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8 July 2010

Tobacco Regulations Consultation Exercise
Scottish Government
Area 3-N
St Andrew's House
1 Regent Road
Edinburgh EH1 3DG

Dear Sirs,

Response to 'A Consultation on Tobacco Draft Regulations – The Tobacco and Primary Medical Services (Scotland) Act 2010' (the "Act")

The member companies of the Tobacco Manufacturers' Association (TMA) are British American Tobacco United Kingdom Ltd, Gallaher Limited (a member of the JTI Group of Companies) and Imperial Tobacco UK Limited. This response is submitted on their behalf and individually they and/or their related entities may also be responding in their own right.

The TMA's view has not changed since we provided written evidence to the Health and Sport Committee on 6 April 2009. A copy is attached for reference; the display ban is addressed on pages 2-3 and the register of tobacco retailers on page 4.

In summary, we believe the Act's ban on the display of tobacco products is unjustified, unwanted and unnecessary. There is no credible evidence to support the stated public health objective that a ban would reduce youth smoking. The legislation is also unwanted by a significant number of stakeholders and by thousands of retailers whose businesses will be adversely affected to no purpose. Furthermore, the ban is unnecessary and disproportionate given that alternative solutions aimed at youth smoking prevention are available.

Youth access prevention

The TMA agrees with the Scottish Government that under-aged persons should not smoke and that they should not have access to tobacco products. In relation to the Prescribed Documents Regulations, the TMA member companies remain committed to helping to prevent young people from being able to access tobacco products, and support the CitizenCard¹, Young Scot and 'No ID,

¹ CitizenCard is a non-profit company supported by Association of Convenience Stores, Camelot, Co-Operative Group, Experian, Ladbrokes, National Federation of Retail Newsagents, and the Tobacco Manufacturers Association.

No Sale' campaigns. We therefore support the Act's criminalisation of under age purchasing and proxy purchasing.

We also support rigorous enforcement of the law on under-age sales and against the supply of illicit tobacco products. The TMA welcomes plans by the Scottish Government and law enforcement agencies to crack down on the supply chain of such products which undermine both public health policy and the legitimate industry.

HM Revenue and Customs' latest estimates (2007/8) show that up to 15% of cigarettes and 52% of handrolling tobacco in the UK is smuggled². We have always said that anti-illicit trade measures are an effective way to support youth access prevention and we have a proven track record of working closely with HMRC, UKBA and law enforcement agencies to combat the trade in illicit product in Scotland.

The TMA does not believe that the proposed regulations for a register of tobacco retailers set out an effective, proportionate and workable approach. As outlined in our written evidence to the Health and Sport Committee, we are concerned that the register will not have any positive impact on reducing youth smoking. Instead, it will have an impact on retail/business and add to their administrative burden.

Display ban

The TMA also does not agree with the position that the draft regulations on tobacco display set out an effective, proportionate and workable approach. We are most concerned they are unsupported by credible evidence and will not achieve the stated public health objectives. The evidence provided by the Scottish government is entirely insufficient to justify this severe restriction on the ability of manufacturers and retailers to communicate effectively with their customers, and the right to compete at point of sale.

Available evidence from other countries where such bans have been introduced (principally Iceland and Canada) has failed to demonstrate any resulting reduction in youth smoking. Indeed, the inadequacy of the evidence has been illustrated by statistics provided by Health Canada which showed that youth smoking remained the same or increased in 5 of the 8 Canadian provinces that have implemented a display ban. In Ontario and Quebec youth smoking amongst 15-19 year olds has stayed the same between 2007 and 2008 and in Saskatchewan, British Columbia and Nova Scotia it has even increased over the same period³.

The TMA is particularly concerned about the draft regulation for displaying a tobacco product when retrieving this for sale or requested display (regulation 4). We believe a limit of 120 sq. cm is a disproportionate measure as retailers will have to contend with the added impracticalities and costs of the proposed restriction.

The impact of the proposed regulations will be not only to diminish dramatically the already limited rights of manufacturers and retailers to communicate effectively with their customers about their products, but will also impose considerable financial burdens on retailers, and seriously undermine the opportunity for legitimate competition between manufacturers. It will also exacerbate the problem of illicit trade. A recent report by the Canadian Convenience Stores Association (CCSA) states that 42 shops closed every week in Canada in 2009 (by which time a number of Canadian provinces had introduced such bans). The number of independent stores has

² Measuring Tax Gaps 2009, HM Revenue and Customs, December 2009

³ Health Canada, Canadian Tobacco Use Monitoring Survey, 2009

dropped by nearly 25% whilst chain stores have grown by 12%. Tobacco smuggling has also increased since the display bans were introduced⁴. These unintended adverse consequences - all of which have been addressed in our previous submission to the Health and Sport Committee - should be avoided.

We therefore urge the Scottish Government to reconsider its draft tobacco control regulations with a view to ensuring that any measures introduced in relation to tobacco display will give due and proper regard to the rights and freedoms of the TMA member companies and the other stakeholders who may be affected.

We would welcome the opportunity to engage again with the Scottish Government to inform the policy-making process, particularly with regard to enforcement of existing and new laws on under-age sales and smuggling, and to work together to ensure proportionate and effective tobacco control measures are implemented.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'C H D Ogden', written in a cursive style.

C H D Ogden
Chief Executive

⁴ CCSA 'State of the Industry' report 2009.

direct line: 020 7544 0110

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our ref: CO/vt2099

your ref:



6th April 2009

Douglas Thornton
Senior Assistant Clerk
Health and Sport Committee
T3.60
Scottish Parliament
Edinburgh
EH99 1SP

By post and email

Dear Mr. Thornton,

Tobacco and Primary Medical Services (Scotland) Bill (SP Bill 22) – Call for Evidence

Thank you for inviting the Tobacco Manufacturers' Association (TMA) to submit written evidence on the general principles of the Tobacco and Primary Medical Services (Scotland) Bill. This response is made on behalf of the TMA member companies: British American Tobacco, Gallaher (a member of the JTI group of companies) and Imperial Tobacco who may also make submissions in their own right.

The declared intent of the tobacco provisions of the Bill (as set out at paragraph 7 of the Policy Memorandum to the Bill) is to "[reduce] *smoking among children and young people through updated statutory controls on the display and sale of tobacco products in Scotland*". The Bill therefore 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. The TMA and our member companies are fully supportive of youth smoking prevention initiatives. We are major stakeholders in the UK wide CitizenCard proof of age scheme, the 'No ID No Sale' campaign and support PASS accredited schemes such as YoungScot. We encourage responsible retailing and applaud rigorous enforcement of the law on under-age sales.

Our observations are confined to relevant sections in Part 1 of the Bill and are as follows:

S1 Prohibition of tobacco displays at the point of sale with only a notice listing the brands available and their prices.

The Tobacco Advertising and Promotion Act 2002 (TAPA) and the "point of sale" Regulations¹ made pursuant to it, limit the advertising of tobacco products at point of sale to a maximum total surface area of A5-size (with 30% of the space taken up by a health warning) on a fixed gantry or other display unit, within fixed or movable premises, that is "primarily used for the display of tobacco products to customers" (Regulation 2). At the time of enacting TAPA, it was expressly stated: "*The [UK] 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

It has not been demonstrated that in-store tobacco product displays have "become quasi-advertisements". There is, therefore, no basis for any suggestion that current arrangements for the storage and display of tobacco products should now be regarded as anything but still "perfectly satisfactory". In these circumstances, a ban on gantry displays would be an entirely disproportionate measure, not only to the recognised legitimate expectations of the retailers, but also to the legitimate expectations of the tobacco manufacturers and existing adult smokers. In addition, there is no reliable evidence that a product display ban will achieve the stated objective of reducing smoking amongst children and young people. Further, there is also no independent evidence which shows that sight of a display of tobacco packaging at the point of sale encourages people of any age to either start or to continue smoking.

Reflecting this fact, the New Zealand government rejected a proposal to ban the display of tobacco products earlier this year on the basis that "*there is no international evidence that it actually works.*"³ Similarly, when the Norwegian Department of Health and Care Services previously considered whether to introduce a display ban in Norway, it 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

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.

Tobacco product displays are not predictors of youth smoking. Reflecting this fact, the UK Department of Health stated in its recent display ban consultation that the predictors of smoking are: age and sex, home environment, drug use and drinking alcohol, truancy and exclusion from school ("Consultation on the Future of Tobacco Control" paragraph 3.8). It rightly does not list retail displays of tobacco products as a factor.

Most young people's first experience of smoking is not consequent upon purchase by them of tobacco products from a retail outlet, but upon obtaining tobacco products from family or friends.

¹ The Tobacco Advertising and Promotion (Point of Sale) (Scotland) Regulations 2004

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

³ Interview of the New Zealand Prime Minister aired on the Sunrise programme on 24 February 2009 (<http://www.3news.co.nz/Full-interview-with-John-Key/tabid/370/articleID/92515/cat/765/Default.aspx>)

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.

Further, when Saskatchewan banned retail display of tobacco products in March 2002, in the first subsequent 18 months' period youth smoking prevalence there increased from 27% to 29%, whilst, during the same period, youth smoking rates declined from 22.5% to 22% in the rest of Canada.⁵

In studies undertaken on relapse, the sight of tobacco packages in retail outlets is not cited as a reason why ex-smokers start smoking again (see eg Wetter et al⁶).

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.

Given the already severe restrictions on consumer communications, tobacco displays are the only means by which tobacco companies can present their existing or new products and brands to smokers and thereby 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 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 Call for Evidence.

Tobacco displays also allow retailers quickly to identify stock and to provide fast and efficient customer service. Importantly, it also provides a secure place for tobacco products and greatly eases the vital task of efficient stock control. It also allows existing adult smokers easily to see which tobacco products are available and in stock. If smokers are unable readily to see at the point of sale what brands retailers have in stock, they could be increasingly inclined to obtain their supplies from illegal street vendors and car boot sales where smuggled tobacco products are openly displayed.

S6 Prohibition of vending machines for the sale of tobacco products.

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.

We therefore acknowledge that access control measures must be implemented more rigorously but that is not the same as an outright ban. The former approach is that being taken for England, Wales and Northern Ireland under the auspices of the Health Bill currently

⁵ Statistics Canada. Canadian Tobacco Use Monitoring Survey 2003: Summary of Results for Wave 1 (February to June) of 2003, May 2005.

⁶ D. Wetter et al "Late relapse/sustained abstinence among former smokers: a longitudinal study" Preventive Medicine 2004 39: 1156-1163

before Parliament in Westminster. We cannot see why the same logic should not apply in Scotland also.

S7 Register of tobacco retailers

and

S12 Tobacco retailing banning orders

Earlier this year, the UK Parliament agreed two Acts that together will provide for a negative licensing system for tobacco retailers to be introduced – the Criminal Justice and Immigration Act (CJIA) the Regulatory Enforcement and Sanctions Act (RESA). However, the territorial extent of the Acts differs and also varies as between particular sections. For example, the CJIA applies to England and Wales, and some of its provisions also apply to Scotland and Northern Ireland. However, the negative licensing provisions that it contains in respect of tobacco retailers do not apply to Scotland or Northern Ireland. They could however be applied by the making of legislation by the Parliament and Assembly that amends Children and Young Persons legislation.

As is evident in the Tobacco and Primary Medical Services (Scotland) Bill however, the Scottish Government has proposed a hybrid approach that is neither a negative nor a positive licensing scheme. As the legislative framework already exists by virtue of CJIA and RESA, the provisions of which could be adopted for application in Scotland, it is questionable as to why a different regime is proposed for Scotland. It is the view of the TMA that a negative licensing scheme would operate most efficiently in curbing the activities of those retailers who persistently make under age sales of tobacco products and therefore the registration of retailers is an unnecessary move that will serve only to impose further bureaucracy on the hard pressed retail sector.

As the opportunity to present our views is limited here to the requested four pages, the TMA would welcome an invitation from the Health and Sport Committee to appear before the committee to present further evidence and take questions from the members.

Finally, the Committee is invited to note and also to address the issue as to whether the Scottish Parliament has competence under the Scotland Act to legislate a display and vending machine ban. Such matters would appear to be primarily concerned with consumer protection and business practices which are reserved to Westminster.

Yours sincerely,
Christopher Ogden

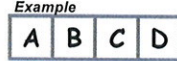
CHD Ogden
Chief Executive

ANNEX B



RESPONDENTS INFORMATION FORM

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately



(Please complete in **BLACK** ink and in **BLOCK CAPITALS**, one per box)

1. Name/Organisation

Organisation Name

T O B A C C O M A N U F A C T U R E R S ' A S S O C I A T I O N

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

O G D E N

Forename

C H R I S T O P H E R

2. Postal Address

14 / 16 C A X T O N S T R E E T
L O N D O N

S W 1 H 0 Q T Phone 0 207544010 Email cogden@the-tma.org.uk

3. Permissions

I am responding as ...

Individual

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?
Please tick as appropriate Yes No

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis
Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise ?

Please tick as appropriate Yes No

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