

ASH critique of Tobacco Industry Evidence to the Chantler Review on standardised packaging

Documents Considered:

- “The Evidence is Plain: The ineffectiveness of standardised packaging for public health” – Imperial Tobacco
- “Submission to the Chantler Review into the public health impacts of standardised packaging for tobacco products” – JTI
- “British American Tobacco UK Limited’s response to Sir Cyril Chantler’s review into standardised packaging of tobacco” – BAT

Introduction

1. The four largest tobacco multinationals, Imperial Tobacco (IT), Japan Tobacco International (JTI), British American Tobacco (BAT) and Philip Morris International (PMI), submitted lengthy responses to the Government’s original consultation on the introduction of standardised packaging which are publicly available. All except PMI have submitted published responses to the Chantler Review, which cover much of the same ground (although there have been media reports of a PMI response we have not been able to track down a copy in the public domain).
2. The industry’s stated objections to standardised packaging can be divided into three broad claims:
 - a. There is no good evidence that standardised packaging will benefit public health.
 - b. There is evidence that standardised packaging will have serious negative consequences, particularly on the level of illicit trade and on tobacco-related businesses such as retailers and packaging companies.
 - c. The policy process, including the terms of reference of the Review, is flawed or biased.
3. Set out below is a critique of these claims, which need to be understood in the context of Article 5.3 of the WHO FCTC¹ and its guidelines.² Article 5.3 requires Parties such as the UK to protect their public health policies with respect to tobacco control from the commercial and vested interests of the tobacco industry. The first guiding principle of the guidelines explains the rationale for this, stating that, “*There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests.*”

Public Health Evidence

4. A critical issue for the Review is to determine what counts as good evidence of public health impacts from standardised packaging. For example, the tobacco companies dismiss the large number of relevant published peer reviewed studies on the grounds that they “*fail to observe plain packs in a natural setting*” (BAT 4.6.1). In effect, the companies are arguing that standardised packaging should be not introduced in any

1 WHO FCTC. 2003. http://www.who.int/fctc/text_download/en/

2 WHO FCTC Guidelines for implementation of Article 5.3. 2008. http://www.who.int/fctc/guidelines/adopted/article_5_3/en/

jurisdiction until it has been shown to work in one or more jurisdictions. This convenient logical contradiction would have prevented any progress at all in this area, were it not for the fact that the argument was rejected in Australia, where standardised packaging was introduced in December 2012.

5. Now the industry is arguing both that standardised packaging has not worked in Australia (relying heavily on a November 2013 study by the consultancy firm London Economics) and that enough time has not yet elapsed to determine whether it has worked or not. The IT submission even baldly states that *“it is impossible for the Government to assess whether any further tobacco control measures would have any appreciable impact on improving public health over and above existing measures”*, which if true would render much of the remainder of the industry’s submissions otiose, since they consist of alleged reasons why the specific measure proposed, standardised packaging, would not in fact work.
6. The IT submission (Appendix B) goes on to recommend the German approach to youth education about smoking, presumably as a tobacco control measure which the Government could and should assess as having an appreciable impact. The German Cancer Research Center (DKFZ) reports ³ that *“evaluations show that the effects of school-based programmes for smoking prevention on the smoking habits of students are minimal”*. Even if this assessment is not accepted, there is no contradiction between these programmes and other tobacco control measures; Professor Reiner Hanewinkel, developer of the “Be Smart – Don’t Start” initiative recommended by IT states in the DKFZ paper that *“I’m strongly in favour of the introduction of plain packaging to prevent the youth from smoking”*.
7. In so far as the industry has a coherent position to present to the Review it is that “Better Regulation” principles require that *“the independent reviewer could only advise that the evidence justifies plain packaging proposals being taken forward if he determined that there was robust and compelling evidence that the introduction of plain packaging is likely to have actual positive public health impacts beyond and in addition to such impacts (if any) known arising from the recent tobacco control initiatives listed in paragraph 2.27 of the [JTI] Consultation Response”*. (JTI 4.19)
8. The JTI Consultation Response document lists the following policy initiatives:
 - a) Ending smoking in enclosed public places and workplaces
 - b) The introduction of graphic health warnings on tobacco products
 - c) Negative licensing of retailers
 - d) Banning the sale of tobacco from vending machines
 - e) The tobacco display ban
 - f) Increases in tobacco taxation
 - g) Raising the minimum age for purchasing tobacco from 16 to 18.
9. In every case except g) above, the industry opposed the proposed policy, arguing that it would produce unintended and unacceptable negative consequences and would not reduce smoking prevalence. However, the latest information suggests a continuing decline in prevalence rates in England, following the implementation of these policy interventions. A letter to the BMJ from Professor Robert West and Senior Research Fellow Jamie Brown, of University College London, cites a survey of 22,167 adults in 2013 shows a fall in smoking prevalence in England to 19.3%, and a continuing decline

³ Tobacco prevention in Germany – what works? German Cancer Research Centre, (DKFZ) 2014.
http://www.dkfz.de/de/tabakkontrolle/download/Publikationen/AdWfP/AdWfP_Tobacco_prevention_in_Germany_what_works.pdf

in early 2014. This is the first time for 80 years that prevalence rates in England have fallen below one in five.⁴

10. Smoking is highly addictive, and no feasible policy, or combination of policies, can be expected to produce a rapid result in reducing prevalence rates. Tobacco control policy is best considered as consisting of a series of inter-related initiatives, contributing to an outcome where the “whole is greater than the sum of the parts”. This naturally makes it difficult to show a distinct benefit from each individual policy element. For example, standardised packaging was introduced in Australia in conjunction with larger health warnings, and a sustained multi-million dollar mass media campaign to motivate quitters and discourage youth uptake. Australia has also committed to annual increases in tobacco taxation of 12.5 per cent over inflation the next four years.⁵ These policies should combine together to produce a significant long-term fall in Australian prevalence rates.
11. In the UK standardised packaging should be seen as completing a strand of tobacco control policy relating to advertising and promotion. Formal advertising, promotion and sponsorship of tobacco products is now banned in the UK. With the ending of retail displays in large shops in April 2012, and in small shops from April 2015, the tobacco industry will no longer be able to use “power wall” displays as a form of advertising. Therefore the pack has become the only means by which brand identity can be communicated to existing and potential consumers.
12. We would therefore suggest that the following is the appropriate test of whether standardised packaging is an appropriate policy:
 - a. Is it consistent with and complementary to other elements of tobacco control policy?
 - b. Together with these policies, is it likely to contribute to a long-term decline in smoking prevalence rates?
13. Specific arguments about public health evidence advanced in the three industry responses involve fallacious reasoning and apply different standards of proof for statements that support or conflict with their perceived interests. For example, BAT claim that “*packaging has no impact on smoking initiation, cessation or relapse*”, citing in support of this assertion “*a study commissioned by the European Commission*” showing that the “*primary drivers of initiation among youth were friends and family smoking*”. This study identified a key vector of transmission of smoking from one generation to the next, but did not address the role of packaging or how this interacts with interpersonal influence. It ignores the fact that tobacco marketing and packaging have been designed to shape social norms and beliefs, as can be seen in numerous tobacco industry documents.^{6 7}

4 Brown J and West R, Smoking prevalence in England is below 20% for the first time in 80 years, Letter, BMJ 2014; 348 doi:

<http://dx.doi.org/10.1136/bmj.g1378>

5 Griffiths E and Cullen S. Smokers slugged in Government's plan to raise \$5.3 billion. ABC 1 August 2013 <http://www.abc.net.au/news/2013-08-01/government-to-raise-5-billion-from-cigarette-tax-increase/4857244>

6 See below for examples of relevant industry documents revealed in US litigation:

[PM-USA PACKAGING Consumer Research](#) ;

[Brand Imagery Study. Market Behaviour \(Hong Kong\) Ltd.](#)

“Settled” women’s issues. Marketing Perceptions, Inc.

<http://legacy.library.ucsf.edu/tid/jpr82i00/pdf?search=%22packaging%20imagery%20perceptions%20attitudes%20bat%22>

7 Hastings, G and MacFadyen, L. [Keep Smiling: No-one's going to die.](#) CTRC & TCRC, 2000

14. One way in which smoking is advertised and promoted among peer groups and families is of course the display of the pack by existing smokers. This is why evidence from studies included in the systematic review and update are relevant. To take one example from many, Hammond D et al, University of Waterloo, reported in 2011 that a survey from a United States sample of young women aged 18 to 19 years showed that *“fully branded female packs were rated significantly more appealing than the same packs without descriptors, “plain” packs, and non-female branded packs. Female branded packs were associated with a greater number of positive attributes including glamour, slimness and attractiveness...”*⁸
15. BAT’s submission argues that these studies *“measure perceptions which are not predictive of actual behaviour”*. The examples given are *“intentions, attitudes and impressions”* (BAT 4.6.4). Yet the tobacco industry uses these same outcomes extensively in its product development, research and marketing strategy. Testing consumer perceptions of packaging is a standard step in the development of any new product line or changes to a product.^{6 7} It seems inconceivable that the tobacco industry would do this if the outcomes are invalid. Furthermore there is research evidence clearly showing that intentions and attitudes are important determinants of behaviour. Although the strength of the relationship varies by individual, behaviour and context, it is generally at least moderate⁹ and it does not need to be strong for significant public health gains to be achieved.
16. The BAT submission critiques studies included in the systematic review seriatim. The submission concludes that *“no individual study is capable of being credible and reliable evidence that the introduction of plain packaging is likely to lead to a decrease in consumption of tobacco”*. It is true that no single study can demonstrate causality, or is without limitations that suggest a need for further investigation. This is not surprising, since it is a central truth of the scientific method. The purpose of a systematic review is to consider whether a series of studies taken together provides credible support for a given hypothesis. All three submissions fail entirely to address this critical point.
17. The industry submissions are happy to rely on single studies, where they support their presuppositions. So they give as evidence of the “failure” of standardised packaging in Australia a November 2013 study by the consultancy firm London Economics, funded by PMI and as far as we are aware not peer reviewed. This reported that since the introduction of plain packaging in Australia their survey showed no statistically significant change in smoking prevalence. The report has been sharply criticised by among others the Cancer Council of Victoria, since:
- a) The survey had a sample size of 5,000, which could only demonstrate statistical significance if smoking prevalence rates had fallen by around two percentage points in less than a year, which would be a sharper decline than has ever been recorded in such a short period in the history of tobacco control policy. To measure a statistically significant decline of, for example half a percentage point, would have required a sample of around 90,000.
 - b) Furthermore the survey relates to all age groups and not the target group most likely to be impacted by plain packaging, in particular teenagers. Given that the power to detect an effect in all age groups combined is minimal, the power to detect effects in just young people is miniscule.
 - c) The report used an online survey panel, which was not representative of the general population (for example, the panel’s smoking prevalence rate was higher than the Australian average)

⁸ Hammond D et al. Impact of female-oriented cigarette packaging in the United States. *Nicotine and Tobacco Research* July 2011. Doi: 10.1093/ntr/ntr045

⁹ Sutton S (1998) Predicting and Explaining Intentions and Behavior: How Well Are We Doing? *Journal of Applied Social Psychology* 28, 1559-1816

Negative Consequences

18. The tobacco industry's principal argument against standardised packaging, repeated in all three submissions, is that it would sharply increase the level of illicit trade in tobacco. In fact, there is no good reason to accept this assertion.
19. None of the submissions address the key point that the security features present on a branded pack of cigarettes would continue to be used on standardised packaging (and indeed the drafting of the amendment to the Children and Families Bill dealing with standardised packaging would allow them to be strengthened).¹⁰
20. The key security features include:
 - a covert mark on each licit pack, which can be read by enforcement authorities using a simple scanner to determine whether or not a pack is counterfeit
 - other security marks that vary between manufacturers, for example the configuration of marks on filter paper
 - number codes printed on each pack, which should be developed and standardised through the introduction of the tracking and tracing system mandated under Article 8 of the Illicit Trade Protocol, negotiated under the WHO Framework Convention on Tobacco Control.
21. The production costs of illicit cigarettes (including packaging) are very low. In Paraguay costs can be as low as 5 US cents a pack, a Jin Ling pack in Kaliningrad or a Chinese counterfeit pack may cost about 20 cents a pack to produce.¹¹ Counterfeiters are also able to produce quality and apparently genuine packaging at low prices in a short time. Even the tax stamps with more sophisticated security features used in other parts of the EU are easy to counterfeit. It follows that, as HM Customs and Excise reported in 2004, outside packaging is the least useful indicator of whether a pack of cigarettes is licit or illicit.¹²
22. Reducing the scale of the illicit tobacco trade in the UK requires integrated investigation and enforcement action at an international, national, regional and local level. If this is achieved then the level of illicit trade is likely to continue to fall, and the introduction of standardised packaging will have little or no impact.
23. The UK government first put in place in 2000, and regularly updates, a detailed strategy to tackle tobacco tax evasion. At a regional level, initiatives such as the North of England programme "*Tackling Illicit Tobacco for Better Health*" have improved collaboration on enforcement between HMRC, police and trading standards officers, and engaged health professionals in work to reduce demand for illicit tobacco.^{13 14}

10 On 7th November 2013, Jane Ellison, Parliamentary Under-Secretary of State for Health, stated that: "*The Government, working with other interested parties, are trying to drive down the size of the illicit tobacco market through improved enforcement and reducing opportunities for fraud. I am grateful to those hon. Members who have made the point that if we were to adopt standardised packaging, it would not mean plain packaging. Approaches such as anti-smuggling devices could be built into standardised packaging, if we choose to go down that route.*" [Hansard](#): backbench business debate. 7 November 2013 column 477

11 Joossens L.. [Smuggling, the Tobacco Industry and Plain Packs](#) Cancer Research UK, Nov. 2012

12 HM Customs & Excise. *Counterfeit cigarettes*. 2004.

13. [North of England Partnership: Tackling Illicit Tobacco for Better Health](#)

14 McNeill, A. Iringe-Koko, B. Bains, M. Bauld, L. Siggins, G. Russell, A. Countering the demand for, and supply of, illicit tobacco: an assessment of the 'North of England Tackling Illicit Tobacco for Better Health' Programme. *Tob Control* doi:10.1136/tobaccocontrol-2013-050957

24. As a member of the European Union, the UK has also benefited from the legally binding agreements signed between the EU and the four major tobacco multinationals in settlement of litigation in the US alleging “*an ongoing global scheme to smuggle cigarettes, launder the proceeds of narcotics trafficking, obstruct government oversight of the tobacco industry, fix prices, bribe foreign public officials, and conduct illegal trade with terrorist groups and state sponsors of terrorism.*”¹⁵ Under these agreements multi-million dollar payments were made to the EU and Member States by the manufacturers who were also required to put measures in place to control the supply chain more effectively. In the future, the UK should also benefit from the impact of the WHO FCTC Illicit Trade Protocol once it is ratified and enters into force.
25. This combination of international, national, regional and local action on illicit trade has had a major impact. The latest HMRC estimate of the “tobacco tax gap”, released on 11th October 2013 shows that about 9% of cigarettes consumed in the UK were illicit compared to 9% in 2010/11 and 7% in 2011/12. The figures for hand rolled tobacco were 36% in 2012/13 compared to 38% in 2010/11 and 35% in 2011/12 (all figures mid-range estimates). The total estimated tax loss from the illicit trade was estimated at £1.9 billion.¹⁶ The level of illicit trade has roughly halved since its anti-smuggling strategy was first put in place in 2000. Meanwhile, total tobacco tax revenues have also continued to rise.¹⁷ Independent research has shown that tobacco industry funded studies such as “Project Star”, quoted in all three industry submissions, routinely overestimate the level of illicit trade in the UK, and focus on counterfeit product, while underestimating the proportion of illicit tobacco that is legitimate product diverted into illicit channels.¹⁸
26. It should be noted that none of the industry submissions disclose that PMI has developed a coding system called “Codentify”, which the company has licensed for free to JTI, IT and BAT. The four tobacco multinationals have set up a “Digital Coding and Tracking Association”, based in Zurich. According to PMI, the system is based on unique twelve digit codes, which enable enforcement authorities to determine key information including: date, time, factory and line of production and intended target market. Since the codes are based on a secure algorithm, it is claimed that it would be a simple matter to identify “fake” codes on illicit packaging. PMI’s promotional material claims that “*Codentify*”... “*makes the leap into the digital age and can meet the demands of governments that want to improve tax revenue collection, the robustness of verification processes and supply chain security ... When it comes to protecting government tax revenues, securing the supply chain and fighting illicit trade, Codentify offers a highly advanced, secure and cost-effective solution for the 21st century.*”¹⁹
27. Codentify (or any of a number of other possible systems) could be used on standardised packs as easily as on branded ones. It is clear that the tobacco industry is promoting contradictory messages depending on which issue it is addressing: on the hand it claims to have a robust coding system which enables it to identify counterfeit, and on the other to claim that pack design is vital in combatting illicit trade.
28. The judgement that standardised packaging need not affect levels of illicit trade is shared by enforcement authorities and expertise both in the UK and the Republic of Ireland, where the Government has announced its intention to legislate for standardised

15 Joossens, L. Raw, M. Progress in combating cigarette smuggling: controlling the supply chain. *Tob Control* 2008;17:399-404 doi:10.1136/tc.2008.026567

16 [Measuring Tax Gaps 2012](#). HM Revenue and Customs

17 HMRC Tobacco Bulletins report that tobacco tax revenue in 2011/12 was £9.6 billion, rising to £9.7 billion in 2012/13

18 See successive reports by Professor Anna Gilmore et al, University of Bath Tobacco Control Group, e.g. “*Towards a greater understanding of the illicit tobacco trade in Europe, a review of the PMI funded “Project Star*”, published Wednesday 22nd January 2014. Also see regional surveys of illicit trade by the market research company NEMS, e.g. the North of England Illicit Tobacco Survey 2011

19 http://www.pmi.com/eng/documents/Codentify_E_Brochure_English.pdf

packaging. On 23rd January 2014 An Garda Síochána Assistant Commissioner Byrne told the Joint Oireachtas Committee on Health and Children that *“it has been stated by certain interested parties that the move to plain packaging may lead to an increase in the trade in illicit tobacco products in Ireland. An Garda Síochána has not, however, been presented with evidence which supports this proposition.... The quality of counterfeit goods, which are already readily available across international markets, is so good, that the identification of the authentic product is often difficult for experts in the field. Those involved in counterfeiting can counterfeit what they need. Changes to plain packaging are not going to impact on this”*. Gerard Moran, Assistant Secretary at the Republic of Ireland’s Revenue Commissioners said: *“In terms of the impact of the standardised packaging legislation on the illicit cigarette market, we are satisfied that it will not damage our efforts to tackle the problem... We expect that the new packaging rules will ensure effective security features to make counterfeiting very difficult; the tax stamp will certainly contain all the features possible to minimise the risk of counterfeiting”*.²⁰

29. This conclusion reinforces evidence given to the UK Parliament’s All Party Group on Smoking and Health by experts on illicit trade including a senior serving police officer, an official from the European Union anti-fraud office OLAF leading its work on illicit trade, and a senior trading standards officer.²¹ It is also supported in evidence given by Nicholas Ilett, Director of Investigations at OLAF, who stated to the House of Lords European Union Sub-committee (Home Affairs) on Wednesday 17th July 2013 that: *“the quality of counterfeits now is so high that it does not make a great deal of difference whether or not the packs are plain”*.²² And by Andrew Leggett, deputy director for tobacco and alcohol strategy at HMRC, who stated in oral evidence to the House of Lords European Union Sub Committee (Home Affairs) on Wednesday 24th July that: *“There are a number of potential factors that weigh on counterfeit packaging if plain packaging was introduced. I think there is a risk there. The extent to which it would materially change the composition of the illicit market in the UK. We’re very doubtful that it would have a material effect.”*²³
30. Therefore it would be reasonable for the Review to conclude that a significant rise in illicit trade as a result of the introduction of standardised packaging is unlikely, particularly if integrated international, national, regional and local initiatives to combat illicit trade continue to develop.

“Flawed” or “Biased” Policy Process

31. This is an important area of challenge for the tobacco industry, less because it is likely to affect the findings of the Review or consequent Government decisions, and more because it is intended to support the likely industry judicial review challenge, should the Government decide to introduce regulations on packaging under the Children and Families Act.
32. For a judicial review challenge to succeed, the industry would need to show that the decision to proceed with regulations was illegal, unreasonable, or the product of procedural impropriety.²⁴ In order for the decision to be found unreasonable, or the product of wrong procedure, the industry wishes to attack the way in which the review is

²⁰ [Public Health \(Standardised Packaging of Tobacco\) Bill 2013: Discussion in the House of Oireachtas](#), 23 Jan. 2014

²¹ [APPG on smoking and Health. Inquiry into the illicit trade in tobacco products. 2013](#)

²² Evidence of Mr Ilett and Mr Rowan (OLAF) to House of Lords EU Sub Committee (Home Affairs) 17th July 2013. Question 18

²³ Evidence of Mr Andy Leggett HMRC House of Lords EU Sub Committee (Home Affairs), 24th July 2013

²⁴ See Lord Diplock’s decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

conducted. In the evidence submitted to the review, JTI, for example launches a direct attack on the concept of peer review in relation to published evidence.

33. The Method Statement for the Review rightly states that submissions “*should indicate the status of the evidence adduced (e.g. peer reviewed)*”. In response, the JTI submission states that peer review is not a good criterion for assessing the value of evidence, since it is a “*non-standardised process*” and “*particularly in the field of social sciences it is a subjective process open to every sort of bias*”, and “*there is a significant body of literature which is critical of the peer review process*”.
34. While it is of course true that the quality of peer reviewed studies can vary widely, peer review is in fact a necessary element of quality control for any research publication, and a fundamental component of the scientific method. The fact that the industry appears to reject the concept on principle is highly revealing. It is not a coincidence that a critical evaluation of the evidence on standardised packaging²⁵ shows that of 77 pieces of evidence relied on by the industry, only 17 addressed standardised packaging and none were published in peer-reviewed journals. In contrast, all 37 pieces of evidence included in the systematic review commissioned by the Department of Health focused on standardised packaging, and 21 pieces of evidence were published in a peer-reviewed journal.
35. Examples of research publications relied on by the industry which could have benefited greatly from peer review include the London Economics study, and the series of “Project Star” reports on the illicit tobacco trade produced by KPMG for PMI. In the former case, the study is too small and too soon to show any likely effect of standardised packaging, and the unsustainable claims made for it show that the methodology selected is likely to have been influenced by the industry’s desired result. In the latter case, it is not possible to discern the exact methodology used from the published results. In so far as the methodology is known, it is likely to have the effect of inflating the claimed level of illicit trade (for example through the use of discarded pack surveys).²⁶ This is consistent with the fact that Project Star estimates of illicit trade in the UK are routinely higher than the tax gap estimates produced by HMRC.

Conclusions

36. The industry’s submissions are characterised by disingenuous dismissal of evidence it finds inconvenient, logically inconsistent arguments, and attempts to define criteria for decision-making on standardised packaging that would preclude any action in advance. They provide no good grounds for the Review to conclude that the public health evidence supporting the introduction of standardised packaging is not well founded.

25 Hatchard J et al: A critical evaluation of the volume, relevance and quality of evidence submitted by the tobacco industry to oppose standardised packaging of tobacco products. *BMJ Open* 2014;4:e003757 doi:10.1136/bmjopen-2013-003757

26 Gilmore A, Rowell A, Gallus S, Lugo A, Joossens L, Sims M. Towards a greater understanding of the illicit tobacco trade in Europe: a review of the PMI funded ‘Project Star’ report. *Tobacco Control* 2013. doi:10.1136/tobaccocontrol-2013-051240