of legitimate goods.

Second, and more importantly, the high duty rates can be exploited by organised crime groups for profit. The cost of producing counterfeit tobacco products is relatively low and the high duty rates allow organised crime groups to sell counterfeit tobacco products at a substantial mark-up but at a price that is still considerably cheaper than the legitimate alternative. These high profit margins provide a valuable source of income for organised crime groups and this, combined with the low risk of being arrested and/or prosecuted, more lenient punishments and fewer individuals involved in the supply chain, make it a more attractive alternative to other forms of illicit trade, such as the drugs trade. As an indication of just how profitable the illicit tobacco market is, illicit traders can afford to lose three out of every five shipments of counterfeit tobacco imported to the UK and still make a profit. The cost of the nine million counterfeit cigarettes in a typical container is around £130,000. They would sell for about £1.8 million on the illicit retail market.

The introduction of standardised packaging will, undoubtedly, make it cheaper and easier for organised crime groups to produce counterfeit tobacco packaging:

- Currently, existing brands are regularly developed to keep pace with consumer demand and a large number of component materials are needed to form a genuine cigarette pack. The constant evolution of brand design including colour, embossing, foils, pack size and pack innovation, all serve to make it more difficult and more expensive for counterfeiters to seek to imitate legal products. Standardised packaging will, however, make the packaging of the different brands very similar, e.g. for each different manufacturers' packaging, only a simple modification - to the name - will be needed to make packaging for the different brands of cigarette. The manufacturers of counterfeit tobacco products will, therefore, need fewer machines and/or less equipment to reproduce it. This will cut down the time taken to produce the packaging, and is likely to reduce the cost of production. This reduction in production costs will increase their profit margins and provide further incentive to increase their market share in the UK; and
- the standardisation of cigarette packs in the UK would provide greater incentives for the development of new illegal or counterfeit products, potentially targeted specifically at the UK which are differentiated by their non-standardised packaging.

However, as well as potentially carrying the 'cachet' of non-standardised packaging, illegal imports tend to be much lower in price, being free of UK tobacco duties and taxes. The weighted average price of UK consumed cigarettes could therefore be expected to fall, with consequential increases in the overall volume consumed.

More generally, the encouragement of such supplies in general provides added incentives for the development of new illicit supply routes and channels, which are necessarily costly to establish and maintain. Increasing the availability of illicit products has the direct effect of encouraging greater consumption of non-duty paid cigarettes. Increasing the availability of low priced illicit products could also impact the tobacco consumption of children under the age of 18 who cannot legally purchase tobacco, and potentially poorer consumers, due to the price advantages that such products offer. In this regard, it should be noted that there is clear survey evidence¹³ that:

- 50% of the tobacco bought by 14 to 15 year olds is illegal;
- 1 in 4 young smokers are regularly offered illegal tobacco, which is far more often than adults; and
- 1 in 7 young smokers have gone to a private address (or a "fag house"¹⁴) to buy illegal cigarettes.

A further issue is that standardised packaging is likely to affect consumer incentives as regards legal and illicit imports. In particular, plain packaging may impact the social acceptability of consuming illicit products.

2. What are the main challenges in producing/selling illicit products or in selling smuggled products? Will they be made easier by standardised tobacco packaging? Why?

A big current challenge for the illicit market is producing counterfeit packaging of a high enough standard to allow illicit traders to deceive customers. They need to secure and maintain a supply chain and consumer base similar to the tobacco companies. The introduction of standardised packaging will make packet sizes, colours, fonts and materials easier to reproduce and, thus, easier for illicit traders to pass-off counterfeit products as legitimate ones.

Furthermore, as there is no consumer demand for standardised packaging and demand for branded packs will not disappear simply as a result of regulation, branded illicit product has the potential to become preferable to consumers over de-branded legal products. Imposing standardised packaging could therefore lead to the development of a whole new market under the control of organised crime. This issue is discussed further in the response to question 1 above.

3. What effect will standardised packaging have on illicit market share and price?

As set out in the response to question 9.1 above, it can be expected that standardised packaging will boost demand for illicit products and will lower the cost of such products. Standardised packaging will be easier to copy and over time consumers become less familiar with the appearance of legitimate branded products. If organised crime groups decide to cut their prices because standardised packaging has lowered production costs and enabled them to increase the scale of their activities, then demand for illicit products is likely to rise further. However, for legitimate manufacturers there is a price beyond which they cannot go because it is made up of UK duty.

Whilst depressing the prices of duty-paid products can be expected to boost duty paid consumption, due to the very high levels of taxation it will continue to be the case that illicit products can be sold at a fraction of the cost of duty-paid products. Accordingly, it seems very unlikely that any consumers currently purchasing illicit products would switch back to duty-paid products if the post-tax duty-paid prices of premium brands were to fall.

Moreover, if the Government decides to increase the duty on tobacco products to counter any price drop (and in order to prevent demand for tobacco products increasing) this will increase the profits of the illicit trader, thus increasing their market share yet further.

4. What impact will the introduction of standardised tobacco packaging have on the enforcement/regulation of illicit trade in the UK?

Our forensics team sees large volumes of illicit product on a daily basis. We regularly see considerable effort made to copy our genuine products. However due to the complexity of designs consumers can detect genuine from fake using the naked eye. This ability would be lost in a standardised pack environment.

Standardised packaging would also make enforcement more difficult and costly:

- the easier and cheaper counterfeit products become to produce, the less the impact of seizures on the criminal, with larger volumes being produced and pushed into the market as the relative risk declines;
- “*illicit white*”¹⁹ products become preferable in terms of price and appearance, so volumes will increase creating greater enforcement complexities;
- confused and unenforceable markets will develop. Standardised packaging could theoretically create a market with legal standardised packs; genuine branded travel retail packs; counterfeit standardised packs; genuine, illegal branded packs;

counterfeit branded packs; illicit whites (branded); illicit whites (unbranded). The result: five of the seven channels/options available to consumers would be run by organised crime;

- domestic counterfeit operations can be expected to be created, allowing easier access to retail supply chains;
- with no clear differentials between brands and provenance, detection opportunities will be reduced resulting in increased enforcement and prosecution costs; and
- any attempted price increase on legitimate domestic products to compensate for a decline in domestic sales to illicit products would only increase the profits of the criminals.

Covert track and trace systems - often presented by tobacco control lobbyists as a solution to the impact that standardised packaging would have on the illicit trade - are not an adequate or comprehensive solution because:

- covert markings are not applied by the manufacturers of counterfeit products or illicit whites;
- they are only used on genuine products, and can only be read by hand-held electronic readers; and
- neither the general public nor retailers have access to readers, making covert markings an irrelevant system for consumers to be able to distinguish between genuine and illicit product.

This all points to a need for increased enforcement at a time when budgetary constraints are impacting the capability of HMRC to tackle this difficult and growing issue.

10. Do you believe that requiring standardised tobacco packaging would have an impact on cross-border shopping?

Yes. We would expect consumers to bring back as much foreign purchased branded tobacco as they possibly can for the reasons explained above and, in particular, in our response to question 5.

Standardised packaging regulations would increase demand for imported genuine product as it would confer a significant 'cachet' on branded imported products, and cross-border

shopping would go some way to meeting the unfulfilled demand for branded tobacco products.

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

Yes. It would set a dangerous precedent and send a very negative signal to potential investors highlighting that the UK does not respect intellectual property rights, with implications for all branded consumer goods companies operating in the UK.

It would send a clear signal that the Government is content to disregard the principles of better regulation that it has committed to adhering to when introducing regulation.

It would have a negative impact across the entire supply chain, from manufacturer to wholesaler to retailer and would, if our expectations about its significantly increasing the illicit trade are realised, lead to independent retail shop closures and a loss of jobs.

It would likely lead to regulatory creep, with other sectors possibly similarly affected in the future.

Standardised packaging also goes against a raft of priorities and policies across Government:

	Government's policies/priorities	Standardised packaging
Promoting growth	Supporting intellectual property rights ³⁸	Destroys intellectual property rights
	Encouraging investment into the UK ³⁹	Discourages investment into UK: brand owners will be concerned at the willingness of Government to destroy brands and use of trademarks
	Supporting small businesses ⁴⁰	Damages small independent retailers by encouraging the increase of illicit trade in tobacco products which drives down legitimate sales
	Encouraging innovation ⁴¹	Reduces or eliminates innovation, by making it almost impossible to differentiate products and brands
	Widening consumer choice ^{39, 46}	Reduces consumer choice, by making it almost impossible to differentiate products and brands
	Increasing competition ^{39, 42}	Reduces consumer choice, by making it almost impossible to differentiate products and brands
	Removing unjustified and unnecessary regulation ^{2, 43}	Adds further unjustified and unnecessary regulation with no evidence of success
Reducing the deficit	Protecting government revenues and reducing the tax gap ⁴⁴	Increases the illicit trade, thereby reducing government revenue and increasing the tax gap
Protecting society	Reducing organised crime ⁴⁵	Creates a counterfeiter's charter, potentially leading to more organised crime and criminal activity
Empowering individuals	Giving people more freedom and control over their own lives ⁴⁶	Stigmatises and bullies adults who choose to purchase tobacco products and smoke

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

Standardised packaging should not be introduced for any legal product, including legal tobacco products of any type.

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

No. The drivers of health inequalities are clearly set out in the Marmot review. Health inequalities arise from a complex interaction of many factors - housing, income, education, social isolation, disability - all of which are strongly affected by the subject's economic and social status. The Marmot review emphasises that:

*"...attempts to reduce health inequalities have not systematically addressed the background causes of ill health and have relied increasingly on tackling more proximal causes (such as smoking), through behaviour change programmes. Part of the explanation for this emphasis lies with the comparative ease of identifying action to address behaviour, rather than the complexity of addressing social inequalities shaping such behaviours."*⁸³

It is possible that standardised packaging could disproportionately impact the many small independent retailers owned and operated by members of the Black Minority Ethnic community, particularly Asian families.

The significant boost to illicit trade that will result from the introduction of standardised packaging can also be expected to impact to a greater extent on adult smokers with lower incomes as they typically have greater access to illicit tobacco products.

14. Please provide any comments you have on the consultation-stage impact assessment.

The Impact Assessment is not fit for purpose.

⁸³ [Marmot Review, February 2010](#)

A number of criticisms of the Impact Assessment have already been made in this submission and Imperial Tobacco's principal criticisms of the Impact Assessment are set out below.

By way of introduction, given the unprecedented nature of the proposal to introduce standardised packaging and the far reaching implications that it would have, Imperial Tobacco would expect the Impact Assessment to undertake a thorough and comprehensive analysis of the policy proposal, which would need to include a robust, impartial and independent review of the evidence. It palpably fails to do so.

In particular, the Impact Assessment acknowledges that for the policy "*...to be justified the impact on smoking behaviour and consequent improvement in health needs to be sufficiently large to justify the related costs*" (page 3). However, there is no such cost-benefit analysis, which would require a full assessment of the likely costs, including the adverse effects on manufacturer and retailer competition and those associated with an increase in legal and illicit trade.

Reliance on the Systematic Review

The Impact Assessment relies on a Systematic Review that does not provide any evidence to justify the introduction of standardised packaging.

The Systematic Review is not independent

The authors of the Systematic Review have well-established links with, and receive funding from, organisations that actively pursue a tobacco control agenda and/or have been well known advocates of standardised packaging for many years. Indeed, 20 of the 37 studies included in the Systematic Review include work by the authors (and their colleagues).

In particular, Dr Moodie, the lead author of the Systematic Review, prepared 5 of the 37 studies referred to in the Systematic Review and Professor Hammond, who assisted with the development of the protocol for the Systematic Review, prepared a further 7 of the studies referred to in the Systematic Review.

The Systematic Review does not assess the policy objectives

The Government's stated objectives behind the introduction of standardised packaging are to influence smoking behaviour by reducing smoking uptake amongst young people and supporting smokers who want to quit (or preventing a relapse amongst smokers who have already quit).

However, the primary aim of the Systematic Review was to assess the potential impact of standardised packaging by reference to the points set out in the FCTC Guidance, namely: the "*appeal of the packaging or product*"; the "*salience and effectiveness of health warnings*"; and "*perceptions of product strength and harm*". The secondary aims of the Systematic Review were to assess any other potential impacts of standardised packaging. The 37 studies included in the Systematic Review are grouped thematically to provide a "*narrative synthesis*" that reflects these stated aims.

The Systematic Review does not provide any evidence that standardised packaging will achieve the stated policy objectives

The Systematic Review does not provide or review any evidence whatsoever of a causal link between tobacco packaging and smoking behaviour. In particular, there is no evidence whatsoever of a causal link on the behaviour of young people or on smokers who want to, or have already, quit.

The "evidence" that the Systematic Review does put forward is flawed and incomplete

Of the 37 "*carefully selected studies*", only three are not opinion-based. Only two report effect sizes (e.g. statistical significance) which is a noncontroversial and basic requirement of scientific evidence. Seven of the "studies" referred to were not publicly available; three are conference abstracts or presentations; and two are merely masters theses.

Even the Systematic Review itself acknowledges the limitations of the studies that were selected:

"The evidence in this review is largely drawn from correlational studies, which makes it difficult to draw conclusions about expected outcomes. Many of the studies use hypothetical scenarios, and are therefore not truly able to test how individuals would react or behave if standardised packaging was to be introduced. Within the correlational studies in the review there are further limitations in that some of the surveys use samples representative of the general population, but most do not, and instead use convenience or probability sampling. This same lack of representativeness also applies to the qualitative research... [A] more relevant limitation of some of the qualitative studies included was that quite limited information about the methodology and analysis was provided... It is also worth noting that findings regarding smoking-related attitudes, beliefs and behaviour from

*both the surveys and qualitative studies in the review are reliant upon self-report."*⁸⁴

In short, the state of the research evidence remains exactly as the Government concluded it was following the last consultation on standardised packaging in 2008. Namely: "*speculative*".

It is no answer to say that the evidence on whether standardised packaging might influence smoking consumption is "*inevitably indirect*" because this policy has not yet been implemented in any country. Indeed, that merely reinforces the need to carry out an independent and methodologically robust analysis of the policy proposal directed at the stated objectives.

The conclusion reached by the authors of the Systematic Review cannot justify the introduction of standardised packaging

In any event, the conclusion that was reached by the authors of the Systematic Review was that:

"...there was consistency in study findings regarding the potential impacts of plain packaging. This consistency of evidence can provide confidence about the observed potential effects of plain packaging. If and when introduced, existing evidence suggests that plain packaging represents an additional tobacco control measure that has the potential to contribute to reductions in the harm caused by tobacco smoking"

"*Consistency of study findings*" does not mean that those study findings are correct, and "*potential to contribute*" does not establish that standardised packaging will achieve the policy objectives.

By any measure, this plainly fails to satisfy the "*robust and compelling*" standard which the Government has committed itself to for the introduction of regulation. Given the draconian nature of the proposal to introduce standardised packaging and the significant implications that it will have - including the possibility of *increasing* tobacco consumption - the Government simply cannot rely on the Systematic Review to justify the introduction of standardised packaging.

⁸⁴ C Moodie et al, Plain Tobacco Packaging: A Systematic Review at page 89.

Proposal to rely on subjective opinion about the impact of standardised packaging on smoking behaviour

Presumably in recognition of the defects of the Systematic Review - and in particular the fact that it does not provide any evidence for whether standardised packaging would have any impact on smoking behaviour - the Impact Assessment states that:

"A quantified estimate of the impact of standardised packaging on smoking behaviour will be based on the findings of a research project being undertaken by the Policy Research Unit on Behaviour and Health. The ... project will elicit subjective judgments from three groups of internationally renowned experts on tobacco control. Participants will be asked to state what they believe to be the likely impact of standardised packaging ..."

It is remarkable that the Government has chosen to proceed with the consultation before making the results of this proposed assessment of the quantitative behavioural impact of standardised packaging available for consideration as part of the consultation.

Imperial Tobacco nevertheless has significant concerns about this proposal:

- it will provide *opinion, not evidence*. Opinion cannot properly form the basis for the introduction of standardised packaging;
- the experts *will not be impartial and independent*. Annex 2 to the Impact Assessment states that impartiality is considered "*impractical*". Why?
- the experts will be *anonymous*. Given that impartiality is apparently impractical, this is extremely concerning. The criticisms of the independence of the Systematic Review set out above demonstrate the basis for this concern. (Indeed, Imperial Tobacco would not be at all surprised (except that it would have no way of finding out) to discover that certain of the authors of the Systematic Review are amongst the group of "*internationally renowned experts*").

Failure to give adequate consideration to the implications of introducing standardised packaging

As noted above, the Impact Assessment lacks any real or impartial evidence as to the benefits of standardised packaging. However, equally as important, it also fails to consider in any meaningful way the unintended consequences and risks of standardised packaging. When introducing a regulatory measure aimed at affecting behaviour and outcomes in any particular market, particularly one which is as draconian and unprecedented as

standardised packaging, it is important to have regard to how manufacturers, retailers and consumers will respond to such a measure, with market participants' reactions being a key driver of unintended consequences. For example, the European Commission's guidelines on Impact Assessment, states that:

"[t]he analysis of impacts involves trying to predict, across a range of different policy areas, the likely consequences - both intended and unintended - of each option".

The Commission Guidelines list a number of examples of unintended consequences of different policy measures, which focus on market participants' reactions. In the present case, the Impact Assessment fails to give adequate consideration (or, in some cases, any consideration at all) to the significant detrimental consequences that would follow the introduction of standardised packaging, including:

- the impact on the economy, innovation, consumer choice, retailers, trade and competition - see section 6, page 21; our response to questions 4, 5, 7, 8 and 9 in Appendix A; and our response to questions 5, 6 and 7 in Appendix B. Indeed, the Regulatory Policy Committee noted that *"no monetised impacts of the proposal are provided"* and that the Impact Assessment would *"benefit from further explaining"* the effect on business that would result from standardised packaging;
- the consequences that would follow from the fact that standardised packaging would breach national, European and international law - see section 2.3, page 8 and our response to question 6 above; and
- the impact on illicit trade - see section 4, page 14 and our response to question 9 above.

Some new Government regulation may be relatively low risk and also easily reversed should it prove unsuccessful. This is clearly not the position as regards standardised packaging.

Failure to give adequate consideration to the regulatory context

The Impact Assessment acknowledges the long term declining prevalence in smoking and the introduction of legislation to ban the sale of tobacco from vending machines and the display of tobacco products. It even acknowledges that standardised packaging would have to be based on expected benefits over and above the existing tobacco control measures. However:

- it omits - and the Government has never undertaken - a comprehensive assessment of the impact of the existing tobacco control measures such as the Tobacco Advertising and Promotion Act 2002;⁸⁵ the ban on the sale of tobacco from vending machines; and the display of tobacco products in retail outlets;
- it would not be reasonable and proportionate to undertake such an assessment against the "*expected benefits*" of the sale of tobacco from vending machines and the display of tobacco products in retail outlets. The Government must undertake a proper analysis of the actual costs or benefits that follow the introduction of these measures.

Again, this was reflected in the comments by the Regulatory Policy Committee who noted that:

"...while the Impact assessment does acknowledge the 'current tobacco control policies', the Impact Assessment would also benefit from explaining more clearly how this proposal will interact with these other recent proposals."

Please see section 7 and our response to questions 3 and 5 above.

Failure to consider alternative options

Option 3 in the Impact Assessment is "*a different approach to tobacco packaging*". However, the Impact Assessment does not consider option 3 at all. Instead, it states that: "*The potential of option 3 will be explored following consultation, if responses to the consultation suggest an alternative approach to reduce the promotional impact of tobacco packaging*".

The Impact Assessment therefore assumes and proceeds on the basis that tobacco packaging has a "*promotional impact*" despite the evidence to the contrary detailed above. The proper approach would be to ask whether there are any alternative and less restrictive options capable of delivering the stated policy objectives of reducing youth smoking and assisting people who want to quit smoking from relapsing.

15. Please include any further comments on tobacco packaging that you wish to bring to our attention. We also welcome any further evidence about tobacco packaging that you believe to be helpful.

This document requires careful consideration in its entirety. Imperial Tobacco's response to the consultation questions should not be read independently from the full Response.

⁸⁵ [Anne Milton, Minister for Public Health, in response to Brandon Lewis MP, 16 July 2012](#)

Appendix B - Imperial Tobacco's answers to the consultation document impact and assessment

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

As outlined in more detail in our responses to questions 7, 8, 9 and 10 of Appendix A, the costs would be extremely significant, both in terms of direct financial costs to our business, and indirect costs throughout the supply chain, including in terms of potential job losses.

We are unable to provide commercially confidential information as the consultation document makes clear that confidentiality cannot be assured. We would, however, be pleased to meet DH Ministers to discuss this further.

However, without further details of the standardised packaging proposal, such as the nature, materials and format of the packaging that would be permitted, it would not be possible to answer this question with any precision.

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

We are not in a position to provide a definitive answer to this question without the provision of further information, such as the nature, materials and format of the packaging that would be permitted; and the rotation of health warnings and so on.

A large number of component materials are needed to form a genuine cigarette pack. The constant evolution of brand design including colour, embossing, foils, opening mechanisms, and even pack sizes, all serve to make it more difficult and more expensive for counterfeiters to seek to imitate legal products. The removal of these elements through the introduction of standardised packaging would make it easier for criminals to produce counterfeit copies.

Counterfeiters are not concerned with the rotation of health warnings or covert markings, further reducing their production costs.

We are unable to provide commercially confidential information as the consultation document makes clear that confidentiality cannot be assured. We would, however, be pleased to meet DH Ministers to discuss this further.

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

Tobacco packaging is amended to comply with relevant legislation and address, as far as possible, the problems posed by the illicit market. We also update our products to ensure they remain relevant to our smokers in this changing environment.

As explained above, tobacco packaging is also essential to the differentiation of products from competitors. We are unable to provide commercially confidential information as the consultation document makes clear that confidentiality cannot be assured. We would, however, be pleased to meet DH Ministers to discuss this further.

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

We are unable to answer this question as it is unclear what is meant by “*pack shape*” in this instance.

There are several different sized packs on the market (depending on the number of cigarettes the pack is designed to hold), and several deviations from the standard “*flip-top*” design, including but not limited to bevel-edge or soft packs.

5. Would retailing service times be affected, and if so, why and by how much, if standardised packaging were introduced?

Two reports⁸⁶ prepared by Deloitte for the Alliance of Australian Retailers suggest that retailing times would be adversely affected if standardised packaging were introduced by an additional 15 to 45 seconds per transaction and that the effect would be particularly significant for smaller retailers. The Deloitte reports also found that standardised packaging would have a number of other adverse implications for retailers. In the context of the ban on the display of tobacco products, it will be even harder for retailers to identify packs if standardised packaging were introduced. The Impact Assessment is therefore wrong to conclude that transaction times would decrease.

The Government should ensure that it collects proper evidence of the impact on retailing service times.

⁸⁶ ["Potential impact on retailers from the introduction of plain tobacco packaging"](#), Deloitte, February 2011; and ["Plain packaging and channel shift"](#), Deloitte, June 2011

The study by Carter et al., "*Measuring the effect of cigarette standardised packaging on transaction times and selection errors in a simulation experiment*"⁸⁷ is widely referred to by anti-tobacco lobbyists in response to the Deloitte reports. Carter et al., suggest that the argument that standardised packaging would increase transaction times is "*spurious*" and can be "*refuted by even a modest experiment undertaken with no budget and a group of volunteers over the space of one week.*" This consisted of 52 subjects standing in front of a display of either 50 plain or coloured cigarette packets. They were then read a randomly ordered list of brands and asked to locate them. The time taken to locate each packet was recorded, as well as any selection errors. From this experiment, Carter et al conclude that: "*...rather than standardised packaging requiring an additional 45 seconds per transaction ... it will if anything modestly decrease transaction times and selection errors.*"

However, this study and "*modest experiment*":

- is unrealistic in that the authors deliberately excluded subjects who were familiar with tobacco brands. This meant that the participants were: "*quicker at locating plain packs than coloured packs because of their general unfamiliarity with cigarette brands, and it remains possible that if the experiment was repeated with experienced tobacco retailers, any advantage conferred by standardised packaging would be lost*". However, it is precisely "*experienced tobacco retailers*" who will be dealing with the implications of standardised packaging in practice;
- does not replicate the retail environment; in particular the recent (for large stores in England) or pending (for small stores and other jurisdictions in the UK) introduction of a display ban;
- even concluded that: "*our qualitative results suggest that colours and logos can serve as a useful cue to locate some tobacco brands*"; and
- misrepresents a view allegedly expressed by Deloitte that standardised packaging would add "*an additional 45 seconds*" per transaction. However, Deloitte actually concluded that standardised packaging will result in an increase in transaction times in a range of "*between 15 and 45 seconds*".

Imperial Tobacco believes that retailing service times would be adversely affected, but that the Government should ensure that they obtain evidence from retailers on this point.

⁸⁷ Carter et al., 26 September 2011

Perhaps most importantly, it should be remembered that the impact on retailing service times would be in addition to all of the other costs that would be imposed on retailers, especially smaller retailers, as identified in section 6 above; our response to questions 5 and 8 in Appendix A; and our response to question 7 below.

6. How could standardised packs be designed to minimise costs for retailers?

They cannot. Please refer to section 6 above; our response to questions 5 and 8 of Appendix A; and our response to question 7 below.

Again, however, the Government should ensure that they obtain evidence from retailers on this point.

7. Would retailers bear any other costs if standardised tobacco packaging were introduced?

Yes. The Government should ensure that they obtain evidence from retailers on this point.

However, the studies conducted by Deloitte in Australia identified a number of significant costs that would impact on retailers, particularly small retailers. These included:

- channel switching: customers moving from small retail outlets to supermarkets in order to be sure that their desired brand will be available;
- increased stock management costs;
- “write-offs” costs for non-compliant products;
- increased security costs; and
- costs as a result of the growth in illicit trade.

Moreover, as explained in our response to question 5 in Appendix A (Part B), these costs are of particular significance for smaller retailers who rely on the materially higher margins on premium, higher priced brands. Standardised packaging can be expected to increase the proportion of tobacco sold by the large grocery retailers (who will exercise buyer power by refusing to stock brands and by selling at substantially lower prices than small, convenience retailers).

Please refer to section 6 above; our response to questions 5, 9 and 10 of Appendix A; and our response questions 5 and 6 in this Appendix.

8. What is the average price of a packet of cigarettes in the following cigarette market segments?

- **Premium brands**
- **Mid-price brands**
- **Economy brands**
- **Ultra-low-price brands**

It is difficult to provide an accurate answer to this question as the price segments have not been defined in the consultation. However, based on what ITUK understand the price segments to be in the UK, we can provide an unweighted average RRP of a pack of 20 king size cigarettes. These RRP's are post-2012 Budget:

- Premium: £7.60
- Sub-Premium: £6.91
- Value: £6.60
- Economy: £6.13

9. What percentage of total cigarette sales in the United Kingdom are in each of the following cigarette market segments?

- **Premium brands**
- **Mid-price brands**
- **Economy brands**
- **Ultra-low-price brands**

It is difficult to provide an accurate answer to this question as the price segments have not been defined in the consultation. However, based on what ITUK understand the price segments to be in the UK we can provide the following splits, based on May 2012 cigarette sales volume data and broken down to stick-level:

- Premium: 21.5%
- Sub-Premium: 15.2%
- Value: 25.4%

- Economy: 37.9%

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

- Premium brands
- Mid-price brands
- Economy brands
- Ultra-low- price brands

We are unable to provide commercially confidential information such as this as the consultation makes clear that confidentiality cannot be assured. We would, however, be pleased to meet DH Ministers to discuss this question further.

We would also highlight that taxation represents the vast majority of the total price of tobacco products.

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

Yes. Please refer to our response to question 9 of Appendix A for a detailed discussion of this point.

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

It is difficult to provide an accurate answer to this question without further information being provided, such as:

- What is meant by the term “carton”;
- whether the proportion refers to value or volume;
- if volume, whether this means weight, stick (and equivalents), pack numbers, outer numbers, stock case numbers, and so on; and
- which part of supply chain it refers to.

However, if by “carton” the DH are referring to “outers”⁸⁸ of cigarettes, then the estimated proportion of total cigarette stick volume by Imperial Tobacco in the UK for FY11/12 to date is approximately 10%. We are unable to answer on behalf of the whole market, but would expect this figure to be broadly in line with our own estimations.

We would be pleased to meet DH Ministers to discuss this further.

⁸⁸ 10s or 20s packs of cigarettes that are typically sold as 100 or 200 multipacks (or equivalent multiples).

Appendix C - Why Young People Start Smoking

An evidence-based approach to smoking policy amongst young people in the UK would begin with a clear understanding of the factors that reliably predict youth smoking and then attempt to address each of these. Proceeding in this fashion would provide a clear, evidence-based link between causes and remedies, as opposed to an approach based on speculation and disputed assumptions.

Here we review the evidence related to predictors of youth smoking. It is clear that packaging and branding is not one of them.

Liverpool Longitudinal Study on Smoking⁸⁹

One of the longest running longitudinal studies on smoking initiation is the Liverpool Longitudinal Study on Smoking (“**LLSS**”), which was established in 1994. The key aim of the LLSS was to answer the question, “*Why do young people smoke?*”

To answer this question, the study has followed a single birth cohort of children from the age of 5 to 16. In its most recent report, *The Liverpool Longitudinal Study on Smoking: Experiences, beliefs and behaviour of adolescents in Secondary School 2002 to 2006*, the study focuses on the key factors that lead to trial and experimental smoking by adolescents.

Central risk factors include living in areas of high social and economic deprivation. It notes that “*between ages 14 to 16 those living in an area with a high deprivation score were 95 per cent more likely to try smoking.*” It also reports that students served by poor schools had a significantly higher risk of trying smoking, with this predictor increasing the risk of trial by 95 per cent.

Goddard 1990 Why children start smoking HMSO and 1992 Why children start smoking⁹⁰

This study by Eileen Goddard for the UK Office of Population Censuses and Surveys reports on secondary school children who were interviewed three times in 1986, 1987 and 1989 when they were at the beginning of their (then) second, third and fourth academic years. The goal of the survey was to “*see which of a range of factors were most closely associated with children starting to smoke.*” The surveys were, of course, undertaken prior to the ban on advertising of tobacco products.

⁸⁹ The Liverpool Longitudinal Study on Smoking, August 2008

⁹⁰ Why Children Start Smoking by Eileen Goddard HMSO (and OPCS (Office of Population Censuses & Surveys) 17 December 1990.

Goddard identified seven factors:

- being a girl;
- having brothers or sisters who smoke;
- having parents who smoke;
- living with a lone parent;
- having relatively less negative views about smoking;
- not intending to stay on in full-time education after 16; and
- thinking that they might be a smoker in the future.

Several of these risk factors, particularly living with a single parent and not intending to remain in school, have been identified as crucially important to smoking uptake in other studies. All the risk factors, according to Goddard, are associated independently with smoking; none has any direct connection with tobacco branding and there is no single, simple explanation as to why adolescents begin to smoke. As Goddard notes:

"...the onset of smoking in young people is a complex process - no simple combination of a small number of factors can be put together to form a good explanation of why some children start to smoke at this age while others do not..."

Goddard notes a low correlation between the brands that were most recognised and brands most likely to be smoked. Indeed, she does not identify branding or even advertising that was then permitted as a cause of youth initiation and the survey data provides no support for the claim that children smoke because of branding.

Conrad et al. 1992 Why Children Start Smoking Cigarettes: Predictors of Onset⁹¹

The research of Conrad et al. echoes the conclusions of Goddard. These authors confined their analysis of the factors associated with youth smoking to longitudinal studies that were published from 1980 onwards. The age of the adolescents in the studies ranged from 10 to 17 with the median age being 12 to 13. The studies lasted from four months to two years and were conducted in the US, Europe and Australia. They provide data drawn from a diverse range of societies.

⁹¹ Conrad et al., 1992 K.M. Conrad, B.R. Flay and D. Hill, *Why children start smoking cigarettes: predictors of onset*, Br. J. Addict. 87 (1992), pp. 1711–1724.

Conrad and her colleagues grouped their analysis of the “*process of becoming a smoker*” around five different categories of smoking predictors or risk factors:

- socio-demographic;
- social bonding;
- social learning;
- intrapersonal/personal/self-image; and
- knowledge, attitudes, and behaviour predictors.

They then discussed the findings by examining the predictive reliability of each group of risk factors in terms of youth smoking.

Socio-demographic predictors such as socio-economic status, age and gender were consistent with theoretical expectations 76 per cent of the time, with the strongest predictors of starting to smoke being socio-economic status and age.

Social bonding predictors, including family and peer bonding and school influences, were consistent in predicting smoking initiation 71 per cent of the time.

Social learning predictors - family smoking, family approval of smoking, other adult influences (including tobacco advertisements), peer influences and the availability of tobacco were consistent 72 per cent of the time.

Intra-personal, personal and self-image predictors which included such things as tolerance of deviance, independence, rebelliousness, risk-taking, alienation and locus of control were consistent in 77 per cent of the cases. What is particularly important is that the most reliable predictor in this grouping of risk factors was rebelliousness/risk-taking.

Knowledge, attitude and behaviour predictors, including understanding of and beliefs about the physical consequences associated with smoking; “addiction”; expected utility from smoking; approval of cigarette advertisements; alcohol and substance use were predictive in 75 per cent of the cases. Approval of cigarette advertisements was predictive in one study and non-predictive of smoking initiation in another.

Finally, one of the strongest predictors of smoking initiation in all of the studies was rebelliousness and risk-taking. Given how strongly these characteristics are associated with initiation, standardised packaging raises serious concerns about the potentially counter-productive impact of such measures.

Conrad et al.'s analysis of the longitudinal research on youth smoking initiation has been confirmed in other research that has taken predictor variables and combined them into single studies. For instance, Smith & Stutts combined the major predictor variables of youth smoking in a single study that found that all variables related to advertising and anti-smoking information ranked low as reliable predictors. They concluded that *“exposure to cigarette advertising, paying attention to cigarette ads, being familiar with cigarette characters and brands, and exposure to antismoking information are not good predictors of smoking levels.”*⁹²

Lloyd and Lucas 1998 Smoking in Adolescence: Images and Identities⁹³

In 1998 two UK researchers - Barbara Lloyd and Kevin Lucas - published a significant work on youth smoking. Their research, commissioned by the DH but never subsequently cited by the Department, was based on a decade of interviews with London and Sussex adolescents about smoking. It argued that many of the traditional anti-smoking interventions, including school-based education programmes, needed to be re-evaluated as they failed to connect with the actual causes of youth smoking. Criticising the inadequate research methods and assumptions of studies such as those employed by the UK DH, they wrote that:

“Health promotion programmes for young people must be theory driven and also based on research that uses adequate, representative samples which are capable of rigorous objective analysis. The inadequacy of strategies based on myth and popular opinion has been illustrated by the failure of many intervention programmes to date. Moreover, a danger exists whereby the adoption and promulgation of such myths by health professionals results in their being accepted as fact and threaten to produce a self-fulfilling prophecy... Sound research may sometimes yield uncomfortable truths. Such truth is the accumulating evidence that many smokers enjoy smoking.”

Lloyd and Lucas also stress that the main reasons for adolescent smoking uptake are found in:

- the structures and functioning of families, and particularly the quality of parent-child relationships;
- the nature of school cultures and the academic success of children;
- the adolescent need for stress and mood control; and
- the fact that smoking provides considerable physical pleasure.

⁹² Smith, K. and M. A. Stutts. 2000. Factors that Influence Adolescents to Smoke. *Journal of Consumer Affairs*, 33 (2), 321-357.

⁹³ Lloyd, Barbara, Kevin Lucas, Janet Holland, Sheena McGrellis and Sean Arnold; *Smoking in adolescence: images and identities*; Published by Routledge, 1998 (London).

They note:

“There is now ... compelling evidence to support the view that the quality of an adolescent’s home environment will impact on his or her health-related behaviour, including the likelihood of taking up cigarettes.”

And:

“...poor family relationships predict teenage smoking independently of parental smoking behaviour.” Furthermore, it is not simply the quality of the home environment but the quality of “relationships within a family” which “also influences the likelihood of an adolescent becoming a smoker. Adolescents value open, communicative relationships with their parents. For some, such relationships obviated the need to use smoking as a symbol of rebellion.”

They observe that:

“Our evidence highlights the significance of individual school cultures. ... The contribution of school culture to health-related values and behaviour cannot be underestimated...”

And finally, with regard to stress, they found that their subjects responded to this by using cathartic coping devices and viewed “smoking as a coping resource” for stress.

Their statistical analysis showed that:

“...adolescents who smoke perceive more stress in their lives; report making less use of problem-focused coping and more use of cathartic coping strategies; perceive smoking as a coping resource.”

Jessor 1977 Problem behaviour and psychosocial development: A longitudinal study of youth,⁹⁴ 1995 Protective factors in adolescent problem behaviour⁹⁵

A further alternative account of smoking uptake is found in the work of Richard Jessor and his colleagues in the US. For Jessor, as for many researchers, smoking is part of a cluster of risk-taking behaviours, rather than a unique adolescent activity. Jessor has looked at a number of these behaviours, including alcohol use and smoking, delinquency and sexual precocity, in

⁹⁴ Jessor, R., & Jessor, S. L. (1977). *Problem behaviour and psychosocial development: A longitudinal study of youth*. New York: Academic Press

⁹⁵ Jessor, R., Van Den Bos, J., Vanderryn, J., Costa, F.M., and Turbin, M.S. 1995. *“Protective factors in adolescent problem behavior: Moderator effects and developmental change”*. *Developmental Psychology*, 31, 923-933.

order to identify the factors that serve to protect adolescents from engaging in them. He has identified seven protective factors as crucial:

- positive orientation towards school;
- positive orientation towards health;
- intolerant attitudes toward deviance;
- positive relations toward adults;
- strong perceived controls;
- friends who engage in conventional behaviours; and
- involvement in pro-social activities (e.g. volunteering).

Contrasting with these seven protective factors are six risk factors which, according to the author, increase the likelihood of problem behaviours:

- low expectations for success;
- low self-esteem;
- general sense of hopelessness;
- friends who engage in problem behaviours;
- a greater orientation towards friends than towards parents; and
- poor school achievement.