

Response of the Tobacco Manufacturers' Association to the Consultation on the Future of Tobacco Control

Introduction

1. This response to the "Consultation on the Future of Tobacco Control" (CFTC) is submitted on behalf of the member companies of the Tobacco Manufacturers' Association (TMA): British American Tobacco United Kingdom Ltd, Gallaher Limited (a member of the JTI Group of companies) and Imperial Tobacco Limited (UK). These companies and/or their related entities will also be responding to the CFTC in their own right.
2. The CFTC seeks input from stakeholders with a view to developing a new national tobacco control strategy. The document posits a wide range of policy options but contains only two specific proposals – relating to the retail display of tobacco products and the sale of tobacco from vending machines – which are accompanied by consultation impact assessments. This submission therefore responds to the two specific proposals and provides feedback in more general terms on some of the other issues raised in the document.
3. The CFTC clearly states at paragraph 1.7 that "this document does not present government policy". However, prior to the publication of the CFTC, Ministers announced their intention to ban tobacco product displays in retail outlets and suggested that vending machine sales might also be prohibited. These statements attracted much press and media attention. The TMA trusts that due consideration will be given to the facts and opinions of all interested parties, in particular to those most affected, including tobacco manufacturers, tobacco retailers and vending machine operators.

Support for youth smoking prevention

4. The CFTC focuses in large part on youth smoking prevention and rightly so; smoking must be a matter for informed adult choice. The TMA agrees that under-aged persons should not smoke and that they should not have access to tobacco products.
5. The major part of the responsibility for enforcing the law on sales to young people lies with retailers. Promotion of the age threshold for sales, the availability of a reliable means of proof-of-age and staff education and training are therefore factors of crucial importance to retailers. For this reason, the TMA and its member companies continue to make substantial financial and other commitments to proof-of-age schemes, most particularly CitizenCard, and the associated No ID, No Sale campaign, which is ever more strongly promoted and used in retail outlets throughout the UK. Encouragingly, recent data show that the under-aged are finding it progressively more difficult to purchase tobacco products from legitimate retail outlets¹.

¹ Statistics on Smoking, England 2007, NHS Information Centre, September 28 2007

6. In addition, the TMA supports strong enforcement of the law on under-age sales. We support test purchasing by the authorities and we encourage the Government to ensure that the new powers afforded by recently enacted legislation are made available at the earliest possible date. The civil sanctions contained in the Regulatory Enforcement and Sanctions Act and s.143 of the Criminal Justice and Immigration Act provide welcome and more forceful means of dealing with those retailers who commit offences and must be taken into account when regulatory proposals are considered.
7. The TMA also supports the many retailers who believe that proxy purchasing of tobacco products, by an adult for an under-age person, should be a criminal offence and would urge the Government to give due consideration to their views.

TMA's response to specific proposals

8. TMA member companies are opposed to tobacco display bans which are, in their view, unsupported by robust evidence that they will achieve the stated public health benefit, and which are anti-business (especially small business). The TMA's concerns in relation to the CFTC proposals to restrict display are set out below.
9. The studies cited in the CFTC do not provide a reliable base for the introduction of new legislation because:
 - a. many of them consider advertising in its broadest sense, which is very different from the simple display of products in a shop that offers them for sale;
 - b. others consider retail marketing (e.g. including point-of-sale advertising, merchandising, promotional activity etc) in its broadest sense and do not attempt to isolate the impact of display;
 - c. none of them study environments that are directly comparable to post Tobacco Advertising and Promotions Act UK;
and
 - d. all of them rely on self-report data and the poor recall of individuals in response to hypothetical and sometimes leading questions.
10. It is vital that the Department of Health now considers all the evidence that suggests that a display ban would not have the effect of reducing smoking rates; including, for example, all of the research into the reasons for youth smoking initiation that does not cite display as a causal factor.
11. The TMA disagrees with the CFTC's interpretation of the product display provisions of the Tobacco Advertising and Promotion Act 2002 (TAPA), regarding the notion that any form of tobacco display is an advertisement. That interpretation is at odds with the provisions of the Act, Ministers' own arguments at the time of the passage of the Act, the intentions of Parliament, and the Government's own position as stated at the time of the application for judicial review of the Tobacco Advertising and Promotion (Point of Sale) Regulations in 2004. Under TAPA, advertising is generally prohibited, and only allowed by way of exceptions that are very restricted in scope.
12. Ministers have the power, under TAPA, to make regulations to impose restrictions on tobacco product display. However, the CFTC does not provide any evidence that this has become an area of concern. Ministers would need to assess the evidence in order to ensure that any restrictions are necessary and proportionate.

13. At the time of the passage of the legislation, it was expressly stated that: *"The Government regards the current practice of storing tobacco products for the most part in a gantry with minimal advertising as perfectly satisfactory and has no current plans to make regulations under this section. However, the Government feels that it is important to have the power to control displays if displays of tobacco products start to become quasi-advertisements."*² Further comments by Ministers and by Counsel for the Department of Health in the 2004 application for judicial review of the advertising regulations made it clear that, in the absence of any other forms of communication with consumers, the display of products was regarded as both proportionate and reasonable.
14. The 2006 Local Authorities Coordinators of Regulatory Services (LACORS) report³ found that the display of tobacco products generally complied with TAPA but did set out some points for further consideration. Following publication of the report, the TMA opened dialogue with LACORS to address those points. Department of Health participation in the discussions was sought, but was not forthcoming. A summary of the outcome is contained in the TMA letter of 23 February 2007 (attached as Annex A to this submission), since when there have not been any further discussions. The TMA has suggested an alternative approach to LACORS and the TMA remains willing to explore this alternative policy option further. Indeed, this fully accords with the Better Regulation Executive Code of Practice Criterion 6.3 and it would be expected that such discussions would have taken place before legislative options were proposed.
15. Tobacco product displays are not predictors of youth smoking. Indeed, the Department of Health itself states in the CFTC that the predictors of smoking are: age and sex, home environment, drug use and drinking alcohol, truancy and exclusion from school (3.8). It rightly does not list retail displays of tobacco products as a factor.
16. The Department of Health acknowledges that the studies used in the CFTC to support arguments to restrict display are "not conclusive" (3.45).
17. The Norwegian Department of Health and Care Services, in considering whether to introduce a display ban in Norway, conceded "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."⁴
18. Furthermore, in the few countries and places where product displays have been banned there has been no significant impact on smoking prevalence. In Iceland and the relevant Canadian provinces, the display bans have not had any impact on established trends in prevalence and consumption.
19. The current data on smoking by the under-aged, and young people more generally, does not take account of significant recent tobacco control legislation, the effect of which cannot yet be properly assessed. The raising of the age of sale for tobacco products from 16 to 18 years only came into effect in October 2007. The restriction orders provided for under the Criminal Justice and Immigration Act 2008 will not be brought into effect until April 2009, meaning that after this date retailers who flout the minimum age law could have their right to sell tobacco suspended. No date has yet been announced for the bringing into effect of the significant additional enforcement powers made available by the Regulatory Enforcement and Sanctions

² Explanatory Notes to Tobacco Advertising and Promotion Act 2002 Chapter 36, Section 8: Displays

³ LACORS (2006) Report on the implementation of the point of sale regulations

⁴ *Public hearing of a proposal on a ban against visible display of tobacco products at points of sale, as well as certain other changes to the Tobacco Damage Act and the Advertising Regulation.* Norwegian Ministry of Health and Care Services, March 2007

Act 2008. All these measures have been introduced with the object of improving the enforcement of the law on under-age sales and reducing the prevalence of smoking.

20. On the question of making impulse purchases, smokers purchase cigarettes in a consciously planned and regular manner, the exact opposite of an impulse purchase. The majority of smokers have pre-selected their brand before entering a shop. Sometimes, they make a different brand selection when in front of the display, particularly if their pre-selected brand is not available.
21. Among the factors listed in the CFTC as providing a rationale for further tobacco control measures, is 'denormalising' tobacco use. The determination of public policy should surely be based, in accordance with the criteria of the Civil Service Code and Code of Practice on Consultation, on an objective assessment of the evidence and should not discriminate against or seek to stigmatise particular individuals or interests. While the promotion of public health is a legitimate policy objective, 'denormalisation' for its own sake is not.
22. The display of tobacco products is of crucial importance to the TMA's member companies and to tobacco retailers. Given the restrictions on consumer communications, tobacco displays are the only means by which tobacco companies can present their products and brands, existing or new, to smokers, and also by which they may compete with one another. When supply of a tobacco brand is interrupted as a result of retailers running out of stock, or for other reasons, adult smokers rely on tobacco displays to enable them to scan swiftly what is available and to make a purchasing choice. Tobacco displays also allow retailers quickly to identify stock and to provide fast and efficient customer service.
23. Tobacco displays are critical to effective competition. The importance of product displays to the viability of competition between manufacturers and to the proper functioning of the market must not be under-estimated, particularly when there are virtually no other opportunities to inform the smoker about the products. The fact that display is such a focal point for competition, however, makes it a matter on which the TMA is unable to say more. That must be left to the responses of individual manufacturers to the consultation paper.
24. In conclusion, the TMA supports the retention of tobacco product displays at point of sale in retail outlets.

Vending Machines

25. The TMA's position on sales by vending machines is unequivocal: the under-aged should not have access to tobacco products. Access to cigarette vending machines should therefore be strictly controlled. At the same time, legitimate access to the machines should not be denied to adult smokers. In the same way as we support the requirement for age verification at the point of sale for tobacco retail in shops, so this rationale should be applied to vending machines. Thus, means must be provided, beyond a code on the siting of machines and human supervision, which effectively controls access to the use of a machine.

TMA's response to other issues raised in the CFTC

Illicit Tobacco Trade

26. We wish to restate here the industry's ongoing commitment to tackling all forms of illicit tobacco trade in the UK, given that our contribution so far was not referenced or recognised in the CFTC. The illicit tobacco market is well entrenched throughout the UK. The TMA agrees with

the CFTC assessment that the illicit trade in tobacco products undermines public health objectives, damages legitimate business and results in substantial revenue losses to HM Treasury. The root cause of the illicit tobacco trade is consumer willingness to avoid extreme levels of UK tobacco taxation by buying lower priced non-UK duty paid product. HMRC upper range estimates and the TMA estimates that 27% of cigarette and 68% of handrolling tobacco consumption in the UK currently avoids UK duty as a result of smuggling, counterfeiting and crossborder shopping.

27. Illicit tobacco traders have no respect for the age of a person to whom they sell their goods. Regrettably the most recent data available indicates that the under-aged are increasingly turning to illicit traders for supplies⁵.
28. It is young people and the "deprived", the very people the CFTC states that it sets out to protect, that are most at risk as a result of the illicit tobacco trade. Therefore the TMA expects that tackling this trade should be the top priority of all the HM Government departments that illicit trade impacts upon.
29. A ban on the display of products will, the TMA fears, blur the distinction between the legal and illegal market by virtue of it all being 'under the counter'. This will serve to hinder the operations being undertaken by HMRC and Trading Standards to enforce the anti-counterfeit scheme and undermine the considerable investment made by the TMA and its member companies in pro-actively providing HMRC with effective tools to prevent tobacco smuggling. For example, we provide electronic readers to Customs and Trading Standards Officers to enable them to identify counterfeit product, and funding support for police anti-illicit trade activities at the local level. As the Exchequer Secretary to the Treasury has stated: "Contact with the main UK tobacco manufacturers and exchange of information has been a key part of the success of the tackling tobacco smuggling strategy".⁶
30. Furthermore, TMA member companies have entered into a Memorandum of Understanding (MoU) with HMRC thereby creating a comprehensive framework for cooperation aimed at combating the smuggling of both genuine and counterfeit tobacco products into the UK as well as seeking to deter all aspects of the illicit trade in tobacco products. Under the MOU there is an undertaking that both the industry and HMRC will work together to identify and assess technologies that could be of benefit in tackling the illicit trade. The introduction of covert anti-counterfeit technology is a prime example of the benefit of the MOU approach in identifying particular concerns and quickly arriving at effective solutions.
31. The TMA agrees that collaboration is important to tackle illicit tobacco trade. This must be a multi agency task, requiring full engagement by all parties. Indeed in our pre-Budget meeting with the Exchequer Secretary to the Treasury on 21 February 2008 the TMA suggested top level measures that would reduce the level of tobacco smuggling and cross border shopping:
 - a. freeze the level of tobacco tax, as any rise, as demonstrated in previous years, only serves to increase the incentives for both those who smuggle and those who purchase illicit tobacco;
 - b. enforcement by HMRC of existing regulation to prosecute illicit tobacco traders;
 - c. allocation of greater resources and manpower to HMRC and other law enforcement agencies; and

⁵ Drug use, Smoking and Drinking among young people in England 2007, NHS Information Centre, 17 July 2008

⁶ Hansard, 8 October 2007

- d. at the local level the TMA would welcome public awareness campaigns and targeted operations by law enforcement agencies and authorities. The TMA has funded the provision of posters in retail outlets warning consumers not to purchase illicit tobacco products.

Plain Packaging

32. The TMA notes that "specific proposals" are not being considered in relation to plain packaging. Nonetheless the TMA understands that this is an area of considerable importance for its member companies on which they will be responding to the CFTC individually.

Pack Size

33. The Department of Health refers to packs of 10 as "kiddie packs". This is an incorrect classification. Packs of 10 are produced to meet the demand from adults who smoke only occasionally, who have low consumption levels, or wish to control their tobacco consumption. All tobacco products are age-restricted products, which no one under the age of 18 should be able to purchase.
34. The prohibition of packs of 10 cigarettes would be almost certain to be counter-productive to tobacco control and to tackling the illicit market. A regular purchaser of a pack of 10 cigarettes, who also wishes to control their expenditure on cigarettes, would be obliged either to purchase a pack of 20 or to turn to the illicit market in which a pack of 20 is often cheaper than purchasing a pack of 10 from a legitimate retailer. Either way, the smoker would be likely to increase their cigarette consumption. There is a strong likelihood that the illicit market would be stimulated still further.

Lower or Reduced Ignition Propensity Cigarettes

35. The TMA is committed to working with regulators and competent authorities to reduce the risk of accidental fires caused by cigarettes. However, it must be made clear that there is no such thing as a fire-safe cigarette. Cigarettes are designed to be burned, and any burning item presents a fire hazard. It is the careless use and disposal of cigarettes that can cause fires.
36. The TMA believes that the UK Government should support the development of a technical standard for ignition propensity testing currently underway in the EU. Given their expertise in this area, TMA member companies seek the opportunity to be involved with the regulators in the evaluation of such a technical standard.
37. It must be an overriding objective for government to demonstrate that cigarettes designed to pass ignition propensity tests will reduce fires in the real world. Therefore the TMA would expect a full impact assessment of the standard in the UK, both prior to introducing any regulation and for a reasonable period afterwards.

Conclusion

38. For all the reasons stated in this response, the TMA is opposed to the proposal to prohibit displays and the possible longer term propositions for plain packaging and a minimum pack size of 20 cigarettes. Any government policy proposals should be balanced, fair, proportionate and evidence based.

39. The TMA and its member companies continue to seek a meaningful dialogue on tobacco issues with the Department of Health that will inform the policy making process and lead to sensible and effective tobacco control measures. We remain hopeful that a working relationship with the Department of Health on the development of tobacco policy issues (and not just the implementation of policy) can be established.

5 September 2008

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23 February 2007

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Dear Wendy,

It was good to meet with you and Jane last week. We very much welcomed the opportunity to talk through various issues and I look forward to maintaining the dialogue we have now established.

As I hope we made clear, the TMA and our member companies have been active in supporting initiatives to prevent under age sales of tobacco products as well as playing our part in stemming the illegal sale of smuggled and counterfeit product. Both the manufacturers and Trading Standards have common cause in these areas.

With regards to the Tobacco Advertising & Promotion Act (TAPA) in retail outlets, the members of the tobacco manufacturers association recognise their duty to comply with TAPA and this the manufacturers rigorously do. The TMA principal member companies operate to the highest standards and have in place stringent internal procedures in this regard and, through their sales forces, apply their best endeavours to encourage retailers to be equally responsible. Interpretation of the legislation however, as was clear in our meeting, has created some debate. For the sake of clarity and to achieve common ground based on mutual understanding of our respective positions, we propose the following:

- Tobacco product display in retail outlets will be confined to back wall gantries / stock keeping units behind the counters from which products are sold. In some outlets this may apply to more than one payment point.
- Tobacco units will no longer be sited on-counter and existing ones will be removed within six months from LACORS endorsement of this proposal.
- TMA and LACORS will meet twice yearly to assess progress and to review any additional POS display issues should they arise. It would also be good business practice for the Department of Health to participate in this arrangement as well.

As you are aware, while the manufacturers' consider all the above activities to be in full compliance with TAPA we very much wish to demonstrate our willingness to address the concerns that Trading Standards have expressed to LACORS.

With regard to how product is displayed on gantries, within the constraints of TAPA and as set forth above, the manufacturers reserve the right to give any specific brand prominence over another in order to encourage brand switching by smokers. This, as we have made clear, is the essence of legitimate competition in a highly regulated marketplace and we note that at our meeting you also acknowledged our legitimate right to compete.

The tobacco companies in the UK have a long experience of achieving results through 'voluntary agreement' arrangements, such as those on Tobacco Advertising and Sponsorship, before legislation rendered them redundant. The Department of Health are well aware of this and I hope they might be enjoined to endorse the arrangements we are now proposing.

Finally, our members raised an issue regarding out of date information in the LACORS Report to the Minister: 'What the Manufacturers Did Next'. While we appreciate that the Report was a snapshot in time, your commitment to consult the various Home Authority Officers during the preparation of your next report to the Minister in June 2007 should address this issue. Perhaps, going forward, if we are able to establish a framework for joint meetings, with all interested parties, this will ensure a more accurate and relevant exchange of information.

I note your view that you are unsure how viable any understanding or process will be unless the Department of Health get involved. In any case, we give the above undertakings in good faith and very much welcome the opportunity to discuss these matters further.

Yours sincerely,
Chris Ogden

CHD Ogden
Director