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Philip Morris Limited's Response to the Department of Health's Consultation on the Future of Tobacco Control

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Philip Morris Limited ("**PML**")[1] is pleased to take this opportunity to provide a response to the Department of Health's (the "**DH**") Consultation on the Future of Tobacco Control (31 May 2008) (the "**Consultation Paper**").

Introduction

The issues raised in the Consultation Paper cover a wide spectrum of matters posing stark and contrasting visions for the "*future of tobacco control*" in the United Kingdom. On the one hand, the DH presents a future that incorporates "*the potential of a harm reduction approach in tobacco control*."[2] By raising regulation of alternative tobacco products and other aspects of product regulation as a valid strand of tobacco policy, the DH offers a compelling vision of governmental tobacco policy that, in addition to appropriately maintaining its focus on preventing initiation and encouraging cessation, will address the reality that millions of adults in the UK will continue to use tobacco products.

On the other hand, the DH side-steps needed measures, including action to reduce youth smoking that it has proposed for over 10 years, and raises new issues that lack solid evidence bases and are unlikely to foster harm reduction. In this vision of the future, the question presented -- stripped of rhetoric -- is whether to exclude tobacco from legitimate commerce in the UK. Specifically, the DH proposes to ban the display of products at point of sale --- a practice described by the Department in 1998 and again in 2002 as perfectly legitimate for a legal consumer product – and suggests consideration of the radical step of plain packaging.

While we support comprehensive, effective regulation of the manufacturing, sale, marketing and use of tobacco products, we do not support regulation designed to prevent adults from buying and using tobacco products or to impose unnecessary impediments to the operation of the legitimate tobacco market. Regulation must be evidence based and should not raise unintended consequences that are neither good for public health nor for the legitimate tobacco industry.

The need for evidence based regulation is a central component of Government policy: "p*olicy solutions must be proportionate"*[3]*, "need to be evidence based, objective and rational,"*[4] "*appropriate and fair,*"[5] and "*tackle as directly as possible the specific market failures, public concerns and other socio-economic problems identified.*"[6] Also, in taking policy decisions, the Government must "*aim to ensure that all relevant evidence has been considered and, where possible, quantified before it takes decisions on ris*k."[7]

Despite our strong disagreement on banning point of sale display and further consideration of plain packaging, we are hopeful that the DH will pursue its breakthrough on harm reduction and choose a future government tobacco policy based on a three-pronged approach:

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[1] Philip Morris Limited is the UK affiliate of Philip Morris International.

[2] Consultation Paper at 5.

[3] Better Regulation Commission, *Five Principles of Good Regulation*, available at http://www.berr.gov.uk/bre.

[4] Better Regulation Commission, *Risk, Responsibility and Regulation – Whose Risk is it Anyway* at 17 (October 2006).

[5] Parliamentary and Health Service Ombudsman, *Principles of Good Administration* (27 March 2007)

[6] HM Treasury, *Managing Risks to the Public: Appraisal Guidance* at 10 (June 2005)

[7] Government's Principles of Managing Risk to the Public

preventing initiation, encouraging cessation, and reducing harm through development of rigorous product regulation, including processes for the evaluation of product modification and alternative products.

Our response follows the structure of the Consultation Paper, adding new issues where appropriate. As many of the matters raised by the DH are not formal proposals and no impact assessments or other prerequisites have been taken for action by the DH, we have not in many instances commented on them or provided full responses. In all such matters, including those on which we have commented (e.g., plain packaging), we reserve our right to respond in detail if and when the DH issues a mandatory complete consultation, including specific proposals and requisite impact assessments.

Comments on Specific Issues/Questions

1. Establishing a Tobacco Specific Regulatory Agency

1.1. The Tobacco Advisory Group of the Royal College of Physicians recently stated, "*there is no systematic regulatory process applied across the production of tobacco products from manufacturers to distributors, wholesalers, retailers, and marketers….*"[8] If the DH hopes to develop and then implement a new regulatory future for tobacco products, the complexities inherent in that task require the full-time attention of experts, both scientific and administrative, to support the DH and to coordinate with other regulatory agencies (local, national, regional (EC), and international (e.g.,WHO)).

1.2. The need for an agency is self-evident given the complexities involved in tobacco regulation and the vast scope of issues covering responsibilities of both national and local authorities. An agency staffed by policy and scientific experts would be able to develop science-based test methods and standards (including new measurement methods for smoke constituents, ingredients testing methods, performance standards for conventional products, and the development of a rigorous process for evaluating potentially reduced risk products), sustain long term research and monitoring, and fulfil the role of a "*coordinating mechanism or focal points for tobacco control*" in the UK.[9] This could be similar to the Irish Office of Tobacco Control established in 2002, the Tobacco Control Programme at Health Canada, or the currently pending proposal to establish a regulatory authority for tobacco under the Food and Drug Administration in the United States.

1.3. We therefore urge the Government to establish an appropriately funded and well-staffed agency as the foundation for the future of tobacco control in the UK.

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[8] Royal College of Physicians, *Harm Reduction in Nicotine Addiction: Helping People Who Can't Quit. A Report by the Tobacco Advisory of the Royal College of Physicians* at 167 (October 2007) ("Royal College of Physicians Report").

[9] See WHO Framework Convention on Tobacco Control ("FCTC"), Article 5(2) (a).

2. Preventing Illicit Trade

Question 4 & 5: How can collaboration between agencies be enhanced to contribute to the inland enforcement against illicit tobacco? What more can the Government do to increase understanding about the wider risks to our communities from smuggled tobacco products?

2.1. While the significant progress that has been made in recent years in fighting smuggling of tobacco products is to be applauded,[10] the fact remains, as the DH acknowledges, "*the UK market is still characterised by high levels of illicit tobacco use.*"[11] One in six cigarettes smoked in the UK is illicit. This translates into approximately 9.5 billion cigarettes every year which evade detection at the country's borders.[12]

2.2. The widespread availability of cheap smuggled and counterfeit cigarettes, accessible to adults and minors alike, severely undermines the Government's public health objectives of reducing initiation and encouraging cessation. In particular and as the DH has repeatedly emphasized, illicit trade has an acute impact on youth smoking:

- In May 2008 the DH stated, "*Cheap smuggled tobacco finds its way to the most vulnerable people – children, teenagers and the poor. It is highly likely that without tackling this issue the… target for reducing prevalence among routine and manual smokers will not be achieved.*"[13]

- In the Consultation Paper the DH states that illicit trade "*harms health in our communities by creating a cheap and unregulated source of tobacco, undermining…targets for reducing smoking prevalence, especially among young people* …."[14]

- The DH cites evidence presented by Action on Smoking & Health UK ("**ASH**") to the Health Select Committee in May 2008 which showed "*a strong association with age*" and purchase of illicit tobacco. According to an ASH survey, one in three smokers aged 16 to 24 reported buying cigarettes from illicit sources.[15]

- The DH notes that the availability of illicit products in pubs, at car boot sales, workplaces, street markets, on the street and from people's homes has created

[10] The Treasury has reported that the illegal cigarette market in the UK declined from 21% in 2000/2001 to 16% in 2003/2004. HM Treasury *New Responses to New Challenges: Reinforcing the Tackling Tobacco Smuggling Strategy* at 8 (March 2006).

[11] Consultation Paper at 21.

[12] Project Star, a KPMG study to quantify the levels of contraband and counterfeit cigarettes across the European Union conducted under the Agreement between the European Community and Philip Morris International (see below), estimated cigarette consumption in the UK for 2007 at 59.4 billion cigarettes. Although the UK is not a party to the Agreement the study includes the UK.

[13] UK Department of Health, *Excellence in Tobacco Control*: *10 High Impact Changes to Achieve Tobacco Control - An Evidence Based Resource for Local Alliances* (May 2008).

[14] Consultation Paper at 21.

[15] Id. at 22

> "*a completely unregulated distribution network, and makes tobacco far more accessible to children and young people*."[16]

2.3. We believe the Government could better fight illicit trade by (1) establishing a national coordinated strategy to eradicate sales outside of the legitimate trade channels; (2) amending – and consistently enforcing – the laws to ensure appropriate sanctions for participating in illicit tobacco trade; (3) developing effective consumer communications programs; (4), implementing a system to identify counterfeit tobacco products; (5) establishing a comprehensive *positive* licensing system to protect the legitimate trade channel; and (6) pursuing fiscal policies to discourage illicit trade. While not technically illicit trade, we also address limiting cross border sales, including those within the EU.

Establishing a National Coordinated Strategy

2.4. Inland distribution networks for illegal cigarettes (both genuine and counterfeit) are well established throughout the UK. These networks operate to effectively reduce the price of cigarettes for many consumers, particularly those in more deprived areas of the country.[17]

2.5. There are indications that Trading Standards, the agency charged with enforcing laws relating to counterfeiting and street trading, lacks direction and funding. The Rogers Review noted that local regulatory services are hindered due to the diffuse structure of local authority regulation and difficulties arising from the lack of effective priority setting from the centre and lack of effective central and local coordination.[18] It also reported that 67% of local authorities claimed to have difficulty in fulfilling their enforcement responsibilities due to the lack of allocated resources within their council (the most commonly cited cause).[19]

2.6. Against that background, we recommend that there be an adequately resourced national strategy led by Trading Standards and the Police to stop sales of tobacco products outside the legitimate retail trade. These agencies should work closely with local authorities and the DH, which should take a substantial role in working to provide expertise to all stakeholders.

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[16] Id.

[17] They also have significant social costs. In its *Intellectual Property Crime Report 2007* the UK Intellectual Property Office (UK IPO) noted, "…*a growing association between dishonesty and damaging social trends. People are selling fake goods whilst also engaged in defrauding the benefits system…..criminals are using illegal immigrants to sell pirated goods. Criminals are also shown to be exploiting children and grooming them into a criminal lifestyle."* Executive Summary at 7.

[18] *National Enforcement Priorities for Local Authority Regulatory Services* (Rogers Review) at 16 (March 2007). The Rogers Review was commissioned to define policy areas (and their enforcement mechanisms) that come under the remit of local authority regulatory services and to make recommendations on policy areas that are central government priorities for local authorities, based on their level of risk, political priority and the perceptions of citizens and business. Local authority representatives have called for central government to be clear about enforcement priorities, and a lack of effective central and local co-ordination was identified in the Hampton Review of regulatory enforcement and inspection as hindering these vitally important services.

[19] Id. at Section 2.12, figure 2.1

Amending and Enforcing the Law

2.7. A national strategy should include a review of the penalties for selling illegal tobacco products, in order to ensure that they act as an effective deterrent to those who participate in the sale of illicit products, including street vendors. In her evidence to the Health Select Committee for the inquiry into health inequalities in May 2008, Deborah Arnott, Director of ASH suggested that smugglers are switching to smuggling tobacco because it is lucrative and poses low risk.[20]

2.8. More specifically with respect to enforcement, HMRC officers can seek prohibition orders to stop retailers from selling tobacco products if retailers are found to have sold tobacco products without the duty-paid, "fiscal mark." However, a loophole exists in that such powers are not available to HMRC officers should a counterfeit product include the duty-paid, "fiscal mark" on its packaging. We would suggest that the powers provided by the Finance Act 2000 and the Tobacco Products Duty Act 1979 be amended to address counterfeit products.

Consumer Awareness Campaigns

2.9. Stimulating awareness among consumers of the consequences of buying illegal cigarettes is clearly important. We recommend that the following three themes be the focus of an appropriately resourced, engaging and targeted communication campaign:

- ***Fair trade.*** The illicit trade unfairly competes with legitimate retailers in the United Kingdom and costs jobs. Germany faces a similar problem and in response earlier this year PMI organized a campaign highlighting the job losses caused by the illicit trade.

- ***Organized crime***. Counterfeiting and smuggling are organized criminal activities – this year PMI organized a campaign in Lithuania to highlight this fact.

- ***Labour conditions.*** Employees who work in counterfeiting factories are subjected to poor working conditions.

- ***Product quality.*** Fake products are often poor quality cigarettes that do not provide consumers with the same standards they expect from genuine brands sold in the legitimate market and do not comply with government regulatory requirements.

Authentication to Prevent Counterfeit Cigarettes

2.10. A critical weapon to fight counterfeits is a reliable and secure authentication tool. Such a tool must allow for rapid detection and interdiction of counterfeits, as well as provide a basis for consumers and the trade to reject counterfeits, thereby reducing the market and profits of counterfeiters.

2.11. As part of its ongoing cooperation with HMRC in the fight against the illicit trade in the UK, PMI recently demonstrated its *Codentify* system. This technology provides

[20] Uncorrected oral evidence taken before the Health Committee on Thursday 22 May 2008

authentication in a simple and inexpensive manner, requiring no special equipment, readers or technical training. Importantly, it is a rapid response system – establishing whether a product is authentic or counterfeit for consumers, trade or law enforcement officials within one minute.

Tracking and Tracing to Ensure the Integrity of the Manufacturers' Supply Chain

2.12. The importance of an effective tracking and tracing regime is recognised in the FCTC[21] and the Draft Illicit Trade Protocol.[22] An effective cigarette tracking and tracing system can follow the movement of bulk quantities of genuine product through the supply chain such that, upon a seizure of contraband product, law-enforcement officials can readily determine: (1) where the seized product came from; (2) where it was supposed to go; and (3) who actually received it along the distribution chain.

2.13. Tracking and tracing information is a key part of the fight against illegal cigarettes because it:

- assists manufacturers and law-enforcement officials in identifying the point at which diverted genuine product entered into illegal distribution channels;
- serves as key evidence in any legal proceedings brought in connection with the diversion of product; and
- allows manufacturers, law enforcement, and other parties to take appropriate corrective action to disrupt the flow of contraband cigarettes.

2.14. Over and above the existing requirements of the Tobacco Products (Amendment) Regulations 2006 to provide certain information about seizures of 100,000 cigarettes and above, a successful model for a more detailed system exists.

2.15. The Anti-Contraband and Anti-Counterfeit Agreement between PMI, the European Community and 26 Member States (the "Agreement") includes extensive tracking and tracing Protocols. Under those protocols, PMI routinely provides the Anti-Fraud Office of the European Commission (OLAF), and nominated officers within signatory Members States with full time access to an on-line database that can be used to identify the first purchaser and, for certain markets, subsequent purchasers of diverted products. In this fashion, authorities can track the movement of our cigarettes through the supply chain and potentially trace back to the point where product has been diverted from legitimate trade channels.

2.16. ASH have "*urged HM Treasury and HMRC to sign up to*" the Agreement and have specifically recognized the ability to track and trace as a crucial element of the Agreement by stating, "*tracking and tracing protocols giving Customs 24 hour online access to the database, allowing Customs to independently identify smuggled cigarettes so they can be traced back to the contractor which bought them from Philip Morris International*."[23]

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[21] FCTC at Article 15.2 (b).

[22] Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products. *Chairperson's text for a protocol on illicit trade in tobacco products*, FCTC/COP/INB-IT/2/3 (18 August 2008).

[23] ASH 2007 Budget Submission at 10.

2.17. We support this view and believe that the UK's efforts to fight the illicit trade would be enhanced not only by such access but also by broader cooperation on an EU scale. The success of the Agreement, which provides a constructive framework for tackling the threat of the illicit trade in the European Union, has been widely recognized: "*This cooperation to date has exceeded all expectations and sets an example of what industry and law enforcement can do when they work together in pursuit of a common goal*."[24]

Adoption of a Comprehensive Licensing Scheme

2.18. The FCTC supports the adoption of a licensing scheme to address illicit trade: "*Each Party shall endeavour to adopt and implement further measures <u>including licensing</u>, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade*."[25]

2.19. Under current regulations, a "*negative*" retailer licensing system is in place via the Finance Act 2000 with respect to the sale of non-duty paid, unmarked tobacco products.[26] In our view, the introduction of a "*positive"* licensing system to sell tobacco products would be more effective by ensuring that only legitimate and qualified businesses are engaged in the manufacture, importation, marketing and sale of tobacco products. A controlled network for legitimate products will improve the Government's ability to prevent the illegal trade in cigarettes and collect taxes applicable to tobacco products. Moreover, industry participants who are required to apply and pay for a licence are more likely to be aware of the consequences of dealing in illicit products and feel a commitment to follow the regulation. UK retailers are already familiar with a positive licensing scheme due to the requirements to obtain a license to sell alcohol and aligning tobacco with this would provide additional uniformity for retailers who sell both products.

2.20. Importantly, positive licensing can serve as the cornerstone of an anti-illicit trade strategy, encompassing many of the separate anti-contraband provisions of UK regulation, such as manufacturer supply chain controls and oversight of the retail environment, while providing infrastructure for future measures.

Fiscal Policies

2.21. Any policy to fight illicit trade cannot be seen in isolation from fiscal policy. We certainly agree that tax increases by themselves are not the sole reason for illicit trade and many factors other than taxation also play a role, particularly enforcement. However, tax-driven price differentials are an incentive and therefore an important factor in regard to illicit trade in tobacco products. As excise taxes and other costs

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[24] IP/06/735 European Commission Press Release (Brussels, 6 June 2006).

[25] FCTC, Article 15, Paragraph 7

[26] Section 14 of the Finance Act 2000, amending the Tobacco Products Duty Act 1979 with the addition of Section 8H (4). In addition, as we discuss below, a "*negative licensing*" system was adopted through the Criminal Justice and Immigration Act 2008 for the "*persistent sale*" of tobacco to minors.

increase, smokers may seek lower-priced cigarettes from a variety of alternative venues and channels, including cheaper products sold on the black market.[27]

2.22. The experience in the UK in the mid to late 1990s illustrates what can happen when significant tax increases are implemented without appropriate controls to combat illicit trade. In order to further its goals of reducing tobacco consumption, particularly by minors, and to increase fiscal revenues, the UK implemented sharp tax hikes from 1995 through 2000. The impact of tax increases on smuggling in the UK was noted by the WHO's European Region:

> *"By 1999, the revenue lost through tobacco smuggling was estimated to be about 25% of all tobacco revenue. In March 2000, the Government announced a strategy to tackle the smuggling problem…. Taxes were increased by 5% above inflation in 2000 and in line with inflation in 2001 and 2002. Since then tobacco smuggling has been stabilized and its growth reversed for the first time in a decade; government revenues rose again after late 2000."*[28]

2.23. The UK decision in 2001 to amend its tax policy and increase taxes more moderately going forward was the right one, but with tax levels already exceeding by far those in neighbouring countries, the price differential between cigarettes sold in the UK and other EU Member States is enormous. In fact, cigarette taxes in the UK are today among the highest in the world. They exceed EU minimum requirements by 244%, EU average levels by 126%, and are 30% higher than tax levels in France, the UK's closest neighbour and a country known for its very high cigarette tax levels.

2.24. We therefore suggest that the UK continues its current policy of moderate increases to allow convergence with other EU Member States to occur. At the same time, we suggest some amendments to the structure of tobacco taxes in the UK that we believe will support the goal of reducing youth smoking (see Section 3 below).[29]

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[27] The World Bank has stated: "*Differences in price between countries or states will clearly increase the incentives to smuggle cigarettes. However, the determinants of smuggling appear to be more than price alone*." World Bank Curbing the Epidemic: Governments and the Economics of Tobacco Control at Chapter 5 (1999). That is why when fiscal measures are adopted that will increase the price of cigarettes, such as increasing taxes, it is critical that governments implement appropriate policies to effectively counter illicit trade in tobacco products.

[28] WHO EU Region, *Taxation of Tobacco Products in the WHO European Region: Practices and Challenges* at 16 (2004).

[29] Even if the EC's current proposal to amend the tobacco excise directives is adopted, COM (2008) 459/2 Proposal for a Council Directive amending Directives 92/79/EEC, 92/80/EEC and 95/59/EC on the structure and rates of excise duty applied on manufactured tobacco. large tax and price differences for cigarettes will remain a fact of life within the EU for the foreseeable future. We have therefore advocated reform of EU rules (Directive 92/12 on general arrangements for products subject to excise duty) to enable countries to better address excessive cross-border sales between EU Member States, e.g. by introducing a mandatory and clear limit of 200 cigarettes for cross-border sales, to replace the current vague 800 cigarette indicative limit rule for personal consumption.

3. Preventing Youth Smoking

Question 6: What more do you think the Government could do to reduce demand for and availability of tobacco products among young people?

3.1. In 2007 the DH stated, "*We feel that we are already doing as much as we are able in both our smoke-free social marketing campaign, and in tobacco regulation to discourage young people from smoking, and restricting access to tobacco products.*"[30]

3.2. While the department has subsequently and laudably supported the past implementation of legislation increasing the minimum age law with the amendment of the Children and Young Persons Act and the subsequent introduction of "negative" licensing to impose sanctions on retailers who sell to minors,[31] more can be done. From a holistic approach, the DH has failed to implement proven and comprehensive measures to address youth smoking, particularly failing to provide a strong and coherent national policy for the UK.

3.3. According to the U.S. Centers for Disease Control, "*Evidence-based strategies that can increase the rate of decline in youth smoking include greater exposure to effective media campaigns, comprehensive school-based tobacco-use prevention policies and programs in conjunction with supportive community activities, and higher retail prices for tobacco products*."[32]

3.4. Rather than propose such tested and proven measures – all of which the DH has in some respects failed to fully or partially implement, the Consultation Paper proposes or raises for consideration punitive limitations on the tobacco market that lack adequate evidentiary bases. Here we respond to Question 6 of the Consultation, noting the lack of comprehensive education, access and fiscal policies to deter youth smoking.

Educational Programs and Communication

3.5. There is no doubt the DH has expended a certain amount of effort in developing guidance to local communities on educational programs, but has fallen short in this area and by no means can support its 2007 statement that it has done "*as much as it is able*" in this field. Indeed, in the same comments, the DH states that "*the schools context may in fact help boost any [tobacco prevention] message placed there by contextualizing it within a curriculum, and as part of the overall schools culture and values. We feel that this…may be a platform on which to launch key messages, and*

[30] National Institute for Health and Clinical Excellence ("NICE") *Mass-media and point-of-sales measures to prevent the uptake of smoking by children and young people* ("NICE Public Health Guidance 14") Stakeholder Response Table at 20 (July 2008) (emphasis added)

[31] The Criminal Justice and Immigration Act 2008.

[32] Office on Smoking and Health, Div of Adolescent and School Health, National Center for Chronic Disease Prevention and Health Promotion, CDC. *Cigarette Use Among High School Students --- United States, 1991—2005* Morbidity and Mortality Weekly Reports 55(26); 724-726 (7 July 2006).

may be worth" reviewing.[33] These statements suggest that as of 2007, the DH had not accomplished much in the way of nationally coordinated and directed communication and educational programs.

3.6. In the same comments, the DH dismissed specific suggestions to implement media campaigns directed at youth, stating "*there is relatively little published research on children and young people and smoking in the UK.*"[34] This is in striking contrast to the DH's evidence base supporting its positions on point of sale display bans and plain packaging which are based heavily -- and, in the case of plain packaging, exclusively -- on data and studies from outside of the UK. The unfortunate implication is that the DH is selectively applying evidentiary standards based on pre-determined policy.

3.7. Now conceding that not enough has been done, the DH states in the Consultation Paper that this year (2008) the National Healthy Schools Programme (NHSP) will "*seek to do more*" on smoking prevention with the objective of raising "*awareness of different approaches and to encourage schools to give higher priority to smoking within their health-education provision*."[35] However, the Consultation Paper does not provide any concrete information as to what the NHSP will do and what role the national government will play. It is hard, therefore, to comment on how youth education will factor in the Government's "future" for tobacco control.

3.8. Nevertheless, other sources provide some insight as to the effectiveness or lack thereof of the Government's programs in this area. Assessing the effectiveness of the teaching of health risks associated with smoking in UK secondary schools, a 2008 study published in Oxford Journals *Health Education Research* acknowledged that the UK government was committed to reducing teen smoking prevalence, but stated that lesson content on smoking prevention was inconsistent both between and within schools.[36] The authors also stated that

> "*a rigorously designed European program, which included lessons relating to social influence processes and training in refusal skills, proved to be counter productive in England, the only country that did not address health consequences as part of the program*."[37]

3.9. While we could suggest educational programs, in our experience, the public health community has been critical of suggestions made by tobacco companies on youth smoking and there are ample guides from public health authorities on best practices which are available to the DH and local authorities. The important point is that the DH must coordinate with local alliances and that it, along with the NHSP, "*must do more*."

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[33] NICE Public Health Guidance 14, Stakeholder Response Table at 19 (2007).

[34] Id. The DH stated that the report contained "*some useful generic insights…which may be helpful in future DH communications campaigns*."

[35] Consultation Paper at 28 (emphasis added).

[36] Ridout F., et al. *Health Risks Information Reaches Secondary School Smokers* Health Education Research Online (January 2008).

[37] Id.

Enforcement of Laws Preventing Sales to Minors

3.10. In its 1998 report *Smoking Kills*, the DH stated that it was "*clear*" that the minimum age law was not being enforced.[38] Noting that under the Children and Young Persons (Protection from Tobacco) Act 1991, "*local authorities have a statutory duty to consider taking enforcement action at least once a year*," the DH acknowledged that not all local authorities were doing so and that the laws were "*not being rigorously applied*."[39] Accordingly, the DH stated that it was developing "*a new Enforcement Protocol with representatives of local authorities, trading standards officers and environmental health officers, for use by local authorities in carrying out their duties under the Act*."[40]

3.11. In 2000, the DH published *Tobacco Enforcement Guidelines*, providing best practices for local compliance with the law, encouraging education of retailers on the law and the publicizing of enforcement action to act as a deterrent.[41] The DH could have adopted mandatory regulations (or sought primary legislation adopting the *Guidelines*). This would have required all local jurisdictions to test purchase with under-age children (where permissible), publish enforcement actions taken, including prosecutions and fines to act as deterrents, and implement local education campaigns to highlight the problem of illegal sales of tobacco products. Instead, the recommendations were issued merely as guidelines, not statutory requirements. It is not surprising therefore that the situation did not improve dramatically.

3.12. For example, in 2004, the British Medical Association stated unequivocally,

> "*<u>There is evidence that the UK's existing legislation on sales of tobacco is not effectively implemented</u>…. Despite the fact that it is against the law to sell to children under 16, English data show that only under a quarter of underage smokers find it difficult to buy cigarettes from shops, and just over half were refused on one or more occasions in 2004.…<u>Despite widespread evidence that the law on underage sales is being broken, there have been very few prosecutions</u>. A total of 73 cases were brought in 2004, of which 57 resulted in a guilty verdict. In four out of five cases, guilty retailers are not even fined*."[42]

3.13. In 2007, the DH responded to continued third-party criticisms of "poor" enforcement of the minimum age law: "*It is not true to suggest (as does the [British Medical Association] report on children and smoking) that enforcement is poor*."[43] In response, NICE stated:

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[38] Department of Health *Smoking Kills: A White Paper on Tobacco* at para. 3.16 (1998) ("Smoking Kills").

[39] Id. at para. 3.20

[40] Id. at para. 3.21

[41] DH News Release *New Code to Protect Children Against Under-age Cigarette Sales* (13 September 2000).

[42] British Medical Association, *Breaking the Cycle of Children's Exposure to Tobacco Smoke* at 39 (April 2007) (emphasis added).

[43] NICE Public Health Guidance 14, Stakeholder Response Table at 20 (2007).

> *"The number of prosecutions of retailers for selling cigarettes to under-aged children in England each year has improved but is small compared to the proportion of children who say they are able to purchase cigarettes from shops."*[44]

According to NICE, 2004 data show that in 2004, 66% of children aged 11-15 who smoked currently had bought cigarettes from a shop.[45]

3.14. The failure to enact legislation requiring local authorities to enforce minimum age laws was emphasized by LACORS in 2007:

> "*There is no duty for Local Authority Trading Standards services to enforce existing legislation; they have an obligation to consider what action they might take each year, but they have no obligation to actually enforce the provisions of the Children and Young Persons Act.*"[46]

3.15. The 2008 amendments to the Children and Young Persons Act 1933, which the DH points to in this Consultation, are an improvement but many of the same problems remain. To begin with, 10 years after the DH first pointed out the failure of the UK to adopt a "*statutory obligation on local authorities to carry out an enforcement campaign*,"[47] the law remains the same.

3.16. Other issues that are not addressed in the amended law are: (1) lack of funding, (2) training of retailers and their employees, [48] and (3) requiring mandatory age validation – a requirement that is basic in many countries around the world, the absence of which would make it difficult for retailers to enforce the new minimum age law.

3.17. Finally, we note that the fine under the amended law for sales to a minor is up to £2,500. That is half the fine imposed for selling tobacco products that do not bear the UK fiscal stamp.[49] While we support a fine in both instances, the lower fine for sales to youth sends a clear signal to retailers that sales to minors is a lesser offence – at least in the Government's view.

Establishing a Positive Licensing System

3.18. The 2008 amendment of the Children and Young Persons Act 1933 raises the stakes for retailers who repeatedly sell to minors by establishing a "negative" licensing system. This means that retailers will lose the right to sell tobacco products, while not requiring them to seek permission to sell tobacco products in the first place. Although

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[44] Id.

[45] Id.

[46] Id. at 28

[47] Smoking Kills at para 3.23.

[48] See NICE Public Health Guidance 14 at 11 (citing Section 9 of the Queensland *Tobacco and Other Smoking Products Act 1998* which requires tobacco retailers to train their employees on laws and requirements regarding sales to minors).

[49] Under the Tobacco Products Duty Act 1979, as amended by Finance Act 1994, the civil fine for failure to comply with the fiscal marking requirements is up to 5% of any unpaid duty or £250, which ever is greater, and the maximum sentence for the associated criminal offence is a fine of £5,000.

we are pleased that the law has been amended to incorporate this sanction, we maintain that a positive license scheme would be far more effective.

3.19. We have previously expressed our support for the introduction of a positive licensing scheme in a 2006 letter to the DH.[50] As we stated then and in Section 2 above regarding illicit trade, a positive licensing scheme is preferable to negative licensing because:

- licensed retailers are easily identified by law enforcement agents;
- retailers who are required to pay for a licence are more likely to comply with the law;
- additional funds from payment of a licence could be devoted to enforcement; and
- withdrawal of the license following evidence of sales to minors would be simpler to enforce, assuming that retailers would have to post a license to indicate that he or she were permitted to sell cigarettes.

3.20. Others share our view. For example, the British Medical Association wrote in 2007, "*A positive licensing scheme, already in place for shops that wish to sell alcohol, would bring tobacco sales in line with alcohol sales. It would be more likely to be taken seriously than a negative licensing scheme.*"[51]

3.21. Similarly, the US Centers for Disease Control advocates licensing of retailers in its "*best practices*" guide to tobacco control,[52] and the Canadian Public Health Association has stated that the "*strongest deterrent for a retailer selling to a minor is revocation or suspension of a license*." [53]

3.22. In fact, the DH stated that a positive licensing system "*would have the greatest impact on reducing the number of illegal under-age sales by providing a clear incentive for retailers to comply with the law.*"[54] In addition, the DH noted that positive licensing could generate additional funds to cover the costs of administration *and* enforcement of the minimum age law.

3.23. Despite this clear statement, the DH rejected positive licensing, apparently because of a desire to avoid the administrative burden and costs of positive licensing and making a distinction between necessary access controls for tobacco products and other age-controlled goods such as alcohol:

> "*Under a positive licensing scheme, retailers would need to apply to the local authority for licence to sell tobacco, with the designated fee, as they do for other age-controlled goods like alcohol. It is also likely to impose a significant additional administrative burden for local*

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[50] PML's Comments on the *Consultation on Under-Age Sale of Tobacco* (6 September 2006).

[51] British Medical Association, *Breaking the Cycle of Children's Exposure to Tobacco Smoke* at 38 (April 2007).

[52] Centers for Disease Control and Prevention *Best Practices for Comprehensive Tobacco Control Programs 2007* Appendix C at 113.

[53] Canadian Public Health Association *All Party Committee on Tobacco Control* http://www.cpha.ca/en/about/provincial-associations/saskatchewan/sktobacco2.aspx

[54] DH *Partial Regulatory Impact Assessment Choosing Health White Paper Action on Sales of Tobacco of Under 16s*, Annex 4 at 5 (November 2004).

authorities… The Government does not want to introduce more red tape and administrative expense for retailers."[55]

Fiscal measures

3.24. Lastly, fiscal measures can be used more effectively to address youth smoking by addressing important weaknesses in the structure of the excise tax. As recognized by the FCTC, fiscal policy is one of the most important ways to discourage young people from smoking.[56] In its MPOWER report, the WHO states that "*low levels of taxation on smoked tobacco products other than cigarettes… and low prices for inexpensive brands of cigarettes reduce the potential health benefits of tobacco taxation and can undermine other tobacco control activities*."[57]

3.25. More specifically, the Government should address three important weaknesses in the structure of the excise tax, as opposed to focusing solely on the tax level:

- Under the current tax structure, cheaper brands pay less tax, which in turn allows those brands to have lower retail sales prices. In fact, low-priced cigarettes have an effective excise tax discount of 32 pence per pack, which provides an incentive for consumers to switch to cheaper brands rather than quit. There is a solution under the EU excise tax directives: a minimum excise tax. Indeed, the UK is one of only seven countries in the EU that do not apply a minimum excise tax on cigarettes.[58] By introducing a minimum excise tax, all cigarettes would pay at least the same minimum monetary amount which would help address down-trading.

- The UK fiscal rules do not prevent commercial strategies by manufacturers to partially absorb tax increases. As a result, low price cigarettes in the UK have been allowed to absorb more than a fifth of the tax increase over the last three years. Whilst appearing contrary to commercial logic, such pricing strategies can make sense because manufacturers typically consider profitability and volume from an overall brand portfolio perspective, rather than on a brand-by-brand basis. A minimum retail price is an important adjunct to tax measures, and the only measure available to ensure that no cigarettes are sold to consumers at unreasonable promotional prices. The UK should, therefore, adopt a minimum retail price for cigarettes – a measure that is effective, proportionate and, whilst disputed by the European Commission, in line with EU law according to various Member States.

- By taxing hand-rolled cigarettes at 55% of machine made cigarettes, these cigarette substitutes are effectively provided a government-sponsored excise tax discount of 158 pence per pack of cigarettes. Any tax policy which encourages a shift in demand to lower taxed and, therefore, lower priced tobacco products would not support the legitimate public health policy objective of reducing youth

[55] Id. at 7.

[56] Article 6.

[57] WHO, Report on the Global Tobacco Epidemic (MPOWER Report) at 54 (2008).

[58] The other EU countries that do not apply a minimum excise tax are Bulgaria, Denmark, Estonia, Ireland, Latvia and Lithuania.

smoking.[59] The European Commission has stated that Member States have underscored the fact that sales and consumption of RYO cigarettes "*are dramatically increasing*," attributing this dynamic to tax-driven price gaps.[60] The UK should follow the example of leading countries on tobacco control, such as Norway, Sweden, Australia and New Zealand that have all moved to equalize taxes on all tobacco products.

3.26. As emphasized by the FCTC, fiscal policies and their impact on the availability of cheap tobacco products can, in the absence of effective enforcement of youth access laws, increase the availability of tobacco products for minors and are thus an integral component of youth smoking prevention policy. The three measures suggested above are much more effective at reducing youth smoking than banning point of sale product display and plain packaging, as the evidence shows. In our view, they are indispensable to make the UK's fiscal policy consistent with its public health objective to combat youth smoking and should thus be given priority.

4. Point of Sale Display Ban

Question 8: Do you believe that there should be further controls on the display of tobacco products in retail environments? If so, what is your preferred option?

4.1. The Consultation Paper states that the "*primary objective*" of banning point of sale display "*is to reduce smoking take-up in under 18's*."[61]

4.2. While we support the objective of reducing the demand for and use by youth of tobacco products, we do not support a ban on the display of tobacco products at points of sale. A ban would be disproportionate and therefore contrary to the law because (1) the DH has not established that a ban would reduce youth smoking and instead relies on evidence that the Department concedes is speculative, (2) it would significantly restrict competition and commercial free speech, and (3) as described in Section 3 above, the Department has failed to implement proven and effective measures to reduce youth smoking.

4.3. The DH has proposed three "options" for consideration: (1) the status quo; (2) limitations on point of sale displays; and (3) a ban on point of sale display. The Consultation Paper is, however, defective in that the DH has failed to propose any recommendations or impact assessments for Option 2, stating in Annex 3, "*The impact assessment will consider this option once it has been further developed*." Rather, the DH seeks advice from the public on potential limitations short of a ban. Since such an "option" is a central consideration of its regulatory proposal, it would be a violation of the Cabinet Office Code of Practice on Consultations for the DH to

[59] In this regard, WHO's European Region stated, "*Research has shown that some cigarette consumers react to price increases by shifting consumption to cheaper tobacco products. To achieve a reduction in overall tobacco consumption, taxes would have to be raised at the same time and in a comparable amount for all tobacco products*." *Taxation of Tobacco Products in the WHO European Region: Practices and Challenges* at 6 (2004).

[60] European Commission *Second Report on the Application of the Tobacco Products Directive* at 11 (November 2007).

[61] Consultation Paper at 68.

make a final recommendation on regulation of point of sale display unless and until it provides a complete review of options, the evidence base, and impact assessments for limiting product display at point of sale and solicits and considers public comments on them.[62]

4.4. Nevertheless and without waiving any rights, we comment on the proposal to ban point of sale display and, based on the evidence provided, contend that additional limitations on point of sale display are not warranted.

Product Display is Not Advertising Under the TAPA

4.5. In the Consultation Paper, the DH makes two arguments – none of which are valid. First, it claims that since the enactment of the Tobacco Advertising and Promotion Act 2002 ("TAPA"), manufacturers (and retailers) have created large displays that are *de facto* advertisements. Second, the DH maintains that any product display is advertising and thus attracts minors to initiate smoking. Neither argument withstands scrutiny,

4.6. On the first point, the only evidence the DH proffers consists of claims that (1) gantries are placed behind the till and thus are visible, (2) stacks of packs are placed "*at any point in the retail premises (particularly in duty free outlets)*," and (3) "*many retailers were found to be stacking multi-packs of cigarettes in a way that creates large virtual advertisements that contravene the spirit, if not the letter of the law*."[63]

4.7. The only visual examples provided are in the LACORS report.[64] Whether or not one agrees with the report that the photographs indicate the use of product display as advertising (and we do not),[65] the report does not recommend banning product display. Rather, it suggests "*further legislation to control the display of products at point of sale and to limit the size of the packets that are permitted to be sold at retail level*."[66] In our view, the evidence provided does not support that recommendation, which in any event, as noted above, is not an issue in this Consultation as the DH has failed to provide any proposal or impact assessment on limitations on point of sale displays.

4.8. Moreover, the DH concedes, "*Increases in size or prominence of display of tobacco products since the TAPA act came into force have yet to be confirmed by research*."[67]

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[62] The DH has asked for examples of limitations on product displays at retail. When a formal consultation is provided, we will provide detailed comments. At this point, we raise without commenting on our views as to the appropriateness of any of them, the following examples from other countries: (1) limiting the size and visibility of product displays; and (2) limit placement of displays to specific locations in general retail venues.

[63] Consultation Paper at 70.

[64] LACORS *Tobacco Advertising and Promotion: What the Manufacturers Did Next. POS Report* (Aug. 2006).

[65] Commenting on the photographs in the LACORS report, Professor Barrie Gunter, Head of the Department of Media and Communication at the University of Leicester, states, "*It is easy to give a misleading impression of product visibility with evidence such as this*." He notes that "*there is no relevant evidence provided to demonstrate that these product displays were prominent within each store environment*." Gunter, Barrie, *Review of Evidence Cited by the Department of Health 'Consultation on the future of tobacco control' in support of Product Display Restrictions* (September 2008) (attached to our Response as Appendix A).

[66] Id. at 12

[67] Consultation Paper at 31 (emphasis added).

The DH also concedes that "*display can cover a wide spectrum, from very large stacks of cigarette cartons to a small discrete gantry*."[68] The DH provides no evidence as to what it means by "very large" gantries, the proportion of such gantries in the retail universe in the UK, and, as we discuss below, the fact that displays have a causal effect on uptake of smoking among youth or reduction cessation rates.

4.9. Our own experience confirms that the size of the gantry has no clear link to the volume of sales in a retail outlet. In fact, there are several reasons why some stores sell more cigarettes than others, none of which relate to the size of the gantry. Contributing factors to sales figures include: (1) location of the store in a high traffic location (e.g., a large train station); (2) proximity of store competition; (3) operating hours compared to other stores; (4) store disciplines (e.g. inventory management and product distribution to meet customer demand); and (4) store customer base.

4.10. On the second point, the DH maintains that "*Display can be considered to be a form of advertising, encompassing any way of showing tobacco products with a view to promoting their sales*."[69] This is in direct conflict with the provision of the TAPA governing point of sale restrictions, its legislative history and the DH's own statements in 1998 and 2002.

4.11. For example, in its 1998 report *Smoking Kills*, the DH stated:

> "*We intend to define what is 'advertising aimed at purchasers' in such a way as to limit it strictly to gantries displaying tobacco products themselves and their prices. In doing so we will be aiming to protect children as far as possible from exposure to pro-tobacco messages in shops, whilst taking account of the legitimate desire of retailers to display products for sale and their prices.*"[70]

4.12. The DH's position was the same in 2002 when it proposed the current restrictions on point of sale and made a very clear distinction between product display and advertising:

> "*The sale of cigarettes and other tobacco products is a legal activity and both retailers and adult consumers have a right to carry out transactions without any unnecessary inconvenience…The Government made clear in Smoking Kills its intention to: 'protect children as far as possible from exposure to pro-tobacco messages in shops, whilst taking account of the legitimate desire of retailers to display products for sale and indicate their prices.' These regulations are intended to restrict advertising at point of sale in a way that protects children in particular whilst permitting a reasonable level of information about the products and their prices to be given to consumers so they can make their purchases*…."
>
> "*These regulations will not cover the display (as opposed to the advertisement) of tobacco products or their prices in places or on a*

[68] Id. at 29.

[69] Id. at Annex 3 70

[70] Smoking Kills at para 3.12 (emphasis added).

> *website where they are sold. Clause 8 of the Tobacco Advertising and Promotion Bill … will give the Government power to make regulations concerning the display of tobacco products or their prices in a place or on a website where tobacco products are offered for sale…in case it is needed in future to prevent loopholes and abuse. However it is not intended to change the way in which tobacco products themselves are currently commonly laid out in corner shops, supermarkets and other places of sale.*"[71]

4.13. The Parliamentary debates surrounding the TAPA also clarified that the law was not intended to prohibit display of branded products:

> "*In many circumstances, an object will clearly be an advertisement and not a display, such as, perhaps, open and closed signs hanging in a shop door showing the brand name of a tobacco product. Other products will clearly be a display and not an advertisement, such as rows of cigarettes in a shop gantry....*"[72]

4.14. The legislators also stated emphatically:

> "It is perfectly legitimate…for products to be displayed, with prices, so that they can be sold, because after all, tobacco is a legal product…." [73]

4.15. The DH has failed to justify how its prior strong and unequivocal views are now inaccurate. It is worth reiterating the Department's statement in the Consultation that there is no research confirming that displays have increased since the TAPA was enacted. Speculation and innuendo cannot form the basis for an about-face in views upon which regulations were drafted, approved and relied upon.

The Data Do Not Establish that Product Display Increases Youth Smoking

4.16. The DH has failed to prove that point of sale display causes minors to smoke or that a ban will achieve a reduction in youth smoking prevalence. In fact, although claiming that "*the evidence about the public health benefits of prohibiting the display of tobacco products in retail environments is strong*," the DH concedes "*it is not conclusive*."[74] Indeed, in the impact assessment, the DH states that "*there has yet to be a full evaluation of a display ban*" on youth smoking.

4.17. Some of the governments it cites as having implemented or considered product display have also noted this fact. The DH points out that Health Canada included "*a doubt about the direct causal link between banning display and reduction in tobacco*

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[71] DH *Consultation on the draft regulations under powers contained in the Tobacco Advertising & Promotion Bill* at para. 39 & 41 (Aug. 2002) (emphasis added)

[72] Hansard, 18 January 2002, Column 1258, Lord Hunt of Kings Heath, the then Parliamentary Under-Secretary of State at the Department of Health speaking at the Committee Reading of the Tobacco Advertising & Promotion Bill in the House of Lords (emphasis added).

[73] Hansard, 13 February 2001, Column 220, Yvette Cooper MP, the then Parliamentary Under-Secretary at the Department of Health speaking at the Second Reading of the Tobacco Advertising & Promotion Bill in the House of Commons (emphasis added).

[74] Consultation Paper at 34.

consumption" in its 2006 consultation on point of sale display bans.[75] The DH quotes Health Canada as stating, "*It is possible that restrictions on tobacco displays will have an impact on this trend, but this remains very speculative at this time*."[76]

4.18. The Norwegian Department of Health and Care Services, when considering a point of sale display ban, explained in 2007 that "…*there is yet no scientific study published that definitely shows the impact that a ban against public display would have on the number of people who smoke*."[77] Similarly, the Tasmania Department of Health stated in 2006 that "*the removal of displays may assist some adult smokers trying to quit…The numbers who actually quit and do not relapse as a result of this measure is expected to be marginal*."[78]

4.19. Importantly, the only country that has had a point of sale display in place for any significant period of time is Iceland which introduced a point of display ban in August 2001. The DH uses data from Iceland which it claims, while not decisive, "*point to the potential benefit in reducing prevalence among young people.*"[79] But the DH relies on data looking at the reduction in youth smoking from 1995 to 2003 – a period covering only two years following the introduction of the point of sale display ban. In the years preceding the ban, Iceland had implemented a number of policies to reduce smoking many of which can account for the reduction in smoking prevalence from 1995 to 2003.[80]

4.20. When viewed by individual year, the data available from Iceland from 1995 to 2007 show that there have been decreases and increases in the incidence of daily and occasional smoking among minors (15 to 19 year old males and females) since the ban took effect. In fact, according to the data, incidence of male smokers aged 15 to 19 were highest in 1997 – four years before the ban – and 2002 – one year after the ban. Incidence for the same group grew marginally from 2004 to 2006 and spiked in 2007 to levels approximately equal to those reported for 1995 and 1999. For females ages 15 to 19, incidence of daily and occasional smokers in 2003 was reportedly above that reported for 2000 and while not reaching that level since has declined and increased every other year from 2004 to 2007.[81]

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[75] Id.

[76] Id. (quoting Health Canada *A Proposal to Regulate the Display and Promotion of Tobacco and Tobacco-related Products at Retail: Consultation Document* (2006)) (emphasis added).

[77] Norwegian Ministry of Health and Care Services, *Public Hearing of A Proposal on A Ban Against Visible Display of Tobacco Products at Point of Sale, As Well As Certain Other Changes to the Tobacco Damage Act and the Advertising Regulation* at 5 (March 2007) (Norwegian Consultation) (emphasis added).

[78] Tasmania Department of Health and Human Services Discussion Paper *Strengthening Measures to Protect Children from Tobacco* at 14 (May 2006)

[79] Consultation Paper at 31.

[80] For example, in 1996 Iceland raised the minimum age for tobacco purchases from 16 to 18; in 1996 0.7% of tobacco sales revenues of the State Tobacco Monopoly (all tobacco products are sold by manufacturers to the State Monopoly) were dedicated to smoking prevention measures; in 2001 public place smoking restrictions were implemented; and in 2001 a positive licensing system for the sale of tobacco at retail was implemented; and again in 2001 0.9% of sales revenues were dedicated to smoking prevention purposes. In addition, tobacco excise taxes were increased over this time period.

[81] Public Health Institute of Iceland; available at www.statice.is.

4.21. It is instructive that in commenting on the data from Iceland, the Norwegian Ministry of Health argued that overall smoking prevalence (including adults) declined from 2001 to 2005, but acknowledges that "*there are no indications to prove that this reduction is a result of the ban, more than other tobacco preventive measures introduced at the same time*." [82]

The Studies Cited by the DH regarding Point of Sale Display are Flawed and/or Irrelevant

4.22. The Consultation Paper cites various studies that purport to contain research evidence regarding the impact of tobacco advertising and product display at point of sale on smoking behaviour and in particular youth smoking.[83] However, contrary to the DH's assertion, none of these studies support the conclusion that restricting tobacco product display at retail would result in fewer minors starting to smoke. Indeed, some of the studies do not even address the points for which the DH cites them. Other research is likewise irrelevant because it simply does not examine point-of-sale display of tobacco products, let alone the potential impact of display restrictions. And those remaining studies that are not on their face irrelevant to the question at hand suffer from severe methodological flaws.

4.23. For example, in support of a statement that point of sale promotion (not product display) is "*virtually the only route for tobacco promotion – persuading existing smokers to keep smoking and encouraging young smokers to start*," the DH cites a 2003 study from Australia. The study does not mention youth smoking.[84]

4.24. Many of the studies cited by the DH merely recite old data repeating well-worn arguments that general advertising causes minors to be more susceptible to smoking. Much of that data comes from the early 1990s, purporting to show reduction in overall smoking incidence following advertising bans in certain markets. Again, an advertising ban is not the issue here,[85] but it is important to note that similar reductions in smoking prevalence can be found in other countries where advertising was not restricted.[86]

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[82] Norwegian Consultation at 5.

[83] Consultation Paper at 29-36, and at 75-76.

[84] Carter SM, *New Frontier, New Power: The Retail Environment in Australia's Dark Market* Tobacco Control (2003).

[85] To be clear, PML and PMI strongly believe that tobacco companies should be permitted to communicate directly to adult smokers but within well-defined rules. The ability to communicate to adult smokers about our brands is fundamental to fair and vigorous competition**.** We do not therefore support total advertising bans. That said, we have actively supported and will continue to support restrictions on tobacco product advertising, including total bans on outdoor advertising and in print, television and radio.

[86] The DH cites a 1992 review of the literature to claim that ad bans in Norway, Finland, Canada and New Zealand caused drops in smoking prevalence. Consultation Paper at 75. However, more recent data show that smoking prevalence in countries without similar ad bans have achieved similar reductions in smoking prevalence. For example, data from the OECD *Health at a Glance* (2007) shows reduction in smoking incidence in Germany from 1978 to 2003; the US from 1980 to 2005; and Japan from 1980 to 2005. The reduction achieved in those countries, with relatively free advertising during much of the time period covered, was essentially comparable to the reduction in Norway, Finland, Canada and New Zealand, although absolute smoking rates are lower in the latter group of countries. Further, as Professor Gunter states in his expert report, a number of later publications have called into question the evidence that tobacco advertising bans reduce smoking prevalence.

4.25. Other studies involved questioning teenagers on brand recall and self-reported "predisposition" to smoke following exposure to photographs of in-store advertising and point of sale displays. At best, such studies measure only beliefs about behaviour rather than the behaviour itself. Because no follow up was made regarding actual smoking behaviour, the conclusions drawn from the studies are speculative, if not immaterial.[87]

4.26. As one of its principal studies, the DH uses a 2006 Australian study for the unqualified proposition that advertising and "*bold displays in stores predisposed young teenagers to smoke*."[88] The study does not support the statement. Using the questionable and artificial methodology of showing 605 teenagers photographs of stores with and without advertising and product display, the researchers concluded that "*advertising and bold displays may help to pre-dispose them to smoking*."[89] As with the other studies cited, there was no follow up to confirm whether the alleged predisposition actually resulted in smoking behaviour.

4.27. Although we disagree with the methodology and the conclusions reached by the study, it is striking that the DH failed to disclose that the study found that while there was higher brand recall and *perceived* ease of access to tobacco products among students who viewed photos of stores with product display, the researchers concluded: "*Exposure to point of sale advertising, but not display, tended to weaken students' resolve not to smoke in the following year. Findings also indicate that exposure to advertising, as opposed to pack display on its own, influenced whether students would accept a cigarette from one of its friends if they offered*."[90]

4.28. Nor did the DH point out that the same study undermined the DH's stated view that banning point of sale display would de-normalize smoking. The researchers found that product display and advertising had no impact on peer approval of smoking, positive attributes being ascribed to smokers, or perceptions about overall harm from smoking.[91]

4.29. These are merely a few examples to illustrate that the research cited by the DH is a far cry from qualifying as evidence basis for objective and rational government policy. For an exhaustive and detailed review of all relevant studies referenced in the Consultation Paper in support of product display restrictions, we attach to this response an expert opinion prepared by Professor Barrie Gunter, Head of the Department of Media and Communication at the University of Leicester.

4.30. In summary, Professor Gunter found, among other things, that:

- The DH failed to provide any rationale concerning the selection of studies reviewed and cited to support its positions, and omitted a number of major studies on the subject.

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[87] See Appendix A, Report of B. Gunter.

[88] Wakefield M., et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point of Sale Cigarette Advertising and Pack Displays* Health Education Research 21:338-347 (15 May 2006).

[89] Id at 338.

[90] Id. at 345.

[91] Id.

- The DH relied on research that was not relevant to tobacco point-of-sale product displays, citing many studies that addressed tobacco advertising currently banned in the UK.

- Much of the research evidence presented on tobacco advertising and product displays in retail environments was based on surveys of non-random and non-representative samples in which self-reported questionnaire data were used. This type of research does not measure real behaviour, provides dubious proxy measures of real behaviour and does not effectively establish cause-effect relations between variables.

- Only two studies cited by the DH used methods that could, in principle, establish cause-effect relationships to a certain degree. However, one did not measure anything approximating real world retail-related behaviour and, moreover, did not find that product display would cause young people to begin smoking; and the other did not study point-of-sale variables at all.

4.31. In order to deprive manufacturers of product display, it is not enough for the DH to selectively cite studies, reports or data that, to the extent they are relevant at all, speculate about the impact a display ban *may* have on youth smoking -- and keep from the public the conclusions of studies that do not support its objectives.

A Point of Sale Display Ban Will Adversely and Unnecessarily Inhibit Competition

4.32. The DH dismisses the concern that a point of sale display ban will negatively affect competition by stating that "*evidence shows that most smokers make up their minds about which brand of tobacco they will buy long before they reach the shop, with less than 3% of tobacco-purchasing customers deciding to change brand at the point of sale*."[92] The sole basis for the 3% figure is a document prepared for British American Tobacco by a US research firm in 1995 which states in a footnote on one page that BAT research in three countries (Switzerland, South Africa, and Finland) show that 3% of consumers switched brands at point of sale influenced by "*category visibility and accessibility*."[93]

4.33. In its consultation paper arguing for point of sale display ban, the Norwegian Ministry of Health quoted an Australian study finding that 84% of adults had decided which tobacco brand to purchase prior to entering the point of sale.[94] Whether the number is 3% or 16%, it is a significant share of the highly competitive tobacco market.

4.34. In any event, it is beyond dispute that a point of sale display ban will adversely impact the ability of manufacturers, importers and retailers to compete. In its proposal to ban tobacco product display, the Norwegian government stated there was no "*doubt that*

[92] Consultation Paper at 33.

[93] Assuming the 3% figure were accurate, as the DH does, one could question the DH's conclusion that point of sale display is an important tool to market tobacco products. If the impact of point of sale display is to only convince 3% of smokers to switch brands – and the DH provides absolutely no data suggesting that youth take up smoking as a result of product display, the public health urgency and effectiveness of a point of sale display ban is questionable.

[94] Norwegian Consultation at 3.

… a [display] ban will remove the use of positioning as a competitive measure between the producers."[95] This is consistent with well-established law recognizing that display space at retail is an important component of competition in the consumer goods sector. Indeed, display space has been at the heart of numerous anti-competition disputes in the EU where courts, governments and manufacturers have stressed the importance of access to display in retail to the ability to enter into and compete in a market.[96]

4.35. Further, the UK laws regulating the promotion of tobacco products are extremely restrictive. Thus a product display ban would remove one of the sole remaining means for adult consumers to know which brands are available in the marketplace and would preclude manufacturers from using one of the few ways left to compete in the UK. A ban would make it virtually impossible to launch new brands or brand extensions, would give brands (and manufacturers) that are already well established in the market a huge competitive advantage, placing a tremendous and unfair disadvantage on manufacturers seeking to enter the UK market. The result would be a virtual freeze on the market and an end to competition other than through pricing.

4.36. In fact, banning product display is likely to lead to more competition on pricing which, as described in more detail in Section 6 below, is contrary to public health policy and will undermine the goal of reducing youth smoking. Moreover it is self-evident that by moving tobacco products "under the counter" will make it easier for criminals to infiltrate the legitimate trade channel with contraband and counterfeited packages and harder for enforcement authorities to determine whether and where illicit products are sold.

A Ban of Product Display at Point of Sale Will Impair Free Commercial Speech

4.37. Product display is not advertising as understood, for example, in the TAPA, the Directive 2003/33/EC on Advertising and Sponsorship of Tobacco Products and as stated by the DH in 1998 and 2002. (See discussion above).

4.38. Product display is an important means of differentiating brands, permitting consumers to know what brands are for sale and allowing manufacturers and retailers to communicate brand packaging conveying quality and product selection. By prohibiting the display of packs at retail, the proposed ban would breach the right to freedom of expression, which extends to the right to commercial expression, and therefore the display of packaged goods at retail.[97]

4.39. Restricting commercial expression for public health reasons is possible, but only if and to the extent the measures are "*necessary in a democratic society*."[98] Previous infringements of the right to commercial speech at point of sale have been judged proportionate precisely because they stopped short of depriving consumers from seeing the display of the product.

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[95] Id. at 5.

[96] See, e.g., European Court of Justice Case C-405/98 *Konsumentombusdmannen v Gourmet International Products Aktiebolag,* Decision of the Court paras 19-21, 38, 39 and Opinion of Advocate General Jacobs, paras 35, 36.

[97] European Convention on Human Rights, art. 10, incorporated into UK law by the Human Rights Act 1998.

[98] Id. at (2).

4.40. Thus, the Administrative Court (High Court of Justice in the Queen's Bench Division) upheld the current point of sale regulations – and, in particular, the restriction of advertising to a single A5-size poster at point of sale – because they did not altogether remove the possibility for consumers to differentiate between products by glancing at the products available.[99] Mr Justice McCombe said that:

> *"I do not consider it to be disproportionate to meet the objective of promoting health by restricting advertising at POS to a single advert of the type to be permitted. Displays of the products for sale will continue and, in addition to the A5 advert, price lists will also be allowed."*[100]

4.41. Crucially, the Court indicated that while measures already taken by the Government in limiting tobacco advertising in the point of sale regulations do restrict free expression, they do not compromise the "*very essence*" of commercial speech because they still allow the open display of branded tobacco products.[101]

4.42. Given that the DH has failed to provide evidence that product display in general and, most importantly, displays in the UK have impacted youth smoking prevalence or that imposing a ban on display of tobacco products at point of sale will advance the stated goal of reducing youth smoking, the proposal to ban product display is clearly disproportionate under UK law and violates the right of commercial free speech.

Youth Smoking Prevention Should Be Addressed Through Proven Effective Measures

4.43. The DH has proposed a point of sale display ban as part of its policy to address youth smoking prevention. But none of the data from countries that have implemented bans on product display or in the studies cited by the DH come close to establishing that a ban on product display will have any effect on youth smoking, much less meet the necessary standard of proportionality needed to outweigh the serious and negative impacts that a ban would have on competition.

4.44. Indeed, even if there were evidence that point of sale display had an effect on youth smoking (and there is no credible evidence that it does), the DH would not be able to establish proportionality given its failure to pursue more effective and less onerous measures than a ban on product display at retail.

4.45. Moving tobacco products "under the counter" is, as we said in the introduction to these comments, consistent with a policy seeking to exclude tobacco products from legitimate commerce and is at odds with the concepts enunciated in the principles of the Better Regulation Commission.

4.46. Instead, before banning point of sale display, the DH should pursue the measures it has only partially implemented or failed to implement that are proven effective in reducing youth smoking and described at length in Section 3 of this paper.

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[99] *R (on the application of British American Tobacco UK Ltd)–v. The Secretary of State for Health* [2004] EWHC 2493 (Admin.)

[100] Id. at para. 51. (emphasis added)

[101] Id.

5. Limitations on Vending Machines

Question 9: Do you believe that there should be further controls on the sale of tobacco from vending machines to restrict access by young people? If so, what is your preferred option?

5.1. In line with WHO's Framework Convention of Tobacco Control (FCTC), PML believes that the law should ensure that minors cannot purchase cigarettes from vending machines. We support age verification measures to ensure that only adult smokers can access tobacco products from vending machines.

5.2. The consultation provides three potential technologies to ensure age verification for vending machines: (1) electronic ID cards provided by the tobacco manufacturers; (2) an ID coin mechanism; and (3) the use of infra-red remote control. We support Option 2, which we believe is most efficient and cost effective way to achieve the objective of preventing youth access to tobacco through vending machines.

6. Plain Packaging Is Neither Appropriate Nor Effective

Question 10: Do you believe that plain packaging of tobacco products has merit as an initiative to reduce smoking uptake by young people?

6.1. The DH is only seeking general feedback from stakeholders on this issue since it is not considering any specific proposal at the moment. Thus, in commenting here, we reserve all rights regarding a final proposal to implement plain packaging, including that the DH must conduct a formal public consultation including a full analysis of the evidence base supporting specific proposals and a complete impact assessment. As to be expected by the significance of the issue and its potential implications, we have provided extensive comments, explaining our reasons for opposing a formal proposal to eliminate the ability of tobacco manufacturers from utilizing their trademarks and logos on consumer packaging.

6.2. Plain or "generic" packaging would be an extreme and disproportionate measure.[102] The purported objective, as explained by the DH is to reduce smoking uptake by young people by making cigarette packs unattractive and "de-normalizing" the use of tobacco products. The result will be to make all cigarette packs look the same, eliminating the ability to differentiate brands, and to commoditize the market.

6.3. The sole basis in the Consultation Paper for concluding that plain packaging will lead to reduced youth smoking is a handful of studies conducted primarily in the 1990s. But not a single study established that plain packaging will have at least reasonable

[102] According to the Consultation Paper, a plain packaging or "*generic, standardized or homogenous packaging*" requirement would mandate that all packaging be stripped of all "*trademarks, logos, colour schemes, and graphics*;" that the brand name "*would be required to be written in a standard typeface, colour and size*;" and that the "*package itself would be required to be plain coloured (such as white or plain cardboard) and to display only the product content, consumer information and health warnings required by law*." Consultation Paper at 40-41.

prospects of decreasing smoking incidence among youth. The DH concedes this point: "*the research into this initiative is speculative, relying on asking people what they might do in a certain situation. The assumption is that changes in packaging will lead to changes in behaviour*."[103]

6.4. A close analysis reveals that the research is not only speculative, but does not support the conclusions that the DH and others draw from it. Most importantly, in many studies (including the most widely cited) the underlying data confirm that pack design – or "brand appeal" -- does not play a role in uptake of smoking or continued smoking. In fact, the majority of adolescents interviewed in these studies said that plain packaging will have no impact on youth smoking. Thus, one study concluded:

> *"It is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarette from friends. There is no brand choice – the choice is simply to smoke or not to smoke. Therefore, in the uptake process brand and package are very minor components. This means that changing the package will not have any major effect on the decision(s) to smoke or not to smoke."*[104]

6.5. As the DH recognizes, the speculative benefit of plain packaging to prevent youth smoking must also be weighed against its impact on illicit trade and price competition. As we show below, an increase in both are likely outcomes of plain packaging. The DH and the public health community are well aware that both are factors that lead to increases in smoking prevalence, especially among youth. Thus, plain packaging will not only fail to achieve its stated objectives, but will actually work against them.

6.6. In addition, plain packaging will impose severe restrictions – restrictions tantamount to expropriation - on the use of long held and extremely valuable intellectual property rights, unduly limit the freedom of commercial speech, significantly restrict competition and breach the Government's obligations under EU law and international trade agreements. Given, on the one hand, the lack of evidence that plain packaging will achieve its intended public health objectives and, on the other hand, the wide range of effective measures to prevent youth smoking, plain packaging is neither an appropriate nor proportionate step to fight youth smoking. While PML wholeheartedly endorses regulation based on principles of harm reduction, particularly regulation intended to prevent youth smoking, we do not believe that the DH should pursue further consultation on plain packaging as it will not reduce youth smoking and is, at bottom, a violation of fundamental legal principles in the UK and the European Union.

6.7. Finally, the Government's claim that "further de-normalization" of smoking is necessary to reduce youth smoking is remarkable. The use of tobacco products has been declining for decades; they cannot be used in virtually any public place in the UK (and many other countries); they are sold in packs dominated by health warnings (soon to include graphic images in the UK); they cannot be advertised in virtually any

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[103] Id. at p. 41 (emphasis added).

[104] Expert Panel Report for Health Canada, *When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products* National Survey of Teens: Knowledge, Attitudes, Beliefs and Smoking Behaviours at 184 (March 1995) (emphasis added).

media available to other consumer goods; they are the subject of massive public health campaigns educating consumers of their adverse health consequences; and they are subject to higher taxes than any other consumer good. Eliminating one of the last remaining forms of product differentiation can only be reconciled with a strategy of preventing tobacco manufacturers from engaging in legitimate commerce.

The Empirical Data Do Not Indicate that Plain Packaging Will Reduce Youth Smoking

6.8. The Consultation Paper cites five empirical studies on plain packaging.[105] All date from the 1990s and were conducted in a vastly different tobacco control environment when health warnings were much smaller and virtually no pictorial warnings existed. No study was conducted in the UK or any other European country.[106]

6.9. A review of the studies reveals the weakness of both the policy and the "science" underlying the case for plain packaging. None were longitudinal in scope, i.e., none measured responses over time by either the same or different individuals and none measured either actual behavioural change or changes in attitudes toward smoking. All of the empirical research relied on self-reported predictions about the effect of plain packaging on respondents' perceptions of smoking, the likely effectiveness of health warnings and the likelihood that they will either begin, quit or reduce smoking.

6.10. The single most widely cited study, a report prepared for Health Canada in 1995, concluded that plain packaging "*would likely depress the incidence of smoking uptake by non-smoking teens, and increase the incidence of smoking cessation by teen and adult smokers*."[107] Yet the authors cautioned, "*The extent of change in incidence is impossible to assess except through field experiments conducted over time*."[108]

6.11. Moreover, the underlying data contradict the 1995 Report's conclusion – a conclusion that has fuelled calls for plain packaging for over ten years. In the national survey of adolescents at the heart of the Report, more respondents said that plain packaging will <u>not</u> reduce consumption or increase cessation among youth smokers:

> "*A close examination of these responses suggests that <u>effects [of plain packaging] will be more marginal than large</u>. This is because: only about 30 - 40% believe plain and generic packaging would make a*

[105] Consultation Paper at 53-57.

[106] The studies were conducted in Australia, Canada and New Zealand. We are aware of a 2007 study not cited in the Consultation Paper conducted in the UK: Grant, I.C., et al., *The Influence of Branding on Adolescent Smoking Behaviour: Exploring the Mediating Role of Image and Attitudes* International Journal of Nonprofit Voluntary Sector Marketing (2007). While not directly addressing plain packaging, the study considered the influence of branding on adolescent smoking behavior and concluded that its findings supported the introduction of generic packaging. The study suffers from the same methodological flaws as the studies cited in the Consultation Paper.

[107] Goldberg M.E., et al. *When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products*, prepared at the request of Health Canada (1995).

[108] Id. at 158. Similarly, in a 1992 study from New Zealand cited by the DH, the researchers stated, *"To predict the effects of plain pack health warnings on habitual smokers, a longitudinal experiment would be required to monitor the impact upon smoking behavior."* P. Beede, et al., *The Effect of Plain Packages on the Perception of Cigarette Health Warnings* 106 Public Health 315 (1992).

> *difference; and, the difference they believe it would make is small in magnitude*."[109]

6.12. Likewise, in its summary of a qualitative study with ten focus groups of teenagers, the Report concludes:

> "*They see the uptake process as being unaffected by promotion or packaging, as primarily a matter of being seen as a smoker or not. Peer situation, and parental acceptance or rejection, are more important in the uptake situation. […] There is no brand choice – the choice is simply to smoke or not to smoke. Therefore, in the uptake process brand and package are very minor components. This means that changing the package will not have any major effect on the decision(s) to smoke or not to smoke."*[110]

6.13. The Report also found that of four factors – price, peer group, brand, and packaging – price was identified by all groups to be the "most important attribute influencing the uptake or cessation of smoking."

6.14. Another study cited by the DH, a 1993 study conducted for the Centre for Health Promotion at the University of Toronto, likewise reported that more than half of adolescents surveyed believed that smoking behaviour will not change as a result of plain packaging.[111]

6.15. The DH also cites a 1996 Canadian study to support its view that plain packaging will "de-normalize" smoking. The researchers, however, stated that of the students interviewed, most said plain packaging "*would make no difference*" to youth smoking.[112]

6.16. On the issue of recall of health warnings, the 1995 Report for Health Canada found that starker and shorter warnings (e.g., "*Smoking can kill you*") were enhanced on plain packages, but recall of longer warnings (e.g., "*Tobacco smoke causes fatal lung disease in nonsmokers*") was diminished. The 1996 Canadian study found that even though plain packaging made health warnings appear more serious, "*recall of the health warning does not appear from our research to be affected by plain packaging*."[113] And the 1992 New Zealand study showed that plain packaging did not have any effect on the recall rates of health warning presented on tobacco products sold in New Zealand. [114]

6.17. Clearly, the empirical evidence does not support the case that plain packaging will reduce youth smoking.

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[109] Goldberg M.E., et al at 76 (emphasis added).

[110] Id. at. 184 (emphasis added).

[111] University of Toronto Centre for Health Promotion *Effects of Plain Packaging on the Image of Tobacco Products Among Youth* (1993), available at http://tobaccodocuments.org/pm/2504106502-6535.html.

[112] Rootman I. et al., *A Study on Youth Smoking: Plain Packaging, Health Warnings, Event Marketing and Price Reductions* (1996)

[113] There was an exception for daily smokers for whom the health warning recall was higher when presented on plain pack, possibly due to novelty effect that was expected to be "*temporary*."

[114] P. Beede, et al. at 317.

6.18. On the other hand, experience shows that overall tobacco consumption is not likely to be affected by plain packaging. As we have seen in other situations, smokers are likely to shift consumption. They may choose to purchase plain packs at retail or may choose other sources for purchasing as we discuss in more detail in 6.33 – 6.39 below. The DH's opinion that consumers will be less likely to smoke because of a lack of branded packaging is belied by the example of single stick sales in many countries where low income levels make pack purchases unaffordable for adult smokers. Another example is in Canada, where 20% of the cigarette market is estimated to consist of illicit cigarettes. As discussed below, 70-80% of the illicit trade consists of cigarettes are sold in clear plastic bags. Again, packaging without branding does not deter sales.

6.19. Rather than deter smoking, the likely impact of plain packaging will be to deprive manufacturers from competition other than through pricing and in turn encourage illicit trade and legitimate cross border sales. The rest of the smoking population is likely to continue to choose to purchase cigarettes in plain packaging. There is nothing in the data presented by the DH that suggests otherwise.

Plain Packaging Will Restrict Competition, Encourage Low Price Cigarettes and Create Incentives for Illicit Trade and Cross-Border Consumption

6.20. The requirement that all tobacco packaging be standardized, eliminating all aspects of trademarks, logos, colour schemes, and graphics and mandating that all brand names be printed in a standard typeface, colour and size is anticompetitive. Moreover, while plain packaging is unlikely to prevent uptake of smoking by young people or curb overall tobacco consumption, it will very likely encourage a significant shift of the supply and demand of tobacco products to low price products, cross-border sales and illicit trade – all of which are recognized to undermine the very goals the DH seeks to achieve.

- **Plain Packaging Will Severely Limit Competition**

6.21. Plain packaging will effectively eliminate the use of brands and trademarks in relation to tobacco products. This in turn will eliminate the well known advantages trademarks create in a free market society – advantages of paramount importance not just for brand owners but for consumers and competition as well.

6.22. The European Court of Justice summarized the significance of trademark rights for consumers and competition as follows:

> *"[T]rade mark rights … constitute an essential element in the system of undistorted competition which the [EC] Treaty is intended to establish. In such a system, undertakings must be able to attract and retain customers by the quality of their products or services, which is made possible only by distinctive signs allowing them to be identified."*[115]

6.23. These principles are well recognised in the UK. For example, in 2001 the Minister for Competition, Consumers and Markets said:

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[115] C-349/95 *Frits Loendersloot v. George Ballantine & Son. Ltd. And Others* (11 November 1997)

> *"The use of trade marks to distinguish goods and to offer consumers a guarantee of their origin and the skills and reputation of their makers can be traced back to the mediaeval craft guilds…The Government recognises the role brands play in guaranteeing consumers choice and value."*[116]

6.24. In a December 2006 report commissioned by the UK Treasury, Andrew Gowers emphasized the critical role of trademarks to UK consumers and businesses:

> *"A trade mark is a badge of origin for goods or services…. By providing a distinctive identity for a product or service, trade marks lower the search costs for consumers by providing them with information about the nature and quality of the product: this also gives brands an incentive to build up good reputations and to develop brand loyalty."*

6.25. Plain packaging will severely undermine these important functions of trademarks, thereby harming both consumers and competition. By foreclosing use of distinctive visual elements, plain packaging would invite consumer confusion by destroying unique brands through its mandated mix of visual elements (standardized design, colors, and font). Consumers will no longer be able to easily distinguish between brands on sale. Restricted to displaying packs that are virtually indistinguishable from one another, manufacturers will find it difficult – if not impossible – to launch new products or line extensions of existing brands. New companies, without the ability to distinguish their products through trademarks, will face enormous difficulties in entering the market. Indeed, manufacturers will be limited to pricing to attract consumers to new products, and, as discussed below, low price tobacco products are recognized as undermining public health objectives.[117]

6.26. A brand represents the attributes that a consumer attaches to a certain product of a manufacturer (e.g., origin, quality, price/value, taste, etc.). Several visual elements present in packaging --such as name, logo, color, typeface, and package design-- combine to form a trade dress unique to the brand. This unique visual identity allows the consumer to identify the desired brand from among the many different offerings without confusion or the need for independent research. Trademark law is premised on the importance of protecting the role played by these distinctive visual elements in providing this information to the consumer.[118]

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[116] Speech by Melanie Johnson MP, the then Minister for Competition, Consumers and Markets speaking at The Brands Conference, 30 October 2001

[117] The ability to continue to use brand names will have little impact in light of the rule that names must be printed in uniform color, typeface and size. Despite the name, the similarity of the packs will certainly lead to consumer confusion and ultimately complete commoditization of the market. Introducing new versions of existing brands will be extraordinarily difficult, if not impossible, as consumers will have no way of easily identifying new brand extensions other than reading the typeface on the pack (assuming there is point of sale display). In fact, distinguishing existing versions of the same brand will be difficult.

[118] The importance of the various visual elements is reflected in their treatment as trademarks. According to the definition of trademarks in the 1994 UK Trade Marks Act and the First Council Directive 89/104 /EEC of 21 December 1988, a trademark may consist of any sign capable of being represented graphically, including in particular words, designs and the shape of goods or their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of others. To guard against consumer confusion, courts routinely examine the entirety of a product's distinctive visual elements when considering whether consumers are likely to be confused as between competing products.

6.27. The difficulties faced by manufacturers and consumers in relation to plain packaging, which are substantial (indeed, overwhelming), will be compounded by the adoption of a ban on product display at retail. As stated in Section 4 of this response, such a ban would face many of the same objections and lead to the same negative outcomes as a generic packaging requirement.

- **Plain Packaging Will Encourage Price Competition and Lead to Lower Priced Cigarettes**

6.28. The Consultation Paper concedes that "*Plain packaging may force tobacco companies to compete on price alone, resulting in cigarettes becoming cheaper*."[119] We would go further: plain packaging will reduce overall cigarette prices.

6.29. As the Consultation Paper states, "*Cigarette consumption and smoking cessation are both responsive to changes in the price of tobacco products*."[120] Most important, "[*p]rice responsiveness is considered to be even greater among young people ….*"[121] As noted above, the plain packaging study most relied upon by the DH (the 1995 Canadian study) reported that the majority of adolescents surveyed reported that pricing – not packaging – was the most significant determinant of initiation and cessation among youth. The DH argues that it can "*counter the effect*" by increasing taxes. [122]

6.30. The DH, however, is not taking into account the facts when it assumes that tax increases can effectively "*counter*" price competition. Whether and how individual manufacturers pass on a tax increase is subject to speculation. Experience shows that manufacturers seeking to grow market share may choose to sacrifice profitability to grow volume. In fact, in several EU markets, the lowest price cigarettes in the market did not pass on tax increases over the last three years.[123] This issue may be magnified in a plain packaging market where pricing will be essentially the only means of competition. The DH's argument also ignores that consumers can switch to other tobacco products that are benefiting from a favourable tax treatment, e.g. hand-rolled cigarettes. Further, as the DH acknowledges, "*significantly increasing the levels of tax on tobacco could increase the smuggled share of the tobacco market*."[124]

6.31. The UK tobacco market itself is a case in point: taxes increased by 42 pence per pack for cheap brands over the last three years, but prices of these brands only increased by

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[119] Consultation Paper at 41.

[120] Id. at 21.

[121] Id.

[122] Id at. 41.

[123] Comparing July 2005 and July 2008, low priced cigarettes did not fully pass on tax increases over that time period in Finland, Hungary, Ireland, Portugal, the Slovak Republic, Slovenia, Sweden and the U.K.

[124] Consultation Paper at 23. Addressing this issue in 2005, the Austrian Minister of Health stated: "*it will be impossible to deal with this phenomenon [the growth of low price cigarettes] by introducing a general tax increase. As our experts at the Ministry of Finance have been completely right to state, any tax increase would have resulted in intensified smuggling, which is on the rise anyway, but would not have prevented those dangerous low-price schemes."* The Federal Ministry for Health and Women's Issues, news conference on the subject of Tobacco Prevention, April 12, 2006. Instead, the Austrian Government decided to introduce a minimum retail price – banning the sale of cigarettes below a certain price – considered to be a more effective and appropriate response than a tax increase.

23 pence per pack. The gap between low and high price cigarettes remained over £1.40 per pack. Cheaper brands have proven to be particularly successful in growing market share, rising from 51.3% to 63.9% market share from 2001 to 2006.[125] At the same time, the overall consumption share of non-UK duty paid tobacco products has remained at very high levels.[126]

6.32. In a twist of logic, therefore, the Government is proposing to implement plain packaging based only on speculation which may have no impact on youth smoking, but is certain to increase what is generally accepted as one of, if not, the most important factors affecting youth smoking: cheap cigarettes.

- **Plain Packaging Will Stimulate Cross-border Sales and Illicit Trade**

6.33. As the Consultation Paper states, illicit trade "*harms health in our communities by creating a cheap and unregulated source of tobacco, undermining … targets for reducing smoking prevalence, especially among young people ….*"[127] Similarly, as we quoted above, the DH stated in 2008, "*Cheap smuggled tobacco finds its way to the most vulnerable people – children, teenagers and the poor. It is highly likely that without tackling this issue the … target for reducing prevalence among routine and manual smokers will not be achieved.*"[128]

6.34. The introduction of plain packaging in the UK will stimulate both the demand and supply of cross-border sales and illicit trade, which is already a significant issue in the UK.[129]

6.35. To begin with, plain packaging offers two significant incentives to counterfeiters. First, it creates a much easier and thus lucrative market for counterfeiting domestic product given that all legal domestic brands will be virtually identical. When discussing the increased risk of counterfeit in a plain pack market, the DH states that "*the colour picture warnings, which must appear on all tobacco products manufactured from October 2008, would remain complicated to reproduce*."[130] In our experience, however, counterfeiters have all the necessary knowledge and technology to reproduce pictorial health warnings. Counterfeiters have already reproduced pictorial health warnings on counterfeits of PMI brands in Brazil, Thailand, Singapore, Jordan and Duty Free.

6.36. Moreover, under a plain packaging scheme, aside from the brand names printed in a standard format, all cigarette packs would share the same design. This creates a cost benefit for counterfeiters of domestic UK products as it makes it technologically

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[125] Euromonitor International *Tobacco in the United Kingdom* (January 2008).

[126] For the time period from 2000-2004, the Tobacco Manufacturers Association estimated the share of non-duty paid products (including cross-border sales) to fluctuate between 26% and 31%. The estimates of HM Revenue and Customs are only slightly lower, in the range of 25-27%. See HM Treasury *New Responses to New Challenges: Reinforcing the Tackling Tobacco Smuggling Strategy* at 12 (March 2006).

[127] Consultation Paper at 21.

[128] DH *Excellence in Tobacco Control*: *10 High Impact Changes to Achieve Tobacco Control - An Evidence Based Resource for Local Alliances* (May 2008).

[129] As we described in Section 2 of this paper, there is no dispute that the market for non-UK duty paid cigarettes is a very serious problem in the UK despite the significant successes of the Government.

[130] Consultation Paper at 42.

simpler to replicate multiple brands when those brands essentially look the same. To be sure, as the Consultation states, there are "*sophisticated markings*" that could help mitigate the counterfeiting risk, but at this point in time no such process has been adopted or implemented by the Government.

6.37. Second, there is no doubt that a market will develop for branded packaging. While the evidence does not suggest that consumers will reduce smoking because of generic packaging (see discussion above), it is likely that when presented with a choice between branded and plain packaging, a smoker will choose a branded pack which would convey through the branding the impression of providing higher quality tobacco products. Of course, this will provide more incentive for counterfeiters of branded packs, as well as of contraband and legitimate intra-EU cross border sales.

6.38. In addition, plain packaging and the commoditization of cigarettes could lead to the spread to the United Kingdom of a phenomenon that is currently seriously undermining the Canadian government's fiscal and health strategies and fostering organized crime. According to a 2008 report by the Royal Canadian Mounted Police, an estimated 22% of smokers in Canada are consuming illegal tobacco products, and 70-80% of the illegal cigarettes sold in Canada are in the form of "*baggies*", clear plastic re-sealable bags of 200 unbranded cigarettes.[131] These sell for as little as C$6 while legitimate tobacco products are sold for C$75-90 for one carton of 200 cigarettes.[132] All other things being equal, many British consumers faced with paying over 5 pounds for a legal unbranded product from a legitimate retailer or a twelfth of that price (on a per stick basis) for a bag of 200 from a street seller may choose the latter option.

6.39. Plain packaging, therefore, will exacerbate the illicit and cross-border tobacco markets. Counterfeiters will have a cost efficient domestic product to copy and a likely increase in demand for fake branded packs, which will be cheaper and look as though they provide more quality and are the "real product" as opposed to genuine product in plain packs. The same will be true for contraband and cross-border sales. Finally, plain packaging may lead consumers to opt for more generic illegal alternatives such as cigarettes sold in plastic bags.

Plain Packaging Violates Established Trademark Law and Will Result in Expropriation of Valuable Property Rights

6.40. The ability to affix a trademark on the packaging of a product constitutes the very essence of trademark rights, as held by the European Court of Justice and the UK courts. Trade dress and logos on packaging are the core of product differentiation at retail.

6.41. Recognizing this, trademarks and trade dress are protected by various forms of registered and unregistered intellectual property rights under the UK Trade Marks Act 1994, as well as under common law and European law principles.[133] While those rights may be restricted to address other public interests, such as public health

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[131] RCMP's 2008 Tobacco Enforcement Strategy http://www.rcmp-grc.gc.ca/fio/tobacco_strategy_2008_e.htm

[132] Id. at 5.

[133] In addition to trademark rights, the distinctive visual elements of packaging are also often the subject of copyright, industrial design and patent rights.

objectives, the restricting measure must be proportionate in relation to the stated objective.

6.42. As we have shown above, plain packaging is clearly a disproportionate measure. It is not even an appropriate measure: based on the available studies, it is unlikely that youth smoking or overall smoking incidence will decrease because of plain packaging. Rather, plain packaging will increase demand for cheap products, including cross-border sales and illicit trade – all of which are detrimental to the DH's public health goals. On the other hand, the economic cost of the measure would be severe, not to mention the public policy implications of such a sweeping attack on the role of trademarks.

6.43. In fact, refusing to permit manufacturers to apply trademarks, brand logos and other distinctive marks on their packs would be contrary to the European Court of Justice's decision on the European Tobacco Product Directive's ban on descriptors and imposing larger health warnings (Directive 2001/37/EC).[134]

6.44. In that case, the claimants argued that the larger health warning requirements and the descriptor ban of the Directive violated the principle of proportionality and the right to property. Opposing the challenge, the French government, among others, argued that the descriptor ban "*does not prohibit all indications or presentations of cigarettes which could attract smokers and encourage brand loyalty, but only those which suggest that one particular tobacco product is less harmful than others*."[135] Similarly, the UK, the Commission and other Member States observed that the Directive would still allow a "*cigarette manufacturer to continue to use its trade mark by distinguishing it from others by means of words, signs, colours and drawings which are particular to it and which it could present on the available surfaces of the tobacco products.*"[136]

6.45. The Court agreed with these arguments and upheld the Directive. Thus, with respect to the descriptor ban, it noted that despite the prohibition of certain terms, "*the fact remains that a manufacturer of tobacco products may continue to distinguish its product by using other distinctive signs.*"[137]

6.46. On health warnings and other mandated on-pack information, the Court found that "*the only effect produced by…the Directive is to restrict the right of manufacturers of tobacco products to use the space on some sides of cigarette packets…to show their trade marks, without prejudicing the substance of their trade mark rights*."[138] More specifically, the Court held that the increased size requirements were still "*in a*

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[134] Case C-491/01 *R v Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. (10 December 2002)

[135] Id. at para. 119.

[136] Id. at para 146. Specifically, the UK government argued that the prohibiting only misleading descriptors "*leaves much of the companies' intellectual property intact*" and stressed the "*freedom which the labeling requirements of article 5 leave to the companies to apply their trademarks and other intellectual property to the majority of the pack surface*." See Written Observation of the UK at paras. 10.10 and 10.26, respectively.

[137] Id. at para 152.

[138] Id at para 150.

proportion which leaves sufficient space for the manufacturers of those products to be able to affix other material, in particular concerning their trade marks…."[139]

6.47. In summary, the Court concluded that, because the restrictions on packaging did not impair "*the very substance*" of manufacturers' trademark rights, the legislature "*has not overstepped the bounds of discretion which it enjoys in this area*."[140] This is not true for plain packaging, which obliterates the "*very substance*" of manufacturers' trademark rights.[141]

6.48. A trademark that cannot be affixed to the product packaging is effectively rendered worthless. By taking away the very substance of trademark rights and effectively commoditizing the tobacco market, plain packaging amounts to nothing less than the expropriation of manufacturers' valuable brands.[142] It will destroy the value of the brands and the large investments manufacturers have made to build up and maintain the goodwill associated with their brands.

6.49. Therefore, even if the Government could demonstrate that plain packaging were a proportionate and legal measure (which it is not) the Government will be required to compensate manufacturers for the value of the expropriated trademarks. As recognized consistently, the value of tobacco manufacturers' trademarks, brand logos and pack designs are enormous, including some of the most valuable commercial brands in the world.[143]

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[139] Id at para 132.

[140] Id. at para 153.

[141] In his Opinion, the Advocate General suggested that the results of a proportionality test would be different where "*normal usage is no longer possible*" and consequently "*the substance of the [trademark] right*" is compromised. The only reason he gives as to why the "*substance*" of the right was not compromised by the Tobacco Products Directive is that the "*trademark can still be displayed on the packaging*" and that *"[o]nly part of the packaging*" is taken up with health warnings and other officially mandated information. A plain packaging requirement would remove even this residual ability to use some part of the packaging for trademarks and would thus fail the Advocate General's "*very substance*" test and suggest a conclusion of a disproportionate interference with intellectual property rights.

[142] Restricted to non-use by plain packaging legislation, distinctive visual elements would become subject to total loss. Under UK law, existing trademarks would be subject to cancellation after five years of non-use (1994 Trademarks Act, Section 46).

[143] As we stated above with regard to a point of sale display ban, packaging itself is not advertising as that term is commonly understood and as recognized by TAPA and the DH in the past. However, as an integral part of the product, packaging is an important means of differentiating brands and in that sense is a means of communicating to consumers about what brands are on sale and in particular the goodwill associated with our trademarks, indicating brand value and quality. Placing trademarks on packaged goods is, thus, at the heart of commercial expression and by prohibiting the ability to do so, a plain packaging requirement would breach the right of freedom of expression which extends to the right to commercial expression. Article 10 of the European Convention on Human Rights incorporated into UK law by the Human Rights Act 1998.

The DH has failed to establish that plain packaging will reduce youth smoking. The evidence it has provided does not come close to meeting the standard of "necessity" required to infringe on commercial free speech as discussed above. Id. at (2). Just as plain packaging crosses the line laid down by the European Court of Justice for the "*very substance*" of trademark rights, so also does it fundamentally interfere with the "*very essence*" of the right to free commercial speech.

Plain Packaging Violates EU Law and International Trade Agreements

6.50. A plain packaging requirement in the UK would violate the principle of free movement of goods as protected under Article 28 of the EC Treaty. As the ECJ emphasized in its decision on the Tobacco Products Directive, "*national rules laying down the requirements to be met by products, in particular those relating to their designation, composition and packaging, are in themselves liable … to constitute obstacles to the free movement of goods.*"[144] Plain packaging would create a barrier to intra-EU trade:[145] market access for any tobacco manufacturer who wants to enter the UK market will be much more difficult due to the inability to distinguish product from those already on the market and known to the consumer. In fact, it will be virtually impossible for any new entrant to make consumers aware that a new product has been launched other than through price competition.

6.51. The Government might try to rely on the public health derogation in Article 30 EC Treaty. To do so, however, it would have to show that the protection of public health it invokes is "*sufficiently established*" on the basis of the "*latest scientific data available.*"[146] As explained above, this is not the case. The studies cited by the DH are outdated and based on flawed and insubstantial research. Furthermore, the Government would have to demonstrate that "*such protection cannot be achieved by means which place less of a restriction on the free movement of goods within the Community*."[147] And "*when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*."[148] Again, as shown above, the DH's case for plain packaging could not meet these requirements. There are clearly less onerous alternatives available that will not impede the operation of the internal market.[149]

6.52. The failure to protect intellectual property, including trademarks, would have severe negative consequences for fair competition and free trade. Mindful of this, international treaties such as the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and the Paris Convention for the Protection of Industrial Property impose obligations on the signatory countries – including the UK – to follow minimum standards concerning the availability, scope and use of intellectual property rights. Plain packaging will squarely conflict with these treaty

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[144] ECJ C-491/01 at 64 (citing ECJ C-267/91 (Keck) and C-268/91 (Mithouard); see also Directive 2001/37/EC, Recital (19), according to which the European Commission and the European Parliament found that differences in how Member States required tobacco products to carry warning labels were "*liable to constitute a barrier to trade and to impede the operation of the internal market in tobacco products.*"

[145] Under established EU law, also de facto barriers to market entry constitute an obstacle to the free movement of goods under Article 28. See, e.g., Case 8/74 *Procureur du Roi v. Benoît and Gustave Dassonville* [1974] ECR 837, § 5; Joined Cases C-267/91 and C-268/91 *Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, § 11; Case 120/78 *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, § 8.

[146] Case C-24/00 *Commission of the European Communities vs. French Republic* at para 55 (5 February 2004)

[147] Case 155/82 *Commission of the European Communities v Kingdom of Belgium* [1983] ECR 531, § 12.

[148] Case C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte FEDESA and Others* [1990] ECR I-4023 at para 13.

[149] By the same token, plain packaging would also violate the WTO agreement on Technical Barriers to Trade (TBT), which requires Members, including the UK, to ensure that technical regulations (including packaging requirements) are not imposed with the effect of creating unnecessary obstacles to international trade.

obligations. Plain packaging not only unjustifiably encumbers the use of a trademark,[150] it also violates the principle that the nature of the goods to which a trademark is applied shall in no case form an obstacle to the registration of the trademark.[151] In short, plain packaging would install a dual-class system of trademarks – one class for tobacco products and one class for other goods. Such a dual-class trademarks system puts the UK completely out of step with the rest of the world and places the UK in breach of its obligations under both TRIPs and the Paris Convention.

Youth Smoking Prevention Should Be Addressed Through Proven and Effective Measures

6.53. The DH has proposed plain packaging to combat youth smoking. As shown above, there is simply no sound basis to use plain packaging to obtain that objective. Instead, as set forth in Section 3 of this paper, there are a host of measures that the DH can pursue to reduce youth smoking. Pursuing plain packaging would be wholly and utterly inappropriate even if such measures did not exist, but the fact that they do would make a future regulatory proposal for plain packaging disproportionate in the extreme.

6.54. In its Consultation Paper, the DH summarizes "*action already taken by the government to reduce youth smoking*."[152] But, as we explain above, far more can be done. Arguing that plain packaging is needed would be unsupportable in light of the lack of evidence that it would have any impact on youth smoking rates and weighed against the unquestionable harm it would cause to competition and the damage it would inflict on manufacturers including but not limited to the expropriation of their extremely valuable intellectual property rights. On the contrary, there is a very real and substantial risk that plain packaging would undermine the Government's public health objectives. In sum, plain packaging is not an evidence-based measure and its speculative benefits do not outweigh its clear negative impacts. There is therefore no basis to continue consideration of this issue.

[150] TRIPs, Article 20.

[151] TRIPs, Article 15.4; Paris Convention for the Protection of Industrial Property ("Paris Convention"), Article 7. Also, under UK law, generic packaging would prevent new trademarks for tobacco products from obtaining registration as the 1994 Trademarks Act provides that a *"trade mark shall not be registered if or to the extent that its use in the United Kingdom would be prohibited in the United Kingdom by any enactment or rule of law ...."* Trade Marks Act 1994 at Section 3(4). In addition, existing trademarks would risk cancellation after five years of non-use. Id. at Section 46.

[152] Consultation Paper at 27.

7. Prohibiting Smoking in Private Places

Question 12: Do you believe that more should be done by the Government to reduce exposure to second-hand smoke within private dwellings or in vehicles used primarily for private purposes?

7.1. The DH states that "*the Government has no plans for smokefree legislation to extend to private dwellings*."[153] Further, it notes that research from Ireland and Scotland "*shows no evidence of smoking shifting from public places into the home after the implementation of smokefree legislation*."[154] The DH also notes that some researchers believe that smokefree legislation increases the likelihood of less smoking within homes. Despite these statements, the DH states it remains concerned about smoking "*within the home and in private vehicle*s," and seeks comments on what more can be done. [155]

7.2. We believe that the DH is correct in not planning to extend legislation restricting or banning smoking in private places, including homes and private cars. Such legislation would be a clear infringement of individual liberties and contrary to the DH's statement in its 1998 paper *Smoking Kills:*

> *"Currently, well over a quarter of the people of Britain smoke. The Government fully recognises their right to choose to do so. We will not in any of our proposals infringe upon that right."*[156]

7.3. We also agree with the DH views expressed in that paper that smokers should be aware of those around them who do not want to be around smoke, and we as state on our internet, "*Particular care should be exercised where children are concerned, and adults should avoid smoking around them*."[157] This view was suggested by the DH's in 1998:

> "*Just as the Government is determined not to infringe upon people's rights to make free and informed choices, it is also determined to ensure that the responsibilities of smokers to people who choose not to smoke are carried out. That means a balance of rights and responsibilities -for those who smoke and for those who do not. Striking that balance is a clear and tough challenge - for the Government, for business, for local authorities, for voluntary groups and especially for individuals*." [158]

7.4. In our opinion, that balance can be achieved where private places are concerned through educational campaigns and health warnings to remind parents and other

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[153] Id. at p. 45

[154] Id.

[155] Id.

[156] Smoking Kills at para.1.26.

[157] www.pmintl.com

[158] Smoking Kills at para.1.26.

adults not to smoke around children.[159] This approach was suggested in the FCTC Conference of the Parties' *Guidelines on Public Smoking Restrictions for the Implementation of Article 8 Protection from Exposure to Tobacco Smoke.* Although we do not agree with all of its conclusions regarding public smoking restrictions, the Guidelines state, "*Public education campaigns should also target settings for which legislation may not be feasible or appropriate, such as private homes*."[160]

8. Harm Reduction

Question 17: Do you support a harm reduction approach and if so can you suggest how it should be developed and implemented?

8.1. By raising the issue of harm reduction as a potential component of government sanctioned tobacco policy, the DH has taken a bold step, recognizing that the future of tobacco control must contain science based regulations that govern the product. As stated by the DH, "*future government strategy in tobacco control should…address the needs of the smoker who cannot quit and give consideration to how the harms caused by smoking can be reduced*."[161]

8.2. Given the complex issues raised by tobacco harm reduction, it is essential that the appropriate resources and expertise are provided to support the development of comprehensive, evidence based regulations and to implement rigorous testing and performance standards for tobacco and nicotine products. As stated above, this requires the creation of a tobacco agency in the UK with sufficient authority and resources.

8.3. It is also important as part of this regulatory strategy to address conventional cigarettes. While it is our view that there is, at this time, little that can be done to substantially reduce the risk of current conventional lit-end cigarettes, certain measures, such as testing smoke emissions, can help provide regulators with information that can be used as a base against which to measure next generation products that have the potential to reduce harm. We support, therefore, as part of a harm reduction strategy, the implementation of product regulation requirements.

8.4. The Tobacco Advisory Group of the Royal College of Physicians stated:

> "*In recent years, the UK and other countries have implemented a broad range of tobacco control strategies, but regulation of the product itself has received relatively little attention or resource. This may be due to a lack of clarity as to whether it is possible to make cigarettes less harmful and, if so, how best to do this. It is also unclear as to what role other*

[159] FCTC Article 12, p. 10.

[160] FCTC Conference of the Parties *Guidelines on Public Smoking Restrictions for the Implementation of Article 8 Protection from Exposure to Tobacco Smoke* at p. 5 (2007).

[161] Consultation Paper at 52.

> *tobacco and nicotine products can play reducing the health burden caused by tobacco use in the UK*."[162]

8.5. In this context, we address below the three areas raised in the Consultation Paper: (1) "alternative tobacco products" (i.e., products sold with the potential to reduce the risk of disease caused by tobacco products); (2) tobacco testing, ingredients and emissions; and (3) reduced cigarette ignition propensity cigarettes. We also raise the need to harmonize regulation of RYO products and manufactured cigarettes – an important public health issue, especially because of the concern among public health officials that youth are buying lower priced hand-rolled products.

8.6. As formal proposals have not been made in the Consultation Paper, our comments below do not contain our complete views (or responses to on-going debates in the public health literature) on the complex issues of tobacco product regulation, including but not limited to alternative tobacco products, smoke constituent and ingredient testing and standards, and cigarette ignition propensity. In the event of a concrete proposal or consultation on any of these or other product regulatory issues, we reserve our right to provide additional comments.

8.7. In addition, although we encourage the DH to begin the process of regulating in these novel areas, all of them are currently being considered at the EU level. Ultimately a coherent and uniform regulatory policy will need to be implemented by the European Commission to avoid a patchwork of inconsistent regulatory standards by Member States.

Alternative Tobacco Products: Products with the potential to reduce risk

8.8. The need to develop regulation to address products marketed with claims that they reduce the risk of tobacco related disease(s) is clear. As the DH has rightly observed, there has been an appearance on the market of allegedly "safer" tobacco products and non-tobacco cigarette substitutes (such as "electronic cigarettes").

8.9. In its *Second Report on the Application of the Tobacco Products Directive*, the European Commission stated that the emergence on the market of novel tobacco and nicotine products required regulatory action to protect public health acknowledging that it was unclear as to which regulatory framework (e.g., tobacco, pharmaceutical, food) applied to these products.[163]

8.10. Similarly, the Tobacco Advisory Group of the Royal College of Physicians wrote in its 2007 report that:

> "*It is not clear how these products will be regulated, or who will be responsible for their regulation, if and when such products are launched in the UK*."[164] The report concluded, "*Some newly launched tobacco*

[162] Royal College of Physicians' Report at 167. Although we disagree with many of the proposals put forth by the Tobacco Advisory Group of the Royal College of Physicians regarding the regulation of conventional tobacco products, we agree with the group's recognition of the need for a harm based regulatory framework. That framework should not, however, seek to eliminate the ability of adults to use and manufacturers to sell conventional cigarettes.

[163] EC Report at 11.

[164] Royal College of Physicians' Report at 176.

> *products, including the PREPs [potentially reduced exposure products], seem to lie completely outside of the current regulations. This clear and unjustifiable regulatory imbalance works against public health*."[165]

8.11. Specific action is needed because most of these novel products, whether containing tobacco, nicotine or neither (as in the case of herbal cigarettes), are sold with explicit or implicit claims that they are safer alternatives to conventional cigarettes and/or are effective smoking cessation therapies. Below we provide our views on regulation of two broad categories of products: (1) products containing tobacco and (2) products that deliver nicotine but do not contain tobacco. We also address snus, which is at the centre of the policy debate over reduced harm tobacco products.

- **Products Containing Tobacco**

8.12. Products containing tobacco fall within the regulatory reach of existing tobacco regulations.[166] However, existing tobacco laws do not provide an adequate basis for regulation of reduced risk products.

8.13. As a first step, the DH should amend existing laws to explicitly prohibit manufacturers from making a reduced risk claim about a tobacco product unless the claim is substantiated by the DH and/or a select scientific advisory committee through a rigorous pre-marketing review process.

8.14. The Consultation Paper states that the Tobacco Products (Manufacture, Presentation and Sales) (Safety) Regulations already prohibits any advertisement or claim of "*relative safety*."[167] This is not clear because the prohibition in the Regulation refers only to statements on packaging.[168] We believe the law should be amended to explicitly prohibit *all* claims *and* to expressly permit a claim that is substantiated under rigorous standards developed by the DH. If a product is proven to have the potential to reduce risk of disease compared to conventional cigarettes, that fact should be communicated to consumers.[169] That is a fundamental underpinning of a regulatory framework based on harm reduction.

8.15. In order to substantiate a claim, the manufacturer would have to establish through reliable scientific data that the product will result, or is reasonably likely to result, in a

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[165] Id. at 238.

[166] Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, Section 2(1) ("*tobacco product" means a product consisting wholly or partly of tobacco, whether genetically modified or not and intended to be smoked, sniffed, sucked or chewed"*).

[167] Consultation Paper at 54 para 5.19.

[168] Tobacco Advertising and Promotion (Point of Sale) Regulations 2002, Statutory Instrument 2002 No. 3041, Regulation 11 (1) (*No person shall supply a tobacco product the packaging of which carries any name, brand name, text, trademark or pictorial or any other representation or sign which suggests that that tobacco product is less harmful to health than other tobacco products.*) (emphasis added).

[169] See Royal College of Physicians' Report at 209-210 ("*The principles of autonomy and individual rights are that adults should have knowledge of and access to less hazardous forms of nicotine in case they want to choose to use them. If significantly less hazardous means exist to satisfy nicotine-addiction, honest information and availability are ways to respect individual rights….it is arguable that consumers have a right to know salient information about the products they wish to use, and about products which the may wish to use but are prevented from using on public health or product safety grounds*.") (emphasis added).

substantial reduction in risk of one or more tobacco related diseases compared to a conventional tobacco product on the market. Elaboration on the data needed to support this standard should be established by the DH with the assistance of a scientific committee of experts. The data should be generated from non-clinical investigation (smoke chemistry, *in vitro* and *in vivo* assays) and clinical investigations.

8.16. In addition to statements that one product is safer, i.e., presents a reduced risk of one or more tobacco related diseases than other products on the market, the following other statements should be subject to pre-market review: (1) a product reduces or eliminates the levels of one or more smoke constituents and (2) a product reduces or eliminates the user's exposure to one or more smoke constituents. Such statements should be subject to pre-market review whether or not the manufacturer states that the reduction in yield or exposure reduces the risk of disease.

8.17. The important point about regulation of claims is that (1) they are not permitted unless substantiated under a pre-market review process and (2) their content is accurate and conveyed in a manner that allows consumers to understand their significance. Achieving an appropriate balance between the objective of communicating benefits of new products and the objective of preventing initiation and encouraging cessation can be done. As the United States Institute of Medicine (IOM) stated in its seminal report on regulating reduced risk tobacco products, "*The problem of conveying balance in communicating health benefits and risks is not unique to tobacco-related PREPs, and the large body of experience in other areas of health and safety regulation may be applicable to these products as well*."[170]

8.18. For example, the DH can develop rules regarding pre-market testing of consumer perception of claims.[171] Further, manufacturers could be required to inform consumers that smoking a reduced risk product, albeit substantiated by expert authorities, is not an alternative to quitting and that the best way to reduce risk of tobacco-related disease is to stop using tobacco products. Depending on the data provided, a claim could be accompanied by a statement that the health consequences of the change are unproven. It is also important that substantiated claims do not imply that the product has been endorsed by the DH, is an alternative to quitting, or is safe to use.

8.19. We recognize that one of the concerns of the public health community is the impact of reduced risk products on tobacco initiation and cessation. Many public health advocates are concerned that the introduction on the market of products that are marketed with claims, even if substantiated, may cause overall harm to the population by causing fewer people to quit or more people to initiate tobacco use. While pre-market testing can provide important information upon which to predict consumer use

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[170] Stratton, K.; Shetty, P.; Wallace, R.; Bondurant, S., eds. Clearing the Smoke: Assessing the Science Base for Tobacco Harm Reduction National Institutes of Health, Institute of Medicine at 218 (Washington, D.C.: National Academies Press 2001) (IOM Report)

[171] Hatsukami, D.K., et al., *Methods to assess potential reduced exposure products*. Nicotine & Tobacco Research 7(6): 827-44, 829-30 (2005) ("*The purpose of consumer product testing is to ensure that claims and marketing of a product will lead the consumer to make an informed decision based on an accurate understanding of valid information, and to ensure that the product does not appeal to youth, those who would have quit otherwise, or those who have previously quit*).

and behaviors, these issues are essentially unknowable prior to the marketing of the product.

8.20. For this reason, population harm is best assessed through post-marketing surveillance and studies, rules about which should be developed by the DH. The IOM's 2001 report commented on this issue:

> *"Regulation cannot assure that the availability of risk-reducing PREPs will lead to reduced tobacco-related harm in the population as a whole. However, a regulatory agency can assure that data are gathered that would permit population effects to be monitored. If tobacco use increases or tobacco-related disease increases, these data would serve as a basis for developing and implementing appropriate public health interventions*."[172]

8.21. Thus, the amendment of existing tobacco regulations, as described, can build a solid basis for tobacco product harm reduction in the UK without undermining the goals of preventing initiation and encouraging cessation.

- **Electronic cigarettes and other non-tobacco nicotine products**

8.22. The Consultation Paper also mentions "electronic cigarettes" and similar products that provide nicotine to consumers but do not contain tobacco.[173] Most are designed to physically resemble cigarettes and are marketed to and understood by consumers as cigarette substitutes, providing one or more of the following benefits: pleasurable alternative to cigarettes; reduced risk of disease; or effective smoking cessation therapies.[174] Because they do not contain tobacco, they cannot be regulated under current tobacco regulations.[175] Yet, even though these products are similar to pharmaceutical nicotine cessation therapies, such as nicotine inhalers, EU Member States have been slow to take action to regulate them as pharmaceutical products.

8.23. In recent months that has changed as other Member States have asserted that these products are pharmaceutical products or medical devices and are blocking or limiting their sale without appropriate pharmaceutical approvals.[176] We agree with this

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[172] IOM Report at 6 (emphasis added); see also WHO's Scientific Advisory Committee on Tobacco Product Regulation, *Statement of Principles Guiding the Evaluation of New or Modified Tobacco Products* at 7 (2002) (post-marketing surveillance will allow the assessment of the impact of the product "*on rates of smoking initiation and cessation*" which are "*important measures of its net harm to the population*").

[173] "Electronic cigarettes" that deliver nicotine in an aerosol along with other substances have been sold in various EU Member States including Austria, Belgium, Germany and the Netherlands. Examples of such products include *Ruyan*, which is characterized as a "tobacco-free electronic cigarette" in which users place "nicotine containers" and *Supersmoker* which the manufacturer describes as an "alternative cigarette" that uses an "atomizer" to deliver nicotine.

[174] For example, the manufacturer of *Ruyan* has in the past stated in consumer communications that the product "*means healthier smoking*" and that "*painless smoke abstention can be realized within a certain period of time, after carrying out the smoke abstention scheme recommended by Ruyan*."

[175] Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002

[176] See: *Expert Opinion of the Advisory Council for Classification Criteria, Pursuant to § 49a of the {Austrian} Medicinal Products Act ("AMG"), on Nicotine Inhalators, in Particular, Electrically Operated or Similar Products (e.g., RUYAN — the Electrical Cigarette; RUYAN Atomizing Electronic Cigarette, and RUYAN Atomizing Tobacco Alkaloid Liquid Container)*. The Advisory Council for Classification Criteria at the Austrian Federal Ministry for Public Health, Family, and Young People Expert (6 March 2007).

approach because pharmaceutical regulation appears to be the only viable option for them today.[177] The DH suggests, however, that such products would only be regulated as a medicinal product if sold with claims that the product "*will help people quit smoking… However, if no such claims are made explicitly in the packaging or marketing, these products remain largely unregulated*."[178] This is unacceptable.

8.24. The better public health policy is to follow the decision of Austria, Belgium, Finland, Estonia, Netherlands,[179] and Hungary and regulate non-tobacco products that deliver nicotine as medicines or medical devices. This is also the view of the U.S. Food and Drug Administration that has ruled in a similar way for other non-tobacco products delivering nicotine.[180]

8.25. Our support of pharmaceutical regulation for products such as electronic cigarettes is not intended to place unreasonable or undue regulatory burdens on the marketing of legitimate smoking cessation products or products that have the potential to offer consumers safer alternatives to cigarettes. However, it is not tenable to permit products that deliver nicotine – whether marketed with or without claims - to be sold without any regulatory oversight.

8.26. Nevertheless, we recognize the imbalance between regulation of tobacco products and that of pharmaceutical products providing nicotine, especially products intended (and substantiated) as nicotine replacement therapies or safer alternatives to conventional cigarettes. One possible way of addressing this dilemma in the long term is to revise the pharmaceutical regulatory framework to accommodate tobacco harm reduction by liberalizing the restrictions on nicotine pharmaceutical products, such as was recently done in Sweden, and as the Consultation Paper suggests. [181]

8.27. Another approach suggested by some public health advocates would be to develop a single, broad regulatory framework covering both tobacco and nicotine products. Some public health groups have referred to this as regulation along a "risk continuum" – essentially establishing regulations of increasing (or decreasing) restrictions based on the risk presented by the product with, hypothetically, conventional cigarettes at one end and nicotine replacement therapies at the other. Thus, the DH should support, as a long term solution for the European Commission and the Member States, expanding the Tobacco Products Directive (2001/37/EC) in this manner.

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[177] Directive 2001/83/EC.

[178] Consultation Paper at 53.

[179] Provisional Classification. In a letter sent out to its counterparts, the Dutch Health Minister concluded that electronic cigarettes were a medicinal product but would "*withhold a final decision on the status of the product until the EU Member States have reached a more uniform position.*"

[180] In July 2002, the FDA granted a petition filed by, among other, the American Lung Association and Campaign for Tobacco Free Kids, to designate a product called *Nicotine Water* as an unapproved new drug. FDA concluded that "*Based on several factors…this product should be regarded as an unapproved new drug"* and also stated that *"Because the nicotine and nicotine polacrilex in Nicotine Water are both active ingredients in FDA-approved drugs (such as Nicoderm CQ, Prostep, Habitrol, and Nicorette) Nicotine Water cannot be marketed as a dietary supplement."* The FDA also issued warning letters to manufacturers of nicotine lollipops and lip balm, citing claims that the products were a "*'convenient and tasty way' to replace the cigarette habit*."

[181] Consultation Paper at 54.

Support the Lifting of the EU Ban on Snus

8.28. Like all tobacco products, snus -- or Swedish-style moist snuff -- causes disease and is addictive. However, the data from Sweden suggest that snus has far fewer adverse health effects than cigarettes. In fact, scientists and public health advocates have reported that snus is substantially less harmful than cigarette smoking, essentially eliminating the risk of lung cancer and other lung diseases and reducing by as much as 50% or more the risk of many other major tobacco related diseases. [182]

8.29. In fact, in 2003 a panel of leading EU tobacco control experts recommended that the EU lift its ban on snus. According to the panel, smokeless tobacco and snus were "*at least 90% less hazardous than cigarette smoking*," and there were "*very substantial benefits in reduced risk to anyone that switches from smoking to smokeless tobacco.*"[183]

8.30. More recently, scientists and public health advocates have reached similar conclusions. In 2007 researchers concluded, "*Current smokers who switch to using snus rather than continuing to smoke can realize substantial health gains.…[T]here is extensive epidemiological evidence that snus is much less hazardous than smoking.*"[184] And in 2006, the American Council on Science and Health stated, "*The health risks associated with smokeless tobacco are much less extensive than those associated with cigarette smoking…. Overall, the use of smokeless tobacco confers only 2% of the health risks of smoking*."[185]

8.31. In the UK, respected scientists have pointed out in a recently published commentary, "*whatever the true overall hazard, use of low nitrosamine smokeless products is clearly substantially less harmful than tobacco smoking.*"[186] The Tobacco Advisory Group of the Royal College of Physicians stated in its 2007 report that "*[t]he epidemiology of tobacco use in Sweden suggests that if the public is offered a substantially less harmful smokeless tobacco product along with access to accurate information on relative risks, a substantial portion can switch to the less harmful product. <u>This has clear implications for public health</u>*."[187]

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[182] See, e.g., European Commission, Health & Consumer Protection Directorate-General, Scientific Committee on Emerging and Newly Identified Health Risks, *Health Effects of Smokeless Tobacco: Preliminary Report* at 107 (June 2007) ; Luo, J., Ye W., Zendehdel K, Adami J., Adami,H-O, Bofetta,P, Nyren, P. *Oral Use of Swedish Moist Snuff (Snus) and Risk for Cancer of the Mouth, Lung, and Pancreas in Male Construction Workers: A Retrospective Cohort Study* (10 May 2007), available at www.thelancet.com; Bates, C, Fagerstrom, K. Jarvis, M., Kunze, M., McNeill, A., Ramstrom, L., *European Union Policy on Smokeless Tobacco: A Statement in Favor of Evidence-based Regulation for Public Health* Tobacco Control 12:360-367, 361 ("*smokeless tobaccos are not associated with major lung diseases, including…COPD and lung cancer*") (2003).

[183] Bates, C, et al., *European Union Policy on Smokeless Tobacco: A Statement in Favor of Evidence-based Regulation for Public Health* Tobacco Control 12:360-367 (2003).

[184] Gartner CE, et al., *Assessment of Swedish Snus for Tobacco Harm Reduction: An Epidemiological Modelling Study* The Lancet 369:2010-14, 2010, 2013 (2007).

[185] Meister K.,, *Helping Smokers Quit: A Role for Smokeless Tobacco?* American Council on Science and Health, at 5 (October 2006).

[186] Britton J, Edwards R., *Tobacco Smoking, Harm Reduction and Nicotine Product Regulation*. Lancet Vol. 371 (2 February 2008)

[187] Royal College of Physicians' Report at 161 (emphasis added). The Report noted that all of the health hazards presented by snus "*are of a lower magnitude than those associated with cigarette smoking;"* that *"smokeless products have little or no effect on the risk of chronic obstructive pulmonary disease or lung cancer*;" that "*in*

8.32. The Consultation Paper refers to the EC's scientific expert committee's review of smokeless, noting that it lends "*some support*" to snus. In fact, although the expert committee in the end concluded that it was not possible to extrapolate the public health impact of lifting the ban in the EU from the experience in Sweden, the committee found a 90% overall reduction in risk of tobacco related disease for an individual who switches to snus from cigarettes.[188]

8.33. We therefore urge the DH to support lifting the EC's ban on snus. Today, many forms of tobacco products, including manufactured cigarettes and fine-cut tobacco, are used by millions of adults in the UK. Those adults should have the informed option of purchasing snus, an alternative tobacco product that reduces the risk of disease without undermining the public health goals of prevention and cessation. The public health concerns about snus should be addressed through regulation rather than the EU's current policy of prohibition.[189]

Tar, Nicotine and Carbon Monoxide Emissions

8.34. The Consultation Paper raised the current requirement that manufacturers test and report the tar, nicotine and CO yields for each of their cigarette brands on an annual basis and notes the debate over the public health benefits "*of testing tobacco products in this way*."[190] It is unclear whether the concern of the DH is the testing of tar, nicotine and CO or the test method used (the International Standard Organization's (ISO) methods for measuring tar, nicotine and CO).[191] We share concerns about the limitations of the ISO test method – or any machine-based test – to reflect actual smoker intake as individuals do not smoke like machines.

8.35. The debate over the ISO test method has been on-going for several years. At one point, the WHO supported supplementing the ISO method with the more intensive method used in Canada – the "Health Canada method."[192] PMI supported this proposal and communicated its support for this proposal to the WHO, as well as to ISO and the DH.[193] The WHO subsequently withdrew its proposal, pending further consideration of the issue by the FCTC's Conference of the Parties Working Group

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Sweden, the available low-harm smokeless products have been shown to be an acceptable substitute for cigarettes to many smokers, while 'gateway' progression from smokeless to smoking is relatively uncommon;" and that therefore, snus "*has potential application as a lower hazard alternative to cigarette smoking*." Id. However, the report noted that "*the applicability of smokeless tobacco as a substitute for cigarette smoking if made available to populations with no tradition of smokeless use is not known*." Id.

[188] The EC's advisory group stated, "*The balance of the benefits and risks … will vary according to circumstances of individuals and population groups. However, for those who substitute smoking by [smokeless tobacco products] the benefits outweigh the risks*." Final Report at 118.

[189] For example, regulations could mandate that consumers are told that snus is not a safe or risk-free alternative to cigarettes. Regulations can also create mechanisms to monitor the actual impact of snus on the prevalence of overall tobacco use and tobacco related diseases. This will allow policy changes to be made if and when necessary. We believe, therefore, that concurrent with the lifting of the ban, the EC, working with the UK and other Member States, should adopt a regulatory framework for snus.

[190] Consultation Paper at 54.

[191] ISO *Routine Analytical Cigarette Smoking Machine –Definitions and Standard Conditions* ISO 3308 (Geneva 2000).

[192] Health Canada, Tobacco Industry Reporting Regulations, Part 3, Section 14(6)(b)

[193] Letter from David Davies to Dr. Yomiko Mochizuki, Director, WHO Tobacco Free Initiative (5 Dec. 2005); Letter from Dr. Matthias K. Schorp to Mr. Rolf Duus, Secretary ISO/TC 126 WG9 (1 Dec. 2005).

on product regulation. We understand that the Working Group is recommending that both ISO and Health Canada methods be used as smoke test methods. As before, we support this proposal.

8.36. Our support of the WHO's proposal also reflects our view, based on data we and others have generated, that the Health Canada intensive method provides a potential upper range for tar, nicotine and carbon monoxide yields. While no machine-based measurement can or is meant to accurately represent human smoking behaviour in all cases and under all circumstances, a range better illustrates the wide variability in tar, nicotine and carbon monoxide intake, depending upon how an individual smokes a cigarette. Thus, until more meaningful standardised measures of actual human smoker exposure are developed, we believe the Health Canada intensive method is an appropriate complement to the current ISO method. If adopted, manufacturers could be required to print a range of numbers (ISO and Health Canada) providing two sets of tar, nicotine and carbon monoxide yield numbers, reflecting a range of smoke intake. [194]

8.37. Finally, the DH and other regulators should note that cigarette designs could be developed, such as new means of ventilation or filtration, so that the Health Canada intensive method would not reflect an upper range of smoker intake. For this reason, governments should continuously monitor the relevance of the Health Canada method to new cigarette designs and technologies. To assist this process, manufacturers should be required to disclose information to governments about new designs and technologies.

Printing Yields on Packs or in Other Communications

8.38. The existing ban on descriptors was based on the view that "*smoking behaviour and addiction, and not only the content of certain substances contained in the product before consumption, also determine the level of inhaled substances*."[195] According to the EU Directive, *"[t]his fact is not reflected in the use of such terms and so may undermine the labelling requirements set in this Directive*."[196]

8.39. The same criticisms have been made regarding machine-based measurements of tar, nicotine and carbon monoxide yields, as the DH states in the Consultation Paper.[197]

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[194] Of course, any yield information provided to consumers would need to be explained in a way that is clear and conveys the limitations of machine-based measurements and additionally discloses the purpose and limits of a dual rating system, including that low and high ends of the "range" do not bracket the full range of human smoke intake.

We note that existing ISO-based ceilings should remain based on ISO measurements. If not, the result would be a de facto ban on virtually all products. For example, today all countries in the European Union have established ISO measured limits of 10 milligrams of tar. Under Health Canada's intensive method, products that measure 1 milligram of tar under the current ISO method would yield approximately 20 milligrams of tar, and those that measure 10 milligrams of tar would yield approximately 30 milligrams of tar. Until more meaningful measurements of actual human exposure are developed and until the potential benefits of ceilings under the Canadian intensive method are examined, we believe that legislation on maximum yields should continue to be based on the existing ISO method. This is particularly important because the Canadian intensive method may only be an interim step until a new test method is established that provides more meaningful information.

[195] Directive 2001/37/EC, Recital 27.

[196] Id.

[197] Consultation Paper at 54.

We agree. The EU Directive – and UK law -- should be amended, and consistent with the ban on descriptors, prohibit manufacturers from printing tar, nicotine and CO yields on packs.

8.40. For the same reason, manufacturers should also be prohibited from incorporating tar, nicotine, or CO numbers in a tobacco product's brand name or printed anywhere on the packaging. Similarly, manufacturers should be prohibited from making statements relating to tar, nicotine, or CO yields in advertisements or other consumer communications. Bans should likewise apply to statements relating to the yields of other smoke constituents (see discussion below).

8.41. An exception to this general rule should be granted to statements about potential reduced risk products substantiated according to the terms described above. Communication of reduced smoke constituents related to those products can play an important role in furthering the goal of harm reduction provided they are made pursuant to requirements described above.

Testing and Reporting Other Smoke Emissions

8.42. The Consultation Paper does not raise the possibility of requiring manufacturers to test and report to Government the yields of smoke emissions (or constituents) other than tar, nicotine and CO, although it does mention the Cancer Research UK's 2006 campaign to advise the public about some of these emissions.[198]

8.43. Knowing the yields of a range of smoke constituents in conventional tobacco products is an important step in developing a better understanding of the relationship between tobacco use and disease and, most importantly, in establishing a baseline against which to assess novel products that have the potential to reduce the risk of disease. We therefore support a requirement for manufacturers to report by-brand information on yields of smoke constituents other than tar, nicotine and CO that have been identified as likely causes of tobacco related diseases.

8.44. Adopting regulation in this area is possible, but several scientific and policy issues remain open: first, no clear scientific consensus exists on which specific constituents to regulate;[199] second, analytical methods for measuring individual constituents must be developed and/or validated; third, only a handful of laboratories in the public or private sector have the ability to test for smoke constituents other than tar, nicotine and CO, which is needed to monitor industry compliance; and fourth, the frequency of by-brand testing for other smoke constituents must be considered in the context of the public health purpose of the testing.

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[198] Id. at 55.

[199] We note that in August 2008, the Conference of the Parties Working Group identified nine smoke constituents as priorities for which "*methods for testing and measuring in mainstream smoke (analytical chemistry) should be validated as a priority*." FCTC/COP/3/6, *Elaboration of Guidelines for Implementation of Articles 9 and 10 of the WHO FCTC*, at 3 (21 Aug. 2008). The Working Group stated that it could take 4 years to validate analytical methods. Id. at 4. However, in 2007, the Working Group suggested 44 smoke constituents based on the "Hoffman list." *Elaboration of Guidelines for Implementation of the Convention; Article 9: Product Regulation*. (26 April 2007) ("2007 Working Group Progress Report"). Another frequently cited list is the one used by Health Canada. Health Canada Tobacco Industry Reporting Regulations, Part 6, Schedule 2

8.45. The most prudent approach in light of these open issues is to recommend, based on objective scientific evidence and with the assistance of a tobacco-specific regulatory agency and/or experts, (1) specific smoke constituents for testing and reporting, (2) the smoke test method to be applied (e.g. ISO, Health Canada), (3) the analytical methods to be used for testing those constituents, (4) the details of the reporting requirements, (5) a plan to establish laboratory capacity, including laboratory qualification criteria, and (6) the frequency with which the testing should be carried out.

8.46. As stated above, we do not support communicating quantitative yields to consumers of specific constituents, unless pursuant to a substantiated claim for a reduced risk product. However, the DH could determine that communications about emissions on a qualitative basis are needed and can be provided through educational programs, on-line communications or through the mandated on-pack health warnings.

Regulating Ingredients

8.47. The Consultation Paper raises ingredient regulation as part of harm reduction, but discusses only one aspect of ingredient regulation: disclosure. We support ingredient disclosure and have provided information regarding our ingredients to the DH. We suggest that the DH incorporate the European Commission's *Practical Guide: Reporting on Tobacco Product Ingredients* (May 2007) which establishes an effective and uniform method for both public and confidential by-brand ingredient reporting. Disclosure should be mandatory for all tobacco products (including accessories used for fine cut products, such as filter tubes).

8.48. A second aspect of ingredient regulation not mentioned in the Consultation Paper but consistently mentioned at the EU level and by public health advocates is testing and standards for tobacco product ingredients. We support ingredient regulation that would permit regulators to ensure that an ingredient does not increase the toxicity or addictiveness of tobacco smoke compared to tobacco products on the market without the ingredient. This approach was advocated by the IOM Report: Cigarette ingredient toxicology review should be conducted "*with the objective of identifying those ingredients that add no significant toxicity to tobacco products and therefore can be considered safe in the context of its use*."[200]

8.49. As with regulation of smoke constituents, adopting regulation in this area is possible, but several scientific and policy issues remain open. For example, the Conference of the Parties Working Group on product regulation has noted the lack of standardized testing for tobacco product ingredients.[201]

8.50. We recommend, therefore, that a tobacco agency and/or scientific committee develop the required test methods and performance standards which ultimately would lead to

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[200] IOM Report at 224.

[201] In its 2007 Progress Report, the Working Group stated, "*[T]esting and measuring of toxicity of cigarette contents [e.g., ingredients]…is an emerging field…*," and refrained from recommending a course of action pending "*more work to develop a better understanding of these issues*." The Working Group also stated, "*the concept of testing and measuring the … dependence-producing properties of various tobacco products is fairly new and its application to tobacco product monitoring in particular has yet to be identified. Although the working group believes this area to be very promising, it is of the opinion that there is insufficient knowledge to move forward with guidelines at this time.*" Id.

the amendment of EU Directive 2001/37/EC (and thus UK law) to (1) require manufactures to conduct assessments of the ingredients they use and to report those assessments to the Member States and the Commission, (2) establish clearly defined performance standards (i.e., the measure by which an ingredient would be permitted for use), and (3), as currently required under Article 12 of the Directive, provide a uniform list of permitted ingredients common for all EU Member States to assist the functioning of the internal market.

Harmonizing Regulation of Fine-Cut Tobacco Products

8.51. Despite the growing number of smokers who use fine cut products, many of these products are not subject to the same or equivalent regulatory requirements as manufactured cigarettes. This is due largely to the fact that many provisions of EU Directive 2001/37/EC are limited to manufactured cigarettes. The imbalance is noted in the European Commission's *Second Report on the Application of the Tobacco Products Directive*, but very limited action is proposed.[202] We urge the DH to take action to the extent possible under the UK law to harmonize regulation between fine-cut and manufactured cigarettes and to press the Commission to include necessary amendments to the Directive to address this pressing problem.

8.52. The following are just a few examples:

- Fine-cut products are not required to comply with tar, nicotine and CO ceilings, and many exceed those ceilings as measured under the current ISO standard for fine-cut products. [203] In fact, RYO cigarettes currently sold in the EU have ISO yields of up to 21 mg tar and 1.8 mg nicotine (at 750 mg of tobacco) and up to 15 mg tar and 1.2 mg nicotine (at 400 mg of tobacco).

- The EU Directive regulates non-tobacco components used in manufactured cigarettes, including ingredients added to filters, tipping paper and cigarette paper. But similar materials used to assemble fine-cut tobacco products, such as filter tubes, are not covered by the Directive.

- Although the UK is requiring graphic warnings on fine-cut packages, there is no EU requirement that fine-cut products bear comparable health warnings to manufactured cigarettes. Thus, in Belgium, where fine cut accounts for over half of the tobacco market, only manufactured cigarettes are required to have graphic health warnings.

8.53. We urge the DH to support amending the EU Directive to apply the same requirements to fine-cut products that apply to manufactured cigarettes. To the extent that new standards are required for fine-cut and other tobacco products, the DH should extend the law to other tobacco products, and, where necessary, seek guidance from scientific experts as to how to do so.

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[202] EU Report at 11.

[203] The ISO standard for measuring tar and nicotine for RYO was published in 2003. ISO 15592-3 (2003).

Reduced Ignition Propensity Cigarettes

8.54. Although our parent company PMI and its affiliates, including PML, do not view reduced cigarette ignition propensity requirements as a crucial component of comprehensive regulation, we have expressed support for legislation and/or regulation based on the performance standard adopted in New York, fifteen other US states, Canada, and soon to be adopted in Australia. This standard is based on the Test Method developed by the American Society for Testing and Materials (ASTM Standard E 2187-04). That test method measures the extinction propensity of cigarettes, i.e., the propensity of cigarettes to remain lit and "therefore capable of igniting soft furnishings." [204]

8.55. As we have consistently stated, we support an EU-wide standard as currently being developed pursuant to the Commission Decision of 25 March 2008, rather than a Member State by Member State approach. This will facilitate implementation by manufacturers and further intra-EU commerce. It will also provide clarity, certainty and consistency across the EU. We also believe the standard should apply to all manufacturers and conventional cigarette brands, regardless of market share. Further, as with all regulatory requirements, enforcement of the standard is a crucial component of the law.

8.56. Finally, it is important that legislators, regulators, public health groups, and, most importantly, consumers understand that products meeting the standard are not "fire-safe" or even necessarily "fire-safer." In that regard, in our comments to the Commission we advised that consumers be informed that anything that burns, if handled carelessly, can cause a fire, including cigarettes manufactured to meet a reduced ignition propensity standard.

[204] We would strongly oppose the adoption of an unproven performance standard and test method. If other standards or test methods are considered, stakeholders must have the opportunity for meaningful input because assessments of feasibility, cost, benefit and time required for implementation all hinge on the substance of the performance standard and test method.

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Appendix A

Review of Evidence Cited by Department of Health 'Consultation on the future of tobacco control' in support of Product Display Restrictions

Barrie Gunter

Contents

1. Background

1.1. I have been commissioned by Philip Morris International to review and critique the research evidence cited by the Department of Health (DH) in its document, *Consultation on the future of tobacco control*, published in May 2008.

1.2. I have been asked to focus on the evidence presented about the impact of tobacco advertising and product display at the point of sale as cited in the section of the DH's consultation document headed 'Controlling advertising and the display of tobacco products in retail environments' (pp. 29-36).

1.3. Further relevant evidence was then cited in Annex 3 in a section headed 'The importance of tobacco display at retail' (pp.75-76). This section refers to some additional items of evidence that were not cited in the earlier section. I shall examine and give opinion on all this evidence.

1.4. In carrying out this critique, I have identified 10 propositions or assertions put forward by the Department of Health in the section on, 'Controlling advertising and display of tobacco products in retail environments'. These propositions have been used to organise my review in both the executive summary (section 2) and the detailed critique of DH evidence (section 3).

2. Executive Summary

General Observations

2.1. Before examining points of detail, there are several overview observations to make about the review of research presented by the Department of Health on advertising and product display in retail environments in its 'Consultation on the future of tobacco control.'

- The review of relevant research literature has been very selective omitting a number of major studies on the subject. No rationale is provided concerning the scope of this review of evidence.

- Not all the research reviewed is relevant to point-of-sale issues. A number of the sources cited dealt with studies that did not examine tobacco point-of-sale advertising or product displays at all, but investigated forms of tobacco advertising that are currently banned in the UK.

- Much of the research evidence presented on tobacco advertising and product displays in retail environments was based on surveys of non-random and non-representative samples in which self-reported questionnaire data were used. This type of research [a] does not measure real behaviour, [b] provides dubious proxy measures of real behaviour and [c] does not effectively establish cause-effect relations between variables.

- Cause-effect relationships can only effectively be established through interventionist experimental research and only two such studies cited by the DH (Wakefield et al, 2006 and Klitzner et al., 1991) used this type of methodology. The first of these lacked ecological validity because it did not measure anything approximating real retail-related behaviour; and in any event it did not conclude that product display on its own had an impact on intention to smoke. The second did not study point-of-sale variables.

- The DH presents contradictory evidence on the subject of impulse purchases and whether these characterise most or only a tiny minority of smokers (Consultation report, paragraphs 3.34 and 3.38.)

- The DH presents evidence that is irrelevant to the statements being made about point-of-sale advertising or product display effects (paragraph 3.33 – Rogers et al., 1995, which did not investigate impulse purchases as stated).

General Status of Evidence about Tobacco Advertising and Product Displays in Retail Environments

2.2. In examining the published evidence for tobacco point-of-sale impact on consumer behaviour a number of critical factors have repeatedly surfaced. These apply both to relevant evidence cited by the Department of Health in its consultation document and to other evidence that has been published on this topic. These factors generally concern points of methodological detail that can often undermine the validity of data produced by specific empirical enquiries and therefore call into question the validity of any conclusions drawn from them.

2.3. Research conducted so far into point of sale and tobacco products has studied:

(i) The nature and extent of point-of-sale displays of tobacco products;

(ii) The impact of new legislative restrictions covering tobacco point of sale displays and advertising, and sale of tobacco, on the sale of tobacco products (and especially cigarettes) to minors;

(iii) The impact of bans on point of sale displays of tobacco products on overall tobacco consumption;

(iv) The impact of point of sale tobacco advertising and product displays on the onset of smoking behaviour among young people;

(v) The impact of point of sale tobacco advertising and product displays on quitting smoking.

2.4. Only research conducted at (ii) to (v) above has any relevance to determining the impact of point-of-sale tobacco advertising and product displays on tobacco consumption and smoking behaviour. Research conducted under (i) has been used in the past to support arguments about the impact of tobacco point-of-sale marketing. This represents an erroneous application of such research. Evidence about the shape, form and positioning of tobacco point-of-sale displays can assist in raising questions about the potential impact that different types of product displays could have on consumers. Such evidence, however, does not provide answers to questions about consumer impact. Photographs of tobacco product displays within retail environments from one perspective can also sometimes give a misleading impression of their potential visibility to and impact upon consumers walking into a store and approaching such displays from different angles.

2.5. Much of the research carried out into the consumer impact of tobacco point-of-sale displays and marketing has used questionnaire surveys. Two crucial points to recognise about such surveys is that:

(a) They are not designed to establish causality between variables, merely degrees of association;

(b) They are usually dependent upon self-report data that are only as accurate as the ability of respondents effectively to recall their past behaviour or to monitor their current behaviour.

2.6. Further points to note about these surveys is that claims are sometimes made about the effects of tobacco marketing or product displays on smoking behaviour when other factors that are known to influence the onset of smoking have not been fully controlled. It is well-known, for example, that the onset of smoking behaviour among young people is influenced to a significant extent by whether their parents smoke, their siblings smoke or their best friends and other members of their peer group smoke. The attitudes held about smoking among these important reference groups are also important factors in this context. These factors must be taken into account in any study that examines the impact of tobacco marketing activities on the uptake of smoking behaviour by new smokers. In much of the survey research on point of sale impact, these factors have been inadequately controlled or poorly measured.

2.7. Even on occasions when controls are built into survey designs for factors such as parental or peer group smoking claims of point-of-sale effects are made that have not been effectively measured. In some cases, claims about point of sale evidence are made, when none was actually obtained at all. For example, studies such as those listed under (i) above that are restricted to auditing the nature and form of tobacco product displays in retail settings or that count how many stores sell tobacco products within the vicinity of a school or college, do not measure actual consumer exposure to tobacco product displays, opportunities to purchase (based on consumer store visits) or tobacco consumption behaviour.

2.8. Sometimes, research-based claims are made about the genesis of smoking behaviour when that behaviour has not been effectively measured. Questions that ask respondents if they think their behaviour has been influenced by advertising restrictions, for instance, measure only beliefs about behaviour rather than the behaviour itself.

2.9. Causality between variables, such as exposure to tobacco product displays and product purchases or consumption, can be tested via experimental or interventionist designs. These kinds of studies have been used relatively rarely in the context of the study of the impact of point of sale displays. Research of this kind has been cited by the Department of Health in its consultation document. Even the evidence from experiments must be treated with caution, however, especially when they are conducted under highly contrived or artificial conditions. Questions can then arise about the 'ecological validity' of the findings when they have been obtained under conditions that do not represent real world experiences.

2.10. In the case of experiments, sometimes the conditions or interventions are controlled by the researchers. This is true of experiments carried out under artificial conditions. An example might be showing teenagers photographs of retail environments in which tobacco product displays or advertising are present or absent. While the researcher has close control over the stimulus materials to which participants are exposed and the conditions under which such exposure takes place, as noted in the previous paragraph, there are questions of 'ecological validity' that can be raised about such studies. Can their findings be generalised to the real world?

2.11. Sometimes, 'interventions' occur in the real world such as the introduction of new regulations for tobacco advertising that result in that advertising being banned or more tightly restricted in certain media or environments. Researchers can monitor what happens to smoking behaviour after the introduction of such restrictions compared with before. While such studies offer greater ecological validity because the effects of real world changes upon real behaviour are being measured, it is impossible for researchers to control or even to know about all the other variables that could also interplay with the key intervention to affect smoking behaviour.

2.12. So far, the limited research literature on the impact of tobacco point of sale has been characterised by the methodological issues described above that more often than not undermine the quality of the data they have produced and the validity of conclusions drawn from them. This is a critical point that should always be borne in mind when reviewing the research evidence. It is a point that does not seem to have been considered by the DH which has chosen to take the findings of the studies it has cited at face value.

2.13. Overall, the research on tobacco point-of-sale effects in aggregate has not yet provided compelling evidence that tobacco point-of-sale displays or promotions trigger the onset of smoking among young people, discourage established smokers from quitting or entice quitters back to smoking.

Specific Observations about the DH Case for Further Point-of-Sale Restrictions on Tobacco Products and Promotions

Proposition 1: Compliance with the point-of-sale regulations has been generally good (Consultation paragraphs 3.21-3.22)

2.14. New restrictions on tobacco advertising in retail environments were introduced in the UK in 2004. An audit of retail premises by LACORS indicated that tobacco manufacturers and retailers have generally complied with these new restrictions. This initial evidence provided by the DH from LACORS, of course, provides no indications about consumer responses to tobacco product displays at points of sale. It also falls into the trap of relying of photographic evidence of product displays that present such displays from one perspective that may not represent the

perspectives from which they are experienced by consumers entering and walking around those retail environments.

Proposition 2: Children and young people are more receptive to tobacco advertising and displays at point of sale than are adults (Consultation paragraph, 3.23, paragraph 3.27 and paragraphs 3.39-3.41)

2.15. The DH (paragraph 3.23) presents several reasons for further control on the display of tobacco products in retail environments. These are listed as:

- protecting children and young people from the promotion of tobacco;
- providing an environment that supports smokers who are trying to quit;
- de-normalising tobacco use; and
- ensuring that health messages about the dangers of tobacco use are not undermined.

2.16. The consultation document published here by the DH presents no compelling evidence to demonstrate whether further restrictions over and above those already in place would be likely to produce these outcomes. Much of the evidence cited emerged out of research into aspects of tobacco marketing at point of sale that are already banned or restricted in the UK. Such evidence is found to have both questionable empirical value because of methodological limitations of the cited studies and little relevance anyway to a case for further restrictions to be imposed on the remaining forms of permitted tobacco advertising or product displays.

2.17. One study only was cited in support of this statement in DH consultation document paragraph 3.27 based on research carried out in the United States by Henriksen and her colleagues. A detailed critique of this study (presented at the end of this report) casts serious doubt on whether this study provided any effective evidence on the impact of tobacco marketing. The measures of branding awareness were limited and did not provide any meaningful indication of consumer marketing exposure for any age group studied. More specifically, it did not address the issue of point-of-sale marketing at all. Its relevance in the current context is therefore questionable. The point was made again in 3.39 and 3.40 which made reference to further American research by the same research group.

2.18. The DH's conclusions reached on behalf of the latter study, however, do not stand up to close critical scrutiny. The tobacco advertising and promotion receptivity measures were not only limited in scope but also logically problematic in the way they were weighted. None of these measures has any relevance to determining the impact of point-of-sale tobacco displays or advertising. Even if we were to take these measures at face value, the statistical relationships demonstrated between them and respondents' reported smoking behaviours were also problematic. It is not clearly demonstrated whether tobacco promotions exposure or peer group or parental influences were at play in connection with the onset of smoking behaviour in the young people surveyed.

Proposition 3: Point-of-sale display and advertising have become important methods of promoting tobacco products (Consultation paragraph 3.28)

2.19. Evidence provided on this statement derives from studies of internal tobacco company documents. The specific evidence provided within these studies comprises extracts from those internal documents. It is unclear how representative of the general conclusions reached by the complete documents these extracts might be. This secondary evidence does not demonstrate anything about the nature of point-of-sale tobacco displays and advertising and provides no insights into the consumer impact of these displays and advertising.

Proposition 4: Recruitment of young people as new smokers is enhanced by point-of-sale displays (Consultation paragraph 3.30)

2.20. The study cited in support of this claim does not provide any direct evidence that point-of-sale tobacco product displays or advertising trigger smoking behaviour among young people. Under artificial test conditions, it found that adolescents exhibited different opinions about how easy it might be to buy cigarettes from a shop depicted in a photograph with cigarettes or cigarette advertising visibly on display or not on display. Although participants shown a photograph of a shop with cigarette advertising visible were more likely than those shown a picture of shop with no advertising to say they would be likely to smoke in the future, it is not clear whether the photograph triggered this response or whether other factors – uncontrolled by the researchers – that differed between adolescents in each condition might have accounted for this response. Moreover, the appearance of cigarette displays made no difference to this response, which contradicts the hypothesis put forward by the DH.

Proposition 5: Display of cigarettes within stores can have added advantage for retailers (Consultation paragraph 3.32)

2.21. It is unclear what bearing this statement has on earlier positions about the impact of point-of-sale tobacco marketing and displays. While it may be true that tobacco companies enter into contracts with retailers linked to display of their products, there is no evidence here, based on the published studies cited, of any illegal or immoral practice or indeed that the sector is behaving any differently from other supply sectors that engage in contractual agreements with retailers.

Proposition 6: Prominent displays of tobacco products can convey the impression, particularly to young people, that smoking is a common and acceptable activity (Consultation paragraph 3.31)

2.22. The DH offers no evidence to support this proposition. The paper by Pollay cited to back up this assertion provides no relevant evidence. This paper presents an analysis of tobacco company internal documents and it does not indicate anything about young people's perceptions of the prevalence of smoking.

Proposition 7. There is evidence that point of sale displays can stimulate impulse purchases among those not intending to buy cigarettes and among adult smokers who are trying to quit (Consultation paragraphs 3.33 and 3.34)

2.23. There is no convincing evidence that point-of-sale tobacco product displays have this effect on consumers, whether they are smokers, non-smokers or ex-smokers. There is evidence from the study cited here by the DH, as well as from other research not cited here, that smokers generally make up their minds about cigarette purchases before reaching a store. This fact is confirmed by the Australian research cited here. Only small minorities of smokers who were trying to quit in this research claimed that seeing cigarette packs on display made them think about making a purchase or believed that removing such displays would make quitting easier. We should also recognise that this research measured smokers' opinions and perceptions and not their actual behaviour. Furthermore, the statement made here by the DH seems to contradict what it says in paragraph 3.38 about impulse purchases.

Proposition 8. The evidence base shows that tobacco promotion encourages people to take up and continue smoking (Consultation paragraph 3.39)

2.24 A comprehensive, up-to-date review of the 'evidence base' to 2008 would show the DH that this is a difficult proposition to support. The evidence that is cited derives from a 16-years-old study sponsored by the Department of Health that has been superseded by more recent research that calls into question earlier conclusions derived from macro-level econometric research into relationships between volumes of expenditure on tobacco advertising and overall societal-level volumes of tobacco consumption. Some of this research examined, in particular, the impact of tobacco advertising bans. This literature also does not provide unequivocal support for the proposition that removal of tobacco advertising and other promotions produces falls in tobacco consumption. Even the research document cited by the DH here (by Smee and colleagues) did not provide unequivocal evidence of tobacco advertising (or advertising ban) effects. This point was acknowledged by the report's own authors who recognised that econometric evidence is inappropriate to demonstrate in any way whether tobacco advertising can serve to trigger smoking in individual smokers.

Proposition 9. There is a growing body of evidence on the impact of tobacco marketing on smoking among young people (Consultation paragraph 3.42 and also paragraph 3.27)

2.25 It is a fact that there is a growing body of research that has attempted to investigate relationships between tobacco marketing and smoking among young people, but it is not equally true that growing amounts of compelling evidence for the effects of tobacco marketing has emerged from this research. The paper by Lovato at his colleagues cited in support of this proposition comprised a review of longitudinal survey studies published up to that point. There are several important points to make about these studies in the present context. First, none of them addressed head-on the impact of point-of-sale tobacco advertising or product displays. Second, taken together they did not produce a consistent body of results about the effects of tobacco marketing on young people's smoking behaviour. Third, many of these studies failed to measure tobacco marketing exposure and instead assessed only opinions about tobacco promotional activities or indicated intentions to accept or use, if offered to them, spin-off merchandise. Fourth, these studies did not always effectively control for social and psychological factors known to be linked to smoking onset among young people. Overall, therefore, this collection of studies does not represent a single body of work reinforcing the same relationships between tobacco promotions and smoking behaviour. Their findings have little relevance to any assessment of the impact of point-of-sale product displays.

Proposition 10 While it is recognised that the introduction of restrictions of tobacco display in retail environments is unlikely to bring an immediate benefits to health or smoking prevalence, evidence suggests that we could expect to see fewer young people starting to use tobacco (Consultation paragraphs 3.44/3.45 and also paragraph 3.29)

2.26 This statement presents a rather optimistic view of outcomes that is not actually conclusively supported by the available research evidence. Certainly none of the research evidence cited by the DH would lead us to draw this conclusion. Evidence on product display bans – which is really the evidence that is directly relevant here - has so far remained both limited and inconclusive. Data from Iceland, which introduced a tobacco product display ban in 2001, does not provide consistent or unambiguous evidence that the ban itself produced a downturn in young people's smoking. Certainly, there is no evidence from the Iceland government's own statistics that fewer teenagers took up smoking after the ban than did so before the ban. Any changes that occurred at all in smoking behaviour, such as a downturn, post-ban in the prevalence of daily smoking across age groups, must also take into account cigarette tax and price increases that also occurred in the post-ban period. The Health Canada report cited in this context by the DH presented data on consumers' opinions about point-of-sale product display bans which do not measure or represent their actual smoking behaviour.

3. Detailed Critique of Department of Health Evidence on the Impact of Tobacco Advertising and Product Display

Proposition 1. Compliance with the point-of-sale regulations has been generally good (Consultation paragraphs 3.21-3.22)

3.1. The DH cites a report produced by LACORS in 2006 that surveyed compliance with new point of sale regulations for tobacco advertising introduced in the UK in December 2004.[1] The DH notes that while compliance was found to have been generally good, there was evidence that tobacco manufacturers use retail environments to draw attention to their products via techniques other than traditional forms of advertising. These techniques include the use of counter-top devices such as clocks and mats, as well as the way the product displays themselves are presented.

3.2. The LACORS audit obtained data via an online survey of Local Authority Trading Standards Services in England. In all, 83 authorities (57% of all local authorities) responded. Among these, 64% had conducted visits to premises to check compliance with the new legislation. Thus, the sample of respondents represented 36% of all potential local authorities. LACORS reported that overall levels of compliance were high. LACORS also stated, however, that local authorities reported a growing number of enquiries about compliance as regards to product display.

3.3. Eight photographic examples were provided of cases where product displays were judged to be compensating for advertising restrictions through the use of other presentational methods. These photographs place a firm emphasis on the tobacco product displays but give no indication of the scale of these displays or of their visibility within the overall environment of each retail outlet. It is easy to give a misleading impression of product visibility with evidence such as this. Ultimately, the assessments made about each display in terms of what the manufacturers were attempting to achieve or how consumers might respond are purely speculative. There is no relevant evidence provided to demonstrate that these product displays were prominent within each store environment.

3.4. Paragraph 3.22 claims that specific product displays 'have the effect of enhancing the promotion of tobacco products'. It is acknowledged that there is nothing illegal about these displays. More important, though, no empirical evidence is provided to demonstrate that specific types of displays have a significant promotional impact, whether upon smokers or non-smokers.

[1] LACORS (2006) *Report on the implementation of the point of sale regulations.* LACORS, London.

Proposition 2: Children and young people are more receptive to tobacco advertising and displays at point of sale than are adults (Consultation paragraph 3.23, paragraph 3.27 and paragraphs 3.39-3.41)

3.5. The DH (paragraph 3.23) presents several reasons for further control on the display of tobacco products in retail environments. These are listed as:

- protecting children and young people from the promotion of tobacco;
- providing an environment that supports smokers who are trying to quit;
- de-normalising tobacco use; and
- ensuring that health messages about the dangers of tobacco use are not undermined.

In doing so, it underlines that its main concerns centre on the potential effects of point-of-sale tobacco displays on young people and then also on more established smokers, especially those who wish to quit.

3.6. These are important issues, but the consultation document published here by the DH presents no compelling evidence to demonstrate whether further restrictions over and above those already in place would be likely to produce these outcomes. Much of the evidence cited emerged out of research into aspects of tobacco marketing at point of sale that are already banned or restricted in the UK. The relevance of that evidence here in relation to making a case for further restrictions on tobacco marketing at point of sale is therefore disputed. A detailed critique of the evidence presented by the DH is provided in Appendix A, where the general empirical value of that evidence is also questioned.

Proposition 3: Point-of-sale display and advertising have become important methods of promoting tobacco products (Consultation paragraph 3.28)

3.7. Paragraph 3.28 makes the point that product display and advertising at the point of sale are important methods of promoting tobacco products given the increased restrictions now placed on other forms of advertising and promotional activity. Citations presented in support of this statement include published work by Lavack and Toth (2006) and Carter (2003). [2] Both studies entailed the examination of originally confidential tobacco company documents obtained from online archives. In addition, Carter examined retail trade publications and the presence of cigarette advertising in those publications. Evidence is cited by Lavack and Toth in the form of quoted extracts from a sample of 260 tobacco company documents, while Carter examined 172 documents that specifically pertained to Australia. Lavack and Toth identified seven key themes from the materials they studied that were derived from analysis of document extracts that they judged to support a number of aspects of tobacco company marketing strategies at the point

[2] Lavack, A., & Toth, G. (2006) Tobacco point-of-purchase promotion; examining tobacco industry documents. *Tobacco Control*, 15, 377-384. Carter, S. (2003) new frontier, new power; the retail environment in Australia's dark market. *Tobacco Control*, 12, 95-101.

of sale. Their analysis was qualitative in nature which means that it did not adopt the more systematic and objective approach of a methodology such as content analysis in reviewing prominent linguistic themes in textual materials. Carter's review of tobacco company documents does not explain in this particular paper how they analysed the texts of these documents. Instead they refer the reader to another published paper for that information.[3]

3.8. In addition, Carter examined 100 advertisements for cigarette brands placed in retail trade publications between January 2001 and June 2003. This sample actually comprised 44 distinct advertisements (some were repeated more than once) for 13 brands. Each advertisement was analysed in terms of whether something new was formally announced in the advert, whether a cigarette pack was visibly displayed, whether other imagery was used, whether retailing information was provided, and whether a positioning statement was used. Although the analysis of advertisements was defined in more precise terms than the analyses of tobacco company documents, it is still not clear that formal content analysis was used in which coder reliability checks were run to ensure consistency, accuracy and objectivity in the way the advertisements were assessed.

3.9. It is argued in both these papers that tobacco companies have relied increasingly on the retail environment as a promotional platform for their products. Lavack and Toth back up this claim with selective quotes from tobacco company documents. Assuming that these extracts are accurately reproduced and not taken out of context, some contain statements that reinforce the view that tobacco marketers did regard the retail environment as having important promotional implications and applications. Furthermore, relationships are established with retailers – with incentives – to ensure that product displays meet the requirements and preferences of tobacco companies. It is also clear that part of the decision-making about product displays is driven by a need to ensure brand visibility in a competitive retail environment. Some tobacco companies were quoted as stating that share of product visibility in a store should match a brand's market share. The emphasis is therefore placed on the need to protect market share among established smokers. There is no evidence from the extracts cited by Lavack and Toth that point of sale display strategies are concerned in any way with the creation of new smokers.

3.10. Carter's analysis of brand advertising in trade publications concerns promotional messages that are targeted at retailers rather than consumers. These publications would not be seen or read by consumers. The information contained in these publications is designed to provide brand information to retailers concerning the distinguishing characteristics of specific brands. Hence the analysis of the text and imagery features of these advertisements has no relevance to any debates about tobacco advertising or other tobacco marketing and the onset or maintenance of

[3] Chapman, S., Byrne, F., & Carter, S. M. (2003) Australia is one of the darkest markets in the world: the global importance of Australian tobacco control. *Tobacco Control*, 12 [suppl III], iii1-3.

smoking among consumers. Even as an analysis of advertising aimed at retailers, few details are supplied about the coding procedure. These are needed in order to judge how good an analysis of its type this specific study represents.

Proposition 4: Recruitment of young people as new smokers is enhanced by point-of-sale displays (Consultation paragraph 3.30)

3.11. In paragraph 3.30, the DH states that 'the recruitment of young people as new smokers is enhanced by point of sale display'. Research from Australia by Wakefield and her colleagues is cited in support of this statement. [4] This investigation used an experimental design in which teenagers aged 14 to 15 years were randomly allocated to three conditions. In these conditions they were exposed to a photograph of a convenience store that in one version showed no visible tobacco product display or advertising, in a second version showed a cigarette pack display but not cigarette advertising and in a third version showed both a tobacco product display and advertising. The teenagers were asked to imagine walking around the store noticing what to buy.

3.12. Afterwards they completed a questionnaire. Among the questions asked were two that dealt with the perceived likelihood that either they or other people their own age would be able to purchase tobacco from the stores in the pictures. They were also asked how likely it was that they would be asked in the case of each store to produce age identity at the store if they tried to purchase cigarettes. Further questions asked respondents to estimate smoking prevalence among their classmates, high school students in general and adults in general as well as questions about peer approval of smoking and the attributes of people who smoke. Questions were also asked about the brand they would be likely to smoke if they were a smoker and then to nominate the brands they thought were most popular among their own age group and among adult smokers. The latter questions were significant because in the photographs of cigarette product displays some brands were clearly visible. A key question then asked respondents to indicate how likely it was that they would smoke in the future.

3.13. Findings showed that those respondents who viewed a photograph of a store with tobacco product display or tobacco advertising clearly visible perceived it would be less difficult to purchase tobacco at that store compared with the control group who saw a picture of a store with no visible tobacco product display. Respondents who saw the cigarette advertising visible were less likely than respondents in the no cigarettes present condition to believe they would be asked for proof of age if they tried to buy cigarettes. Those in the tobacco product display condition however showed no significant difference in their responding from those in the no cigarettes condition.

[4] Wakefield, M., Germain, D., Durkin, S., & Henriksen, L. (2006) An experimental study of effects on schoolchildren of exposure to point-of-sale cigarette advertising and pack displays. *Health Education Research*, 21(3), 338-347.

3.14. Turning to respondents' intentions to smoke in the following year, among those who had not yet tried smoking, those exposed to the cigarette advertising at point of sale condition were more likely to think they would smoke in the future than were those in other conditions. There was no strong indication that exposure to the product display condition had any impact on this response. In this case, non-smokers were more likely to say they would smoke a cigarette if offered one by a friend in the cigarette advertising condition than in the cigarette display condition.

3.15. When asked to name cigarette brands that were most popular among adult smokers, there was evidence that respondents exposed to the cigarette advertising condition were more likely to report a brand that was advertised in the picture they saw as compared with respondents in the control condition where no cigarettes were visible. There was also a marginally significant difference on this measure between respondents in the cigarette advertising and cigarette display conditions.

3.16. In sum, this study provided limited evidence of a cigarette product display effect and cigarette advertising effect. In relation to intention to smoke, product display had no impact. There was some evidence that seeing specific brands advertised could have primed preferential recall of those brands subsequently. It is also important to note that this study measured teenagers' responses to photographs of retail outlets and not their responses to tobacco advertising or product displays as they would actually be experienced in real stores.

Proposition 5: Prominent displays of tobacco products can convey the impression, particularly to young people, that smoking is a common and acceptable activity (Consultation paragraph 3.31)

3.17. Paragraph 3.31 states the 'research suggests that prominent displays of tobacco products can convey the impression particularly to young people, that smoking is a common and socially acceptable activity'. A paper by Pollay is cited in support of this statement.[5] Pollay's paper does not provide any empirical evidence that tobacco point of sale displays promote smoking among young people. In a continuation of the analysis of Lavack and Toth, also cited by the DH (paragraph 3.28) and discussed earlier in my paper, Pollay offers evidence based on an analysis of tobacco company documents from which a number of selective quotes have been extracted.

3.18. Pollay argues that the principal indication by Lavack and Toth that tobacco product displays are linked to and most significantly are concerned with maintenance of brand market share does not represent the full purpose of point of sale promotions. They should be regarded as another form of advertising that also has the purpose of recruiting new smokers and discouraging established smokers from quitting. No specific consumer research evidence is presented to back up

[5] Pollay, R. W. (2007) More than meets the eye: on the importance of retail cigarette merchandising. *Tobacco Control*, 15, 270-274.

these claims. I would argue that analyses of tobacco company documents may provide limited insights into the consumer attitude or behaviour impact of point of sale tobacco displays or promotions (or indeed of any forms of tobacco marketing) unless they present the results of carefully constructed research investigations for which essential methodological details have been presented and can be fully critiqued. Otherwise, we must turn to relevant published social scientific enquiries with young people that have used methodologies that have enabled relationships between exposure to tobacco marketing and smoking behaviour to be investigated.

Proposition 6: Display of cigarettes within stores can have added advantage for retailers (Consultation paragraph 3.32)

3.19. Paragraph 3.32 refers to the added value tobacco product displays can have for retailers, again citing Lavack and Toth, whose study has already been examined. The suggestion here is that tobacco manufacturers enter into deals with retailers designed to ensure that their products are 'displayed to the best advantage'. A paper by Feighery, Ribisl, Clark and Haladjian is presented as evidence here.[6] This paper reports the findings from as series of in-depth interviews conducted with 29 tobacco retailers in 21 states in the United States. These respondents were the owners or managers of independent convenience stores as well as managers of larger supermarket stores. The interviews were audio-taped and transcribed for analysis.

3.20. The findings indicated that tobacco companies did offer incentives to them such as volume discounts and display and promotional allowances. Contracts could vary with the types of incentive agreements reached and could vary over time. Tobacco companies would also stipulate when special price offers could be deployed and would support these premium offers. Interviewees also disclosed that there is fierce competition between tobacco companies for premium placements in retail outlets. They also apparently indicated that tobacco companies will offer incentives to ensure that brand advertising within a store meets their requirements and specifications. While the interviewees who served as informants in this study may have described accurately the nature of the agreements that can be reached between tobacco companies and retailers, the practices described in this research gave no indication that any rules or codes were being breached. Furthermore, to add meaning to these findings, it would be interesting to have comparisons made with suppliers in other sectors such as food, drink, and household cleaning products to find out whether similar practices are deployed in other product areas where there is a lot of competition between rival brands. There was no indication from this research that tobacco companies were doing anything distinctive.

[6] Feighery, E. C., Ribisl, K. M., Clark, P. I., and Haladjian, H. H., (2003) How tobacco companies ensure prime placement of their advertising and products in stores: interviews with retailers aboyut tobacco company incentive programmes. *Tobacco Control*, 12, 184-188.

Proposition 7: There is evidence that point of sale displays can stimulate impulse purchases among those not intending to buy cigarettes and among adult smokers who are trying to quit (Consultation paragraph 3.33 and 3.34)

3.21. Paragraph 3.33 states that there is evidence that point of sale displays can stimulate impulse purchases among those not intending to buy cigarettes and also among adult smokers intending to quit. The evidence for this statement derives from a study in Australia by Wakefield and her colleagues.[7] Further illustrative findings are presented from this study in paragraph 3.34.

3.22. In this research telephone interviews were conducted with 2,996 adults aged 18+ years. The response rate was 43%. Respondents were asked whether they smoked daily or weekly or less often, whether they were recent quitters (smoked more than 100 cigarettes in their lifetime but nothing in the last 12 months), or were non-smokers. Respondents were also asked about frequency of visits to supermarkets, milk bars/convenience stores, and petrol stations. Those who visited any of these outlets more often than 'never' were then asked: 'when you are in a supermarket, milk bar/convenience store, or petrol station, how often do you notice the cigarette packs near the cash register?' Responses options were 'never/rarely,' 'sometimes,', or 'often/always.' Factory manufactured cigarette smokers were asked, 'thinking about you personally, do you agree or disagree that removing cigarette packs from view in stores would make it easier for you to quit smoking?' Then they were asked, 'when shopping for something other than cigarettes, how often do you decide to buy cigarettes as a result of seeing the cigarette pack display in the store ['always,' 'often,' 'sometimes,', 'rarely,' or 'never']. Factory manufactured cigarette smokers who had made quit attempts in the last 12 months were asked whether they ever avoided going to places where they used to buy cigarettes in case they might be tempted to buy them. They were then asked whether there was ever a time when seeing the cigarette pack display in a store gave them an urge to buy cigarettes and if so, did they act upon that urge?

3.23. Wakefield et al reported that 17.6% of their respondents were smokers of factory manufactured cigarettes. In all, 40.7% of smokers had tried to quit smoking in the last 12 months. A further 57% of smokers were considering quitting in the next six months. Over half of smokers (55.3%) always or often noticed cigarette pack displays, while around one in four (25.5%) said they rarely noticed these displays.

3.24. One in four smokers (25.2%) said they decide to buy cigarettes as a result of seeing cigarette pack displays in stores, at least sometimes (15.2% sometimes, 7.2% often, 2.9% always). This meant that three in four (74.8%) rarely or never did this. Among smokers who had *tried to quit* in the past 12 months, 37.7% said that seeing a cigarette pack display had encouraged them to buy. Among this same category of smoker, one in five (19.4%) said they avoided stores where they

[7] Wakefield, M., Germain, D., and Henriksen, L. (2008) The effect of retail cigarette pack displays on impulse purchase. *Addiction*, 103(2), 338-347.

usually bought cigarettes in case they might be tempted to buy cigarettes again. It is not clear whether the majority of these respondents felt that seeing cigarette pack displays did not give them the urge to buy cigarettes.

3.25. Of the smokers who *had quit* smoking in the past 12 months, around one in three (33.9%) said that seeing the cigarette pack display near the cash register gave them an urge to buy cigarettes. By deduction, this also means that two-thirds did not have this experience.

3.26. Finally, among all smokers, a minority (11.4%) agreed that removing cigarette pack displays from view in stores would make it easier for them to quit smoking. The great majority of smokers did not hold this opinion.

3.27. The conclusion that this research supports the argument that point of sale displays of cigarettes trigger impulse purchases or make it harder for smokers to quit is over blown. While some smokers might hold these beliefs, most do not, assuming that we take these percentages at face value. However, in order to find out whether display bans or restrictions make a difference to consumption we need to measure consumer behaviour before and after such bans are introduced. The Australian evidence just discussed simply provides smokers and ex-smokers opinions about how they feel they might respond to tobacco product displays.

3.28. Paragraph 3.33 also makes reference to research that allegedly shows that tobacco impulse purchases can increase by up to 28% in the presence of point of sale tobacco displays. The study cited here is one conducted by Rogers and his colleagues.[8] However, this study was not concerned with the measurement of impulse purchases or indeed any aspect of consumer behaviour. It reported on the impact of a community mobilization campaign designed to encourage people across several communities in northern California to complain about retail store signage displays for tobacco that contravened local ordinances. The study comprised an audit of exterior and interior tobacco promotions across samples of retail outlets in five communities and an analysis of volumes of complaints about these stores before and after the mobilization campaign was instigated and publicised.

3.29. Paragraph 3.38 cites evidence that most smokers have decided which brands they wish to purchase before they reach the shop – hence contradicting earlier DH claims about impulse purchase evidence. Impulse purchases therefore are rare. In the study cited by a commercial agency, Trade Marketing Solutions ("TMS"), only 3% of smokers reported making impulse purchases. It is particularly notable here that the DH promotes evidence that denies impulse purchases while earlier in paragraph 3.33 it claimed that point of sale displays can trigger such purchases. The report from TMS comprises a series of presentation slides that offer headline findings from a variety of marketing research sources. However, data are

[8] Rogers, T., Feighery, E. C., Tencati, E. M., Butler, J. L., & Weiner, L. (195) Community mobilization to reduce point-of-purchase advertising of tobacco products. *Health Education Quarterly*, 2294), 427-442.

presented to show that a clear majority of cigarette purchases made at point of sale were intended and only a small minority were impulse purchases. This was true of markets such as Finland and Switzerland. What this report also illustrates is that other sectors – such as confectionery and soft drinks - are extremely active in their use of the retail environment to promote their merchandise. Critiques of tobacco companies' retail activities frequently give the impression that they are unusual or distinctive in this respect, when nothing could be further from the truth.

Proposition 8: The evidence base shows that tobacco promotion encourages people to take up and continue smoking (Consultation paragraph 3.39)

3.30. Paragraph 3.39 of the DH consultation document argues that the evidence base shows that tobacco promotion encourages people to take up and continue smoking. Furthermore, advertising bans had been found to produce reductions in smoking that could not be readily attributed to other factors. The report by Smee, Parsonage, Anderson and Duckworth is cited here.[9] The findings cited by the DH were reported by Smee and his colleagues, however, their review of the research literature also acknowledged that the evidence for the impact of total volume of tobacco advertising (whether measured in terms of expenditure on advertising or the amount that physically appears in different media) or for the impact of tobacco advertising bans on consumption of tobacco products was not always conclusive or consistent. Not only did some studies using econometric analyses fail to show significant effects of advertising expenditure levels or advertising bans, but also some that did were subsequently challenged by subsequent studies on methodological grounds. A number of later publications have continued to call into question the evidence for advertising expenditure and advertising ban effects.[10]

Proposition 9: There is a growing body of evidence on the impact of tobacco marketing on smoking among young people (Consultation paragraphs 3.42 and 3.27)

3.31. Paragraph 3.27. Reference 34 refers to a report produced by Lovato, Linn, Stead and Best (2002).[11] This comprised a review of nine longitudinal studies that used measures of smoking behaviour and exposure to tobacco advertising or receptivity to such advertising and where the participants were aged 18 or younger. According to the DH, "a major study of nine cohort studies found 'a positive, consistent and specific relationship' between exposure to tobacco advertising and

[9] Smee, C., Parsonage, M., Anderson, R., & Duckworth, S. (1992) *Effect of tobacco advertising on tobacco consumption: A discussion document reviewing the evidence*. Department of Health, London.

[10] Boddewyn, J. J. (1994) Cigarette advertising bans and smoking: The flawed policy connection. *International Journal of Advertising*, 13, 311-332. Lancaster, K. M., and Lancaster, A. R. (2003) The economics of tobacco advertising: spending, demand and the effects of bans. *International Journal of Advertising*, 22, 41-65.

[11] Lovato, C., Linn, G., Stead, L. F., & best, A. (2003) Impact of tobacco advertising and promotion on increasing adolescent smoking behaviours (Cochrane Review). *Cochrane Library*, Issue, 3, 2004. Chichester, UK: John Wiley & Sons.

later take-up of smoking among teenagers." We need to consider the accuracy of this conclusion. The Lovato review examined studies that were characterised by problematic measures of tobacco promotions exposure and its links to smoking onset and that often failed to control effectively for other social and psychological factors known to influence smoking uptake by young people (e.g., family and peer group factors). The findings taken together did not produce a consistent or coherent body of evidence about the impact of tobacco advertising and other promotions. Most importantly, none of the reviewed research examined the impact of point-of-sale product displays. A more detailed critique of the nine studies reviewed by Lovato is presented in Appendix B.

Proposition 10: While it is recognised that the introduction of tobacco display in retail environments is unlikely to bring an immediate benefit to health or smoking prevalence, evidence suggests that we would expect to see fewer young people starting to use tobacco (Consultation paragraph 3.44/3.45, and also paragraph 3.29).

3.32. This a rather optimistic conclusion to reach on the basis of the most relevant, available evidence. In paragraph 3.29 the DH cites evidence from Iceland about the impact on youth smoking levels of a total product display ban that was introduced in 2001. We are told that the number of 16-17 year olds who had smoked in the last 30 days was 32% in 1995 (six years before the display ban), 28% in 1999 (two years before the ban) and 20% in 2003 (two years after the ban). In terms the percentage of 16-17 year olds who had ever smoked, this fell from 61% in 1995 to 46% in 2003. However, it is important to take a closer look at smoking level trend data for Iceland year by year across the time period.

3.33. Table 1 below presents data from the National Statistical Institute of Iceland. The data on smoking are produced by the Public Health Institute of Iceland via three national surveys a year conducted among people aged 15 to 89 years. These data show the percentages of all people, all males, all females and of teenagers and people in the twenties who said they had 'never' smoked. If the display ban had an impact on these figures, we would expect them to increase after the ban compared with before.

3.34. A comparison between 1995 and 2003, as the DH has made, does show that overall the proportion of 'never' smokers in 1995 was 2.2% lower than that registered in 2003. Among the 15 to 19s (not a precise match to the ESPAD data quoted by the DH), the proportion of 'never' smokers in 1995 was 3% higher than in 2003. While there was an initial increase in 'never' smokers among 15 to 19s in 2002 (70.6%), the year after the display ban was introduced compared with 1999 (67.2%), two years before the ban, this trend shifted direction in 2003. Among those aged 20 to 29 years, the 2003 figure showed a more marked change in 'never' smokers compared with 1995, registering an increase of 7.3%.

3.35. In the years after 2003, overall percentages of 'never smokers' increased, though without achieving the high point of 2002. Further, this figure has continued to

fluctuate up and down from year to year. Among the 15 to 19s, the percentage of 'never smokers' increased in 2004 before decreasing again 2005 and then remaining fairly stable in 2006 and 2007. In 2007, the percentage of 'never smokers' among the 15 to 19s hardly differed from the figure registered in 1996, five years before the tobacco product display ban. Among the 20 to 29s, the percentage of 'never smokers' decreased significantly in 2004 and 2005 compared with 2003, and then climbed again in 2006 and 2007.

Table 1. Have Never Smoked

	Total %	All Males %	All Females %	15-19s %	20-29s %
1994	43.6	40.6	46.5	-	-
1995	41.8	39.2	44.5	68.8	50.9
1996	42.0	39.8	44.2	69.9	49.2
1997	43.5	41.5	45.4	67.6	51.2
1998	42.4	39.7	44.6	64.6	51.2
1999	42.8	41.7	43.9	67.2	48.9
2000	47.0	44.1	49.8	69.3	54.7
2001*	**44.0**	**44.0**	**45.9**	**70.0**	**51.2**
2002	47.8	45.1	50.4	70.6	55.2
2003	44.0	40.0	47.7	65.8	58.2
2004	45.2	42.9	47.4	72.6	54.0
2005	46.7	46.6	46.7	69.7	51.5
2006	45.5	43.3	47.6	67.7	55.1
2007	46.6	45.1	48.1	69.3	56.1

- Ban on retail displays of tobacco products

Source: Statistics Iceland (www.statice.is)

3.36. In a further analysis, we can look at figures for the percentages of people in Iceland who say they smoke on a daily basis. First, looking at figures for the total population, we can see that between 1995 and 2002 there was a fall in the percentage (-5.2%) of people who said they smoked every day. In 2003, the trend reversed and a small increase (+0.8%) in daily smoking occurred compared with 2002. Over all age groups, the percentage of daily smokers fell in 2004 and 2005, and then stabilised in 2006 and 2007.

3.37. Turning to teenagers, there was a miniscule change between 1995 and 2002 (-0.4%). However, by 2003, a further 1% drop occurred. In 2004, there was another drop of 4.5%, but then an increase of 3.3% in 2005, before a fall of 3.5% in 2006 and a rise of 3% in 2007. Thus, daily smoking levels among teenagers in Iceland exhibited significant year-on-year fluctuations even following the tobacco product display ban. Among 20 to 29s, there were significant fluctuations but overall

virtually no change in rates of daily smoking between 1995 and 2002. However, between 2002 and 2003, a more marked fall in daily smoking rates occurred (-4.2%). In 2004 and 2005, the percentage of daily smokers in this age group increased by 3.5%, before falling away again in 2006 and 2007.

3.38. Any changes in reported tobacco consumption in Iceland during the period following the point of sale ban need to be placed in a broader context. For instance, price increases occurred for cigarettes that could also have affected rate of consumption. Cigarette tax increases in November 2002 and again in November 2004 were followed by retail price increases of 17% and 10% respectively.

Table 2. Smoke Daily

	Total %	All Males %	All Females %	15-19s %	20-29s %
1994	26.9	27.9	25.9	-	-
1995	26.8	26.7	26.9	18.3	26.1
1996	28.1	28.2	28.0	16.4	33.3
1997	27.3	28.3	26.3	19.2	28.5
1998	25.0	24.5	25.4	17.4	28.2
1999	25.2	25.0	25.5	17.2	28.9
2000	22.9	23.3	22.5	14.4	24.4
2001*	**23.9**	**24.5**	**22.8**	**17.5**	**27.0**
2002	21.6	22.2	21.1	17.9	26.0
2003	22.4	25.4	19.6	16.9	21.8
2004	20.2	21.5	18.9	12.4	23.3
2005	19.5	19.5	19.5	15.7	24.3
2006	19.3	21.3	17.4	12.2	23.1
2007	19.4	20.7	18.2	15.2	21.5

- *Ban on retail displays of tobacco products

Source: Statistics Iceland (www.statice.is)

3.39. Paragraph 3.37 refers to a ban on tobacco product displays in Saskatchewan in Canada that allegedly did not have critical impact on any retail businesses, although no conclusive evidence on this point was forthcoming. A citation is made to a document drafted by Blau and Greaves in 2005.[12] This report provides few details about the impact of the state's tobacco reduction campaign in terms of retail business impact. It indicates that implementation of tobacco display

[12] Blau, J., and Greaves, L. (2005) Saskatechewan Coalition for Tobacco Reduction: Evidence to Ontario Standing Committee on Finance and Economic Affairs, April 2005.

restrictions had been successful, but gave no clear indications about whether retail business had suffered economically as a result.

3.40. Paragraph 3.26 lists a number of countries in which actions have been taken to ban or restrict point of sale tobacco product display and makes reference to a report produced by Health Canada.[13] This study is referred to again in paragraph 3.45 in the context of the impact of tobacco point-of-sale display bans in tobacco consumption. The latter report sets out the terms of reference for the introduction of new regulations for tobacco product display and promotions at points of sale. In Section 3.0 (The Problem Posed by Display of Tobacco Products and Other Activities) some evidence is provided on the impact of retail tobacco displays and promotions. Much of this evidence comprises audits of the prevalence and nature of tobacco product displays in retail outlets based on American and Canadian studies. Consumer influences have been implied on the basis of these studies that have not actually been tested empirically. Original research for Health Canada asked respondents for their opinions about cigarette displays and promotions and about tighter restrictions over them. Once again, such data provide no evidence of the actual consumer impact of these displays or of any further restrictions on them.

[13] Health Canada (2006) A proposal to regulate the display and promotion of tobacco and tobacco-related products as retail: consultation document. Health Canada, Ottawa.

4. Comments on Annex 3. The Importance of Tobacco Display at Retail

4.1. Further discussion of point-of-sale product displays was presented in Annex 3 on pages 75 to 77 of the Consultation document. Most of the research evidence cited here had been cited earlier. The remarks made earlier about that evidence apply again here.

Promotion Increases Consumption

4.2. In Annex 3, paragraph 31, point a), the DH acknowledges that there has not yet been a full evaluation of a product display ban, and yet research evidence has indicated that tobacco promotion encourages people to take up and continue smoking. The 1992 report by Smee et al and the research from 1991 by Klitzner et al are cited again here. As observed earlier, the literature review by Smee and his colleagues did not produce conclusive evidence of a tobacco advertising effect on smoking uptake or continuation. It was primarily concerned with an examination of relationships between the total volume of tobacco advertising and total volume of sales or consumption. In some instances, such data were collected in relation to an analysis of the impact of tobacco advertising bans. This research was econometric in nature and therefore not concerned with investigating or establishing any role played by advertising in shaping the smoking behaviour of individuals. While Smee did review some research evidence that had addressed issues such as young people's awareness of tobacco advertising and tobacco brands that review was highly selective and even then acknowledged that the evidence related to the onset of smoking behaviour was not conclusive. The research by Klitzner and colleagues did not provide evidence that tobacco promotions influence the propensity of adolescents to take up smoking. It simply revealed that teenagers who were better at identifying tobacco brands were more likely to smoke cigarettes. There is no indication from this study that brand awareness triggered smoking.

4.3. In Annex 3, paragraph 31, point b), the longitudinal research by Pierce and colleagues is cited again with the claim that this research 'found clear evidence that tobacco industry advertising and promotional activities can influence non-susceptible never smokers to start the process of becoming addicted to cigarettes' (Consultation document, p.75). My earlier critique of this research cast doubt on this reading of what was found here. What is clear from this research is that only certain teenagers, with parents who adopted a particular parenting style, displayed relationships between the receptivity to tobacco marketing index devised by the researchers and the onset of smoking. Even then, that relationship did not demonstrate a causal link or direction or causal agency. There were also serious doubts cast on the measure of receptivity to tobacco marketing.

Impact of Marketing on Young People

4.4. In Annex 3, paragraph 31, point c), we are told that there is a growing body of evidence on the impact of tobacco marketing on smoking among young people. The growth in volume of the research evidence cannot be disputed, but whether that evidence actually demonstrates a link between tobacco marketing and smoking behaviour is another matter. The research review by Lovato et al and the research by Pierce and his colleagues is cited once more here. The Lovato review has been critiqued in some detail in the Appendix to this report to reveal that the longitudinal studies examined there were characterised by different methodological issues that called their findings into question. The Pierce study from 1998 cited here is an earlier one from that cited previously by the DH, but the methodology was largely the same and the critical variables that measured tobacco marketing receptivity and smoking behaviour were the same. The critical remarks made earlier about the study published by Pierce and his colleagues in 2002 apply equally to the study published in 1998.[14]

4.5. In Annex 3, paragraph 31, point d), further reference is made to the Lovato et al review of longitudinal research into tobacco marketing and smoking among young people. The point is made that tobacco advertising awareness or 'receptivity' at one point in time was found to be related to the onset of smoking among young people at a later time. Although different methodological issues have been raised in relation to each of the studies reviewed by Lovato et al., there is a broader problem with all this longitudinal work. Even if we have faith in the measures of tobacco marketing exposure or involvement (which have generally been questionable), analytically it is important to determine whether early tobacco marketing awareness triggers later smoking behaviour or whether smoking interest from other sources triggers attention to tobacco marketing. This distinction tends not to be made, nor has it been effectively investigated so far. To do so would require analyses over time in which tobacco marketing exposure or 'receptivity' is treated as an independent variable in some analyses and as a dependent variable in other analyses. For instance, to what extent were young 'never smokers' and 'smokers' in wave one of a longitudinal survey receptive to tobacco advertising and then to what extent were they both receptive to it again in wave two (and wave three if there is one)? To what extent were other social factors, such as family member smoking and best friend smoking at waves one and two also related to an individual's smoking at either wave one or wave two and also to their tobacco marketing receptivity at both waves?

4.6. A further general problem lies with the relatively limited and crude measures of tobacco marketing experiences of young people used in most survey research to date. Measures should attempt to determine exposure to different forms of tobacco marketing and use behavioural measures to do so. Measures of favourite advertisements or favourite brands or advertisement or brand recall or recognition

[14] Pierce, J., Choi, W., Gilpin, E et al. (1998) Tobacco industry promotion of cigarettes and adolescent smoking. *Journal of the American Medical Association*, 279(7), 511-515.

do not serve as valid proxies for exposure measures because the same response from two or more respondents to these attitudinal questions could disguise vastly different tobacco marketing exposure histories.

Impulse Purchases

4.7. In Annex 3, paragraph 32, point a) (page 76 of consultation document), we are told that 'there is a body of evidence suggesting that point of sale displays stimulate impulse purchase among those not intending to buy cigarettes..' The Australian research by Wakefield and her colleagues is again cited here. My critique of this research earlier showed, however, that one should observe a degree of caution about reaching this conclusion from that research. Most of the respondents in that survey did not engage in impulse purchases and while some quitters believed that they might be tempted to buy cigarettes again if they saw them in a shop, most did not think this. In any case, such self-attributed effects do not represent evidence of actual point of sale impact. The paper by Harper, cited for the first time here, allegedly provides evidence 'that the promotion of cigarettes at point of sale can influence smokers trying to quit to relapse...'[15] It does not. Harper provides a two-page opinion based on references to secondary evidence produced by other writers. There is no new evidence provided here on the impact of tobacco point of sale marketing or product displays.

4.8. The same paragraph continues with a statement that point of sale tobacco displays push up impulse purchases. Yet the evidence on this point, even within studies cited by the DH itself in this consultation document, does not consistently provide evidence for this outcome. The reference to the 1995 paper by Rogers, Feighery and colleagues is, in any case, irrelevant to this particular debate because that study did not investigate impulse purchases or indeed any other kind of purchase. It was concerned with a community campaign to engage members of the public in several California communities to act to enforce local restrictions on retail tobacco advertising and promotions.

4.9. In Annex 3, paragraph 32, point b), the 2004 research of Henricksen and her colleagues is again cited in support of the argument that tobacco point of sale marketing and promotions increases the odds of teenagers ever smoking. This study was critiqued above (paragraphs 13 and 14). The main concern with this investigation was that exposure to tobacco marketing and promotion at point of sale was not effectively measured. The researchers measured self-reported frequencies of visits to stores in which the measurement of volume of tobacco marketing or product displays was not built in to the research design. We therefore have no idea whether data on reported visitations to two stores resulted in potentially the same or dramatically different levels of exposure to tobacco displays or tobacco marketing.

[15] Harper, T. (2006) Why the tobacco industry fears point of sale display bans. *Tobacco Control*, 15, 270-271.

4.10. In Annex 3, paragraph 32, point c) it is stated that there is evidence to suggest that display gantries play a role in recruiting new smokers. Research from 2006 by Wakefield and her colleagues is cited again. This study was critiqued earlier. Wakefield's research did not find that product displays prompted adolescent respondents to want to smoke. She found some evidence that exposure to visually advertised brands promoted brand recall. Throughout the study, however, participants were exposed to photographs of shops and were not tested for their behavioural responses in actual retail outlets.

4.11. In Annex 3, paragraph 33, reference is again made to evidence from Iceland. In Iceland, a point of sale ban of tobacco product displays was introduced in 2001. Evidence on smoking rates in Iceland before and after the point of sale display ban was discussed under proposition 10 in section 3 above. As we saw there, data provided by the Iceland government indicated that smoking rates, especially among young people in Iceland, have not displayed the simplistic pattern of change suggested by the ESPAD data, contingent upon the tobacco product display ban.

4.12. Annex 3, paragraph 36 on page 77 of the consultation document repeats again the key finding from Henriksen and colleagues that was quoted on the page before and seems to add nothing to the overall case being made here.

4.13. Annex 3, paragraphs 37 to 39 of the text explores the implications of Henriksen's research if applied to the UK. While the DH recognises that there are legislative and social differences between the UK and California, this acknowledgement, while true, misses the point. The crucial point here is that the Henriksen data provide dubious insights into the effects of tobacco point of sale marketing. Hence the 50% increase in 'ever smokers' contingent upon exposure to tobacco point of sale displays represents a mis-reading of the findings of that study. That observation, in turn, renders the projections made in paragraphs 38 and 39 somewhat redundant.

5. Academic Qualifications and Experience – Barrie Gunter

5.1. I am Professor of Mass Communication at the University of Leicester where I am also Head of the Department of Media and Communication. This is the oldest established academic media department and media or communications chair in the United Kingdom. Before joining the University of Leicester in 2005, I was Professor of Journalism Studies and founder member of the Department of Journalism Studies, University of Sheffield (1994-2005). Prior to moving into the academic world, I worked for 15 years in broadcast regulation, serving on the research staff of the Independent Broadcasting Authority (1980-1991), becoming Head of Research there (1987-1991) before subsequently being appointed as Head of Research at the Independent Television Commission, where I established a new audience research department. Between 1994 and 1998 I was also Visiting Professor at the Department of Psychology, University College London. I am currently an Honorary Visiting Fellow (2005-) in the School of Library, Archive and Information Studies at University College London and a member of the Advisory Board of the Centre for Publishing at the same institution.

5.2. I obtained a B.Sc (Hons.) degree in Psychology from the University of Wales (1975), an M.Sc degree in Social Psychology from the University of London (London School of Economics, 1976), and a Ph.D in Psychology from the University of East London (1980). I am a Chartered Psychologist and Associate Fellow of the British Psychological Society and a Full Member of the Market Research Society, UK.

5.3. I have written and edited nearly 50 books and produced nearly 300 other publications on marketing, media, management, and psychology topics. Among these works I have produced a number of books about the impact of advertising and other media content on young people's social and consumer attitudes and behaviour. I have also conducted research projects on children's understanding and memory of advertising, attitudes towards advertising, and reactions to advertising. I have served on the editorial boards of leading media and communications journals, including the *Human Communication Research, Journal of Broadcasting & Electronic Media, Journal of Communication, Media Psychology* and *Trends in Communication*. I am regularly called upon to review and critique learned paper submissions for many more academic journals.

5.4 I have previously provided evidence on behalf of Philip Morris affiliates and other tobacco companies in litigation and regulatory submissions.

Signed 

Date 6 September 2018

Appendix A

Detailed Critique of Evidence Presented by DH Associated with *Proposition 2: Children and young people are more receptive to tobacco advertising and displays at point of sale than are adults (Consultation paragraph 3.23, paragraph 3.27 and paragraphs 3.39-3.41)*

A.1. Paragraph 3.27 opens by stating that, 'evidence shows that children and young people are more receptive to tobacco advertising than are adults.' A study by Pierce et al (1991) is cited at this point.[16] It is stated that exposure to tobacco marketing in convenience was associated with a 50% increase in the odds of teenagers ever smoking. This study needs to be examined more closely. Pierce and his colleagues began with a sample of 24,296 adults (18+) and 5,040 adolescents (12-17) in California. These were obtained via random-digit telephone dialling. They interviewed all adult smokers and former smokers plus a further random 28% of all other adults from the adult sample. Response rates were high – 75.3% for the adults and 78.4% for the teenagers. California data were also compared with national US data from another large survey (n=13,013, aged 17+).

A.2. Adult smokers were those who had smoked at least 100 cigarettes in their lifetime and smoked now. Former smokers had smoked 100+ cigarettes but did not smoke now. Non-smokers were those who had smoked fewer than 100 cigarettes and had not smoked in the last 30 days. Among teenagers, current smokers were those who had smoked in the last 30 days. Experimental smokers had smoked but not in the last 30 days. Contemplating smokers had not smoked but were thinking about it. Never smokers had not smoked and were not thinking about it.

A.3. Tobacco marketing 'exposure' was measured in both the adult and adolescents survey by asking current smokers, 'What brand do you usually buy?' In addition, all respondents were asked about cigarette advertising: 'Think about the cigarette advertisements you have recently seen on billboards or in magazines – what brand of cigarette was advertised the most?'

A.4. The results showed that 33.6% of all adults identified Marlboro as the most advertised brand, and 13.7% identified Camel. Among the adolescents' sample, 41.8% of 12-17s identified Marlboro as the most advertised brand and 28.5% identified Camel. The percentage who named Marlboro as the most advertised brand increased with age among the teenagers, with 48.1% of 16-17s identifying it. With Camel, advertisements were mentioned most by 12-13s (34.2%), followed by 16-17s (22.8%), 18-24s (19.8%) and then older respondents (less than 10%). Boys who had smoked in the last 30 days were somewhat more likely

[16] Pierce, J. P., Gilpin, E., Burns, D. M., Whalen, E., Rosbrook, B., Shopland, D., & Johnson, M. (1991) Does tobacco advertising target young people to start smoking? *Journal of the American Medical Association*, 266(22), 3154-3158.

than average to mention Marlboro (56.7%), while mentions of Camel (28.4%) among these boys were no higher than average. The great majority of teenage smokers (79.9%) smoked either Marlboro or Camel. These brands were smoked by 84% of 18-24s, by 75.5% of 25-29s, and 58.2% of 30-44s.

A.5. This study provides incomplete evidence of tobacco marketing impact. While Marlboro and Camel were the brands perceived to be advertised the most, this does not represent a measure of how much these brands were actually advertised (e.g., their share of voice in the advertising marketplace) nor of the extent of exposure to them on the part of survey respondents. We also need more details about the breakdown of the samples in terms of their smoking status so that we know the base sizes for these sub-groups. The measure of brand awareness does not demonstrate that particular age groups were targeted. Nor does it demonstrate respondents' receptivity to cigarette advertising. Were the most nominated brands also the ones most advertised? We do not know. Did brand awareness trigger smoking onset? No evidence is presented to answer this question. What was the role of parents and siblings in the onset of smoking among adolescents? These variables were not included in the analyses here.

A.6. Paragraph 3.27 also makes reference to a study by Henriksen and her colleagues in 2004 as containing further evidence for the impact of retail tobacco marketing on adolescent smokers.[17] This study in California involved an initial contact sample of 2,731 12 to 14 year olds of whom 78% eventually participated. These respondents were presented with photographs and addresses of 12 retail tobacco outlets in their school catchment areas that had been identified by earlier research as popular destinations for purchasing snacks. Exposure to retail marketing was measured in terms of reported frequency of visits to the pictured stores or any others stores they may have visited. Respondents were also asked whether they owned a cigarette promotional item, the frequency with which they could recall seeing tobacco advertisements in magazines on the past week and how often they recalled seeing people smoking on television or in movies in the past week.

A.7. After controlling statistically for parental and peer group smoking, parental control practices, grades at school and personal risk-taking propensities, greater reported exposure to tobacco marketing (as measured here) was associated with a 50% increase in the odds of ever smoking. The problem with this result, however, is that the researchers failed effectively to measure exposure to tobacco marketing. They measured self-reported frequencies of visits to stores known to sell tobacco products, among other products. There are no measures of the extent to which tobacco marketing or advertising was present in these stores. There is no evidence concerning the attention survey respondents may have paid to tobacco product displays or promotional items in stores. No separate audit was taken to determine the amount of tobacco marketing or promotional presence there was in each store. It is also important to note that the base sizes of smokers were very

[17] Henriksen, L., Feighery, E. C., Wang, Y., & Fortmann, S. P.(2004) Association of retail tobacco marketing with adolescent smoking. *American Journal of Public Health*, 94(12), 2081-2083.

small. Fewer than 3% of 12 year olds, 6% of 13 year olds, and fewer than 8% of 14 year olds said that they smoked – even a puff.

A.8. Paragraph 3.40 cites evidence from longitudinal research in the United States that reputedly found that tobacco advertising and promotions can encourage young non-smokers to take up smoking. The evidence here is taken from a study reported by Pierce.[18] This study reports on a follow-up survey carried out in 1999 among a sample of adolescents who had originally been surveyed three years earlier in 1996, when they were aged 12 to 14 years. In the earlier survey, respondents had been asked about their smoking behaviour, their receptivity to tobacco advertising and promotions, and about other social factors known to be related to the onset of smoking among young people. In the follow-up survey, a further interview was conducted with 68% of the original respondents.

A.9. A question about their smoking asked respondents whether they had ever smoked a cigarette and whether they had ever tried or experimented with cigarette smoking. If respondents gave 'no' responses to both these questions, they were classified as 'never smokers.' This question was asked of respondents in both the 1996 and 1999 surveys.

A.10. To assess receptivity to tobacco industry advertising and promotions, respondents in 1996 were asked to recall tobacco advertising and indicate their affective reaction to brand advertising by stating their favourite cigarette advertisement and their willingness to use an item with an image of a tobacco brand. The tobacco promotions question was as follows: "Some tobacco companies offer promotional items, such as clothing and bags, which have the company brand name or logo on them and which the public can buy or receive for free. In the past 12 months have you (1) exchanged coupons for an item with a tobacco brand name or logo on it? (2) Received as a gift or for free, any item with a tobacco brand name or logo on it? (3) Purchased any item with a tobacco brand name or logo on it?" Four levels of receptivity were defined: *minimum* – did not name a brand that was advertised; *low level* – named a brand but did not have a favourite cigarette advertisement; *moderate* - would not use an item with a brand image or logo, but named a favourite cigarette advertisement; *high* – willing to use an item with a brand image or to have obtained one.

A.11. Respondents were also asked about which parent had most say over their daily life, the extent to which they knew what was going on in the adolescent's life and the degree to which they controlled the adolescent's life (high versus low authoritative).

A.12. Analyses were conducted to assess the degree to which parenting variables and receptivity to tobacco advertising and promotions were associated with a likelihood of progression from never smoker in 1996 to smoker in 1999. The

[18] Pierce, J. (2002) Does tobacco marketing undermine the influence of recommended parenting in encouraging adolescents from smoking? *American Journal of Preventive Medicine*, 23(2), 73-81.

researchers reported that tobacco advertising and promotions receptivity in 1996 was significantly linked to progression to smoking status from non-smoking status between 1996 and 1999 and this is the finding focused on by the DH.

A.13. A closer examination of this study, however, shows that this is an overly simplistic interpretation of the findings. The tobacco advertising and promotions receptivity index was significantly related to progression to smoking status from non-smoking status for just over half the sample in 1999 – those respondents (55%) who parents were classified as high in authoritativeness in their parenting style. These were parents who more closely monitored their children's behaviour, checked up on what they were doing and set firmer rules about conduct. Adolescents were less authoritative parents displayed no significant relationship between tobacco advertising and promotions receptivity and progression on to smoking status as they grew older.

A.14. In all, we are told that around 30% of 12 to 14 year olds who were never smokers in 1996 had smoked by the 3-year follow survey. Those with more authoritative parents were half as likely to smoke by follow-up as were adolescents in families with less authoritative parents (20% versus 41%). Adolescents with more authoritative parents were also 60% less likely to have friends who smoked as compared with adolescents of les authoritative parents. Thus, children of more controlling parents are less likely to take up smoking and are less likely to have friends who smoke, quite possibly in both instances an outcome of parental disapproval. Even so, having best friends who smoked was a significant predictor of smoking uptake among adolescents with high and low authoritative parents. In both cases, also, having family members who smoked was not associated with smoking uptake. Hence, for these mid-teens, smoking behaviour was more sensitive to peer-group pressures than family role models.

A.15. The argument is made by the researchers that tobacco advertising and promotions can significantly influence smoking onset among teenagers, but that parenting style can reduce this influence. Pierce et al state: 'This study verified that authoritative parenting reduces the risk of future smoking in adolescent never smokers' (p.79). Yet, their findings show that receptivity to tobacco advertising and promotions was significantly related to increased likelihood of smoking onset among teenagers with more authoritative parents and was non-significant as a factor among teenagers with low authoritative parents. These findings seem to contradict their conclusion.

A.16. We also need to look more closely at the receptivity to tobacco advertising and promotion variable. Being able to recall a cigarette brand and willingness to use a branded item reveal little about history of exposure to tobacco advertising. Having ever received for free or bought a branded item also represents a problematic measure of involvement with tobacco marketing. The item received for free question does not distinguish the source of the gift or the reason why it was given. Whether there was an association between the gift and the brand is therefore not

established. The purchase of an item with a tobacco brand on it does not establish the reason for the purchase. Was the purchase of that item made because of the brand? Was it made because the item was attractive in appearance or competitively priced and served a functional purpose for the individual at the time? Again, the importance of the brand is not established. The exchange of coupons for an item would infer a closer link between involvement with the brand and spin-off merchandise simply because coupons would be obtained through cigarette purchases. However, whose purchases produced the coupons? Did a parent give the coupons to their child to use? Did the child then make any connection between the consumption of cigarettes and the gift? There are assumptions being made about the role played by spin-off merchandising in driving teenage interest in smoking that require further evidence to substantiate.

A.17. Finally, there are problems with the receptivity index in terms of the operational definition of each level of receptivity. A *high* level of receptivity required the adolescent to be willing to use an item with a brand image or to have obtained one. This either/or feature implies that willingness to use an item and actual use of it should be regarded as equal in terms of their potential role as 'risk factors'. But is this a reasonable assumption to make? A willingness to use an item could mean only that. Such an individual may have in fact had no experience of spin-off merchandising associated with tobacco brands and yet say they would be perfectly happy to use or own such an item.

A.18. A *moderate* level of receptivity was defined as those adolescents who would not use an item with a brand image or logo (but did they own one?), but who named a favourite cigarette advertisement. A *low* level of receptivity comprised those who named a brand but did not have a favourite cigarette. How do we know that those class as moderate and low differed in a meaningful way in their experience with tobacco marketing. There is a presumption here that being able to name a favourite cigarette advertisement represents a greater level of involvement that simply being able to recall a brand. It is more important to know about the degree of familiarity with brands to have a better idea about consumer brand involvement and this is not assessed here. Instead assumptions are being made about 'degree' of involvement on the basis of nominal-level or categorical data that are not able to provide that kind of measurement.

A.19. Paragraph 3.41 continues the argument being made in the previous paragraph and cites a further study by Klitzner and colleagues.[19] This evidence is presented as relevant to understanding the impact of point of sale tobacco displays. This seems to be a leap of faith because the Klitzner study does not deal in any way with forms of tobacco advertising that bear any resemblance to tobacco displays and promotions in retail environments. In this study, a modest sample 272 participants aged between 10 and 17 years provided data on their smoking status, magazine readership and ability to recognise advertisements. Magazine readership was

[19] Klitzner, M., Gruenewald, P. J., & Bamberger, E. (1991) Cigarette advertising and adolescent experimentation with smoking. *British Journal of Addiction*, 86, 287-298.

measured through self-report estimations and focused on magazines known to contain cigarette advertisements. Thus, it represented an indication of possible exposure to cigarette print advertising. The participants also took part in a task in which they were presented with 20 cigarette advertisements, 20 advertisements for alcoholic drinks and 20 advertisements for perfumes. The advertisements had been manipulated by the researcher beforehand so as to remove any brand identifying features from them. Participants answered three questions about each advertisement: whether they had ever seen the ad before, which of the three product types was being advertised, and which brand of the identified product type was being advertised. Their performance on these questions in relation to the cigarette advertisements was the related to their smoking status.

A.20. In relation to each advertisement recognition question, two analyses were computed. The first of these determined whether smokers were better than non-smokers at the recognition task. The second determined whether high performers on advertisement recognition were more likely than low performers to be smokers.

A.21. On the first question of whether they had seen the advertisement before, there was no significant statistical relationship with smoking status on either of the two tests.

A.22. On the second test of product type recognition, smokers performed better than non-smokers in recognition of cigarette product advertisements. However, high performers and low performers on the advertisement recognition task did not differ in their propensities to be smokers. Cigarette advertisement recognition was also higher for those who performed better on the first recognition task (of having seen specific ads before) and among more frequent magazine readers.

A.23. On the third measure of cigarette brand recognition, smokers did not differ from non-smokers in their ability to recognise cigarette brands. However, high performers on brand recognition were more likely to be smokers than were low performers on this recognition task. Performance on the brand recognition task was also better for those who performed well on the product recognition tasks and among more frequent magazine readers.

A.24. As the researchers themselves acknowledge with cross-sectional data of the kind obtained in this study, it is not possible to conduct direct tests of cause-effect relations between variables. It emerged that ability to recognize cigarette magazine advertisements and the brands in those advertisements were related to smoking. While smokers were more attuned to cigarette advertisements in general compared with non-smokers, at least in respect of recognising that a particular advertisement was for a cigarette, they were not more able to recognise specific brands. Those who were able to recognise brands were more likely to be smokers. This finding, however, does not demonstrate that involvement with brand triggers smoking. It may confirm that while smokers may be more generically attuned to

cigarette advertisements, they only process it in detail when they relate to smokers' preferred brands.

A.25. As it clear from the description of this study, its methodology revealed little of relevance to any analysis of point-of-sale tobacco product display impact.

Appendix B

Detailed Critique of Longitudinal Studies Reviewed by Lovato, Linn, Stead and Best (2004)

B.1. The first study examined by Lovato et al was conducted by Alexander (1983).[20] It was carried out in Australia and comprised two surveys with a sample of 5,616 children aged 10 to 12 years. The follow-up survey occurred one year after the initial survey. The sample in wave 2 comprised 87% of those contacted in wave 1. Data were provided via self-completion questionnaires during school time. A measure of approval of cigarette advertising was used as measured via semantic differential scales. Smokers were defined as those who had had a puff of a cigarette in the previous four weeks. There were four groups: never smokers at both waves; smokers at wave 1 but not at wave 2; smokers at wave 2 but not at wave 1; and smokers at both waves.

B.2. Lovato et al reported that the results here showed that approval of advertising was the fourth most important predictor of smoking uptake after age, peer smoking and sibling smoking. Respondents who approved of cigarette advertising were twice as likely to become smokers and those who disapproved. There is a serious limitation to this measure, however. Approval of advertising does not measure exposure to it. It is feasible that some respondents could have objected to cigarette advertising or approved of it on a point of principal but without actually ever having witnessed any such advertising.

B.3. The second study reviewed by Lovato et al was conducted by Armstrong (1990).[21] This was also conducted in Australia and comprised three survey waves conducted over a 30-months period. An initial sample of 2,366 children was recruited and 82% were re-contacted at wave 2 (17 months later) and 64% at wave 3 (30 months after wave 1). The children were aged between 11 and 14 years at baseline. The influence of cigarette advertising was assessed via one question: How much do cigarette advertisements make you think you would like to smoke a cigarette? Smoking was defined as just a few puffs in the past 12 months.

B.4. Results here indicated that a stronger perceived influence of cigarette advertising was associated with smoking uptake at the one-year and two-year follow-up surveys after adjusting for other variables associated with smoking uptake. Girls were 8% more likely at wave 1 and 15% more likely at wave two to smoke if they

[20] Alexander, H. M., Calcott, R., Dobson, A. J., Hardes, G. R., Lloyd, D. M., O'Connell, D. L. et al. (1983) Cigarette smoking and drug use in school children: IV. Factors associated with changes in smoking behaviour. *International Journal of Epidemiology*, 12, 59-66.

[21] Armstrong, B. K., De Klerk, N. H., Shean, R. E., Dunn, D. A., & Dolin, P. J. (19900 Influence of education and advertising on the uptake of smoking by children. *Medical Journal of Australia*, 152, 117-124.

believed that cigarette advertising could influence them to smoke. For boys, there was a 5% greater likelihood of this at wave 1 and a 15% greater likelihood at wave 2. The question used here to assess the impact of cigarette advertising was based on personal attributions rather than an independent scientific measurement of advertising exposure or involvement with advertising. There is an assumption that all cigarette advertising is the same and would impact upon young people in the same way. This viewpoint contradicts the findings other research that show that young people have favourite cigarette brands and advertisements and that some cigarette brands and advertisements stand out more than others. [22]

B.5. The third study reviewed by Lovato et al was by Biener (2000).[23] This was conducted in the USA and comprised two survey waves conducted four years apart. The study was designed to find out whether awareness of tobacco advertising/promotion predicts smoking uptake. The sample comprised 1,069 12 to 15 year olds at baseline and 58% were re-interviewed at wave 2. In all, 529 had smoked no more than one cigarette at baseline and were included in the analysis. Data were collected via telephone interviews. Tobacco marketing receptivity was measured via two questions: [1] 'Some tobacco companies make clothing, hats, bags or other things with the brand on it. Do you have a piece of clothing or other thing that has a tobacco brand name or logo on it?' [2] 'Of all the cigarette advertisements you have seen, which brand's ads do you think attract your attention the most?' High receptivity was defined in terms of owning a tobacco-related item and naming a brand. Moderate receptivity was defined as owning an item or naming a brand. Low receptivity was defined as neither owning an item nor naming a brand.

B.6. The results showed that 46% of non-smoking adolescents (that is, who had smoked no more than one cigarette at baseline) and who owned a tobacco promotion item and named a brand advertisement that attracted their attention (high receptivity) progressed from not smoking or early experimenting to established smoking at follow up four years later. The same outcome was true for only 18% of those who displayed moderate receptivity and 14% who displayed low receptivity. Even among respondents who were never smokers at baseline (not even a puff) 29% of those who displayed high receptivity to tobacco marketing progressed to established smoking at follow up. These findings occurred after statistical controls were introduced for the effects of family and peer smoking.

B.7. Once again, though, this result is a self-fulfilling prophecy. Assessing which ad respondents felt attracted their attention the most does not represent a measure of exposure to advertising or promotions. Two or more individuals giving the same

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[22] Fischer, P. M., Schwartz, M. P., Richards, J. W., Goldstein, A. O., & Rojas, T. H. (1991) brand logo recognition by children aged 3 to 6 years: Mickey Mouse and old Joe the Camel. *Journal of the American Medical Association*, 266 (22), 3145-3148.

[23] Biener, L., & Siegel, M. (2000) Tobacco marketing and adolescent smoking: More support for a causal inference. *American Journal of Public Health*, 90, 407-411.

response to this item could have quite distinct histories of exposure to tobacco advertising. The question about tobacco promotional items only establishes whether respondents possessed any such items and does not give any indication of degree of involvement with such promotions. Among respondents classified as showing 'moderate receptivity' – which could mean they possess a tobacco promotional item – only a minority progressed on to become smokers.

B.8. The fourth study reviewed by Lovato et al was by Charlton (1989) and was conducted in northern England.[24] There were 1,125 boys and 1,213 girls surveyed from 29 schools at baseline with a four-month follow-up survey. Respondents were aged 11 to 13 years. In all, 1,390 respondents (65%) were non-smokers at baseline and they were included in the main analysis. Data were colleted via self-completion questionnaires. Awareness of tobacco advertising was measured by asking respondents if they could name a brand of cigarette. Up to two brands were recorded. Respondents were also asked about their favourite advertisements for cigarettes: 'Do you have a favourite cigarette advertisement? If so which is it? Smoking was defined as ever trying a cigarette. At baseline, 80% of never smokers could name at least one cigarette brand and 15% had a favourite cigarette advertisement.

B.9. Results here showed that being able to name a cigarette brand was associated with trying smoking at the four-month follow-up. Having a favourite cigarette advertisement did not predict smoking uptake. When boys and girls were examined separately, the cigarette brand effect occurred only for girls. Hence no evidence emerged here that cigarette advertising had any part to play in triggering smoking among young teenagers. Being able to name a brand was higher among those who started to smoke, but then this would be expected. This does not indicate that brand awareness preceded smoking.

B.10. The fifth study reviewed by Lovato et al was by Diaz (1998).[25] This was a two-wave cohort study with 1,126 respondents (age not given) at baseline and 1,003 at follow-up. The study was conducted in Spain. The surveys occurred 12 months apart. There was a single question about advertising: 'Accept tobacco advertising – agree/disagree'. Respondents were divided into non-smokers, experimental smokers, weekly and daily smokers.

B.11. This study found that there was an increased likelihood that non-smokers would become smokers if they accepted tobacco advertising, but that this finding was not statistically significant.

B.12. The sixth study reviewed by Lovato et al was conducted by Pierce (1998) in the USA (California) and comprised a baseline survey and a follow-up survey three

[24] Charlton, A., & Blair, V. (1989) Predicting the onset of smoking in boys and girls. *Social Science and Medicine*, 29, 813-818.

[25] Diaz, E., Villalbi, J. R., nebot, M., Auba, J., Sanz, F. (1998) Smoking initiation in students: cross-sectional and longitudinal study of predictive factors. *Medical Clinician (Barc)*, 110, 334-339.

years later.[26] There were 5,531 respondents aged 12 to 17 at baseline and 3,376 (62%) were re-interviewed. Data were collected by telephone interviews. In all, 1,752 respondents were classified as non-susceptible never-smokers at baseline and 965 were experimenters. Receptivity to tobacco advertising was assessed as high, moderate, low or minimal. Highly receptive respondents were those who said 'yes' to 'have you bought or received a promotional item?' or 'would you ever use a promotional item?' Saying 'no' to these questions but naming a most advertised tobacco brand and having a favourite tobacco advertisements resulted in respondents being classified as moderately receptive. Naming a brand but not have a favourite advertisement resulted in a classification of minimal receptivity. Not naming a brand or a favourite tobacco advertisement meant respondents were classified as low receptivity.

B.13. Having a favourite advertisement (moderate receptivity) at baseline predicted progression to smoking uptake as did possession or willingness to use a promotion item (high receptivity). Lower receptivity to tobacco promotions and advertising did not predict progression to smoking uptake. The problem with this study is that it does not measure amount of tobacco advertising or promotion exposure. The promotional item is also ambiguous because there are two components to it that are treated as equivalent in meaning when they are not. The fact that respondents have or have not received a promotional item is not the same as indicating whether they would ever use such an item. These items are not differentiated as distinct measures in the analysis; instead responses to them are combined. Saying 'yes' to both does not mean the same as saying 'yes' to one and 'no' to the other. Furthermore, naming a favourite cigarette advertisement is not a measure of exposure to cigarette advertising. Two or more respondents who can name favourite ads could have completely different histories of tobacco advertising exposure. As such these measures are uninformative in terms of telling us anything about the impact of tobacco advertising or promotions on smoking behaviour.

B.14. The seventh study reviewed by Lovato et al was by Pucci (1999) and comprised a two-wave cohort study with survey waves conducted four years apart.[27] The research took place in Massachusetts, USA. The research addresses the question of whether there was an association between brand-specific magazine advertising and subsequent brand of initiation or regular use? Pearson correlation coefficients were computer between variables. Data were collected via telephone interviews. At baseline, 1,069 teenagers were contacted and 627 (59%) were re-contacted at wave 2. Exposure to tobacco advertising was measured by asking respondents to name up to three magazines or newspapers read in the last 30 days. Data on pages of advertising by brand in each publication were obtained. These data were combined to calculate exposure to brand-specific advertising. These exposures

[26] Pierce, J. P., Choi, W. S., Gilpin, E. A., Farkas, A. J., & Berry, C. C. (1998) Tobacco industry promotion of cigarettes ad adolescent smoking. *Journal of the American Medical Assoication,*279, 511-515.
[27] Pucci, L. G., & Siegel, M. (1999) exposure to brand-specific cigarette advertising in magazines and its impact on youth smoking. *Preventive Medicine*, 29, 313-320.

were aggregated to create a 'total gross impressions' measure. Share of gross impressions was then calculated for each brand.

B.15. We are told by Lovato et al that Pucci found a relationship between exposure to specific brand advertising and smoking. However, we need to look at this result more closely. What Pucci in fact measured was self-reported exposure to specific publications that were then separately analysed for the presence of cigarette brand advertising. We do not have a direct measure of exposure to that advertising, only an indirect one that might be quite inaccurate. The fact that a respondent indicated that they read a specific magazine does not mean that they noticed any cigarette advertising in it. Two or more readers of the same magazine might read it in quite different ways. One might work their way through it from cover to cover, while another might dip in and out of specific sections thought to be of most interest. Readers might consult the contents page for items of greatest interest to them and then turn directly to the page numbers of articles of greatest interest. In the process they might skim over advertisements without giving them a glance.

B.16. The eighth study reviewed by Lovato et al was conducted by Sargent (2002) in Vermont, USA.[28] This comprised three survey waves: baseline, wave 2 at 12 months and wave 3 at 18 months. The initial sample comprised 727 students (aged nine to 15 years). We are told that 537 (74%) completed both follow-up surveys. Data were collected via self-completion questionnaires. Respondents were divided into non-susceptible never smokers, susceptible never smokers, puffers (not more than one cigarette), experimenter/not current (2-100 cigarettes in lifetime, none in last 30 days), experimenter/current (2-100 in lifetime and smoked in last 30 days), regular (>100 in lifetime). Receptivity to cigarette promotions was measured in terms of whether respondents said that they owned or would be willing to use a cigarette promotional item.

B.17. The results showed that owning or being willing to use a personal item bearing a cigarette brand logo at baseline (receptive to tobacco marketing) was linked to higher smoking uptake 18 months later. The problem with this finding resides in the measure of tobacco marketing receptivity. Actually owning a branded item or being willing to use one represent two distinct behavioural measures and are conflated in this analysis when they should have been treated as separate and distinct. Neither of these measures, but certainly the willingness to use measure, provides an indication of degree of exposure to tobacco marketing nor of the degree of involvement with tobacco marketing. These are the types of measures on which data are needed to establish the role played by marketing messages in the onset of smoking.

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[28] Sargent, J. D., Dalton, M., & Beach, M. (2000) Exposure to cigarette promotions and smoking uptake in adolescents: Evidence of a dose-response relation. *Tobacco Control*, 9(2), 163-168. Sargent, J. D., Dalton, M., Beach, M., Bernhardt, A., Heatherton, T., Stevens, M. (2000) Effect of cigarette promotions on smoking uptake among adolescents. *Preventive Medicine*, 30(4), 320-327.

B.18. The ninth study reviewed by Lovato et al was conducted by While (1996) in England.[29] This comprised two survey waves carried out one year apart with 814 boys and 576 girls (aged 11-12) from 31 schools. The main analysis focused on 136 boys and 134 girls who became smokers during the period between the two surveys. Data were collected via self-completion questionnaires. Smoking was defined as every trying a cigarette. Awareness of advertising was measured by using the same technique as Charlton (1989) and asking smokers which brand they smoked and why.

B.19. The results of this study showed that girls who named one of the two most advertised brands were most likely to have taken up smoking, but that the same finding did not occur among boys. The brands in question were Benson and Hedges and Silk Cut. It was the naming of these brands in particular rather than other brands that predicted smoking uptake the most. Boys who named either of these two brands or both of them were more likely to become smokers than boys who named no brands, but were not statistically more likely to take up smoking than boys who named other brands. However, no statistical controls were deployed for other factors known to be associated with smoking uptake such as parental smoking, sibling smoking or peer group smoking. Moreover, the naming of brands does not represent a measure of exposure to advertising. Furthermore, it was only specific brands that were associated with smoking and not others. There is no way of telling, however, whether the brands named were the ones to which respondents had had greatest advertising exposure, because this was not assessed.

[29] While, D., Kelly, S., Huang, W., & Charlton, A. (1996) Cigarette advertising and onset of smoking in children: questionnaire survey. *British Medical Journal*, 313, 398-399.