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13 December 2010

Ms. J. McAlarney  
Health Improvement Policy Branch  
Department of Health, Social Services and Public Safety (DHSSPS)  
Room C 4.22  
Castle Buildings  
Belfast BT4 3SQ

*Dear Ms McAlarney,*

**Consultation – Tobacco Control Regulations to Ban Displays of Tobacco Products at Point of Sale and to Prohibit Sales of Tobacco Products from Vending Machines (the "Consultation")**

Thank you for your letter of 1 October 2010 informing the Tobacco Manufacturers' Association ("TMA") of the Consultation.

The member companies of the 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 Department of Health, Social Services and Public Safety's ("DHSSPS") consultation on the Tobacco Control Regulations to Ban Displays of Tobacco Products at Point of Sale and to Prohibit Sales of Tobacco Products from Vending Machines makes reference to the UK Department of Health's ("DoH") consultation, *The Future of Tobacco Control ("FTC")*, of May 2008. On the matter of core principles, the TMA's view has not changed since our response to the FTC consultation. A copy of that response is attached for reference in Annex A. Paragraphs 8 to 25 in particular address the issues of display and vending machine bans.

We have stressed our support for measures which are aimed at youth-smoking prevention. Such measures, however, must be evidence-based, effective and proportionate. The TMA member companies remain committed to helping prevent minors from being able to access tobacco products, and to building on the success to date of the CitizenCard and No ID No Sale campaigns.

We would welcome the opportunity to engage with DHSSPS to inform the policy-making process, and to work together to ensure proportionate and effective tobacco control measures are implemented.

The powers to make the new tobacco control regulations are set out in the Health Act 2009. We believe however, that the proposals to ban the display of tobacco products and vending machines under this Act are unjustified, unwanted and unnecessary. There is no credible evidence to support the stated public health objective that the bans will reduce youth smoking or help people who wish to quit. The proposed legislation is opposed by a significant number of stakeholders including retailers, as well as suppliers and operators of vending machines, all of whose businesses will be adversely affected without justification.

Furthermore, the bans are disproportionate given that alternative solutions, for example, those aimed at youth smoking prevention, are available.

As a result, each member of the TMA has brought in England a judicial review of the decision by the Secretary of State for Health to introduce the display ban and the cigarette vending machine bans. The Administrative Court in London will consider the case in April 2011.

We set out below our responses to the following questions in the Consultation which are directly relevant to our members.

**Q1: Do you believe that the proposed regulations set out an effective and workable approach to removing the display of tobacco products?**

No. The TMA does not agree that the proposed regulations on tobacco display set out an effective and workable approach. They are unsupported by credible evidence and will not achieve the stated public health objectives. The evidence provided by the UK Government in 2009 was 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.

When publishing the Health Act 2009, the UK DoH stated that the Act would be implemented "in large shops from 1 October 2011 and in small shops from 1 October 2013." The Northern Ireland Executive is however proposing to accelerate this process, without an appropriate or adequate evidential justification, to the earlier implementation date of 1 July 2011 for all shops. The new UK Government also confirmed in its recent White Paper that it is at present reviewing the options for the display of tobacco.

Given the prejudice caused by the 1 July 2011 date and concerns about an inadequate transitional regime, we believe it is in the interest of all parties for the UK Government to be given the time to consider a proper review of the evidence and the alternative solutions to a display ban. We therefore believe that the Northern Ireland Executive should reconsider the implementation of the display ban regulations in Northern Ireland in July 2011. We also address this issue under question 19.

**Q3: Do you believe that these proposed regulations are proportionate and avoid imposing unnecessary burdens on businesses to achieve removing the display of tobacco products?**

No. The impact of the proposed regulations will be not only to diminish the already limited rights of manufacturers and retailers to communicate effectively with their customers about their products, but will also impose considerable disproportionate and unnecessary financial burdens on retailers. Legitimate competition between manufacturers also risks being adversely affected. Furthermore, the already serious problem of illicit trade in Northern Ireland may well be exacerbated (see in particular paragraph 29 to Annex A).

**Q6: Do you have any other comments on the proposed tobacco display regulations?**

Together with the relevant provisions of the Act, the Regulations will effectively prohibit tobacco product displays in Northern Ireland. The evidence relied on in the FTC consultation (which the DoH itself has admitted is "*not conclusive*"), and the information and reports subsequently cited by the DoH, are entirely insufficient to justify such a severe and absolute prohibition on the ability of manufacturers and retailers to communicate with their customers, and the right to compete at point of sale.

As outlined in our letter of 9 March 2010 in response to the DHSSPS's Consultation on 'Strengthening Sanctions Against Retailers for Under-Age Sales of Tobacco Products', the TMA believes that under-aged persons should not smoke and that they should not have access to tobacco products. In previous consultations we have stressed our support for measures which are aimed at youth smoking prevention.

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<sup>1</sup> Consultation on the future of tobacco control, DoH, May 2008, p. 34

Such measures must, however, be evidence-based, effective, proportionate and conform to principles of better regulation recognised in Northern Ireland and elsewhere<sup>2</sup>.

A major part of the responsibility for enforcing the law on sales to minors lies with retailers. Promotion of the age threshold for sales, the availability of a reliable means of proof-of-age verification 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, particularly CitizenCard, and the associated 'No ID, No Sale' ("NINS") campaign, which is increasingly promoted and utilised in retail outlets throughout the UK. Encouragingly, UK data show that those under 18 years of age are finding it progressively more difficult to purchase tobacco products from legitimate retail outlets<sup>3</sup>. We are concerned that the DHSSPS consultation does not provide any recent statistics for Northern Ireland, which is not an adequate starting point for rigorous evidence based analysis of either a baseline scenario or the impact of the specific regulatory proposals.

In addition, the TMA supports strong enforcement of the law on under-age sales and smuggling. We support test purchasing by the authorities and were encouraged by the introduction of new powers in England and Wales afforded by recently enacted legislation<sup>4</sup>, which brought in tobacco retailing banning orders. As indicated in our submission on the Consultation on 'Strengthening Sanctions Against Retailers for Under-Age Sales of Tobacco Products', the TMA would also welcome any new initiatives by the DHSSPS and law enforcement agencies in Northern Ireland to crack down on the supply chain of illicit tobacco products which undermines both public health policy and the legitimate industry.

HM Revenue and Customs' revised estimates for 2008/2009 show that up to 17% of cigarettes and 53% of handrolling tobacco in the UK is smuggled<sup>5</sup>. 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 tobacco smuggling in Northern Ireland.

The TMA 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 Northern Ireland Executive to give due consideration to their views. The TMA notes the inclusion of a provision which prohibits the proxy purchase of tobacco products in the Tobacco and Primary Medical Services (Scotland) Act 2010.

**Q16: Do you think the intended effect of prohibiting the sale of tobacco products from vending machines will be achieved by the proposed regulations?**

No. As we made clear in our earlier submission to the DoH's FTC consultation (Annex A), the TMA firmly believes that access to cigarette vending machines should be strictly controlled to avoid under-aged access. We can see no proper justification, however, for denying adults access to such machines.

The draft Regulations, which will ban all vending machines, will have a catastrophic impact on the livelihood of the many people who work in the vending business, and its suppliers in Northern Ireland.

**Q18: Do you have any other comments on the proposed vending machine regulations?**

Prior to the last-minute amendment of s 22 of the Health Act 2009, the previous UK Government was proceeding on the basis that the appropriate course was to introduce regulations to restrict under-age access to (rather than ban) vending machines which it stated at the time, "would be effective, proportionate and deliverable in preventing under-age sales and balance the views of all concerned".<sup>6</sup>

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<sup>2</sup> See, for example, the Northern Ireland Better Regulation Strategy 2001, available at <http://www.detini.gov.uk/deti-better-regulation-index/better-regulation-strategy.htm>

<sup>3</sup> Statistics on Smoking, England 2007, NHS Information Centre, 28 September 2007

<sup>4</sup> The Regulatory Enforcement and Sanctions Act 2008 and the Criminal Justice and Immigration Act 2008

<sup>5</sup> Measuring Tax Gaps 2009, HM Revenue and Customs, March 2010 (Revised)

<sup>6</sup> The then Public Health Minister Gillian Merron MP, House of Commons, 12 October 2009.

The TMA understands that, in reliance on that previous position of the Government, many vending machine operators invested significant sums in the technology necessary to ensure effective safeguards against youth access to their machines. There are now around 800 vending machines with remote access already in place in pubs and clubs across the UK. The draft Regulations, if passed, will clearly be contrary to the legitimate expectations of machine operators, and will amount to a significant infringement of their property rights.

**Q19: Do you have any views or comments on the proposed timescale for introducing the new tobacco control regulations in respect of tobacco displays, price displays and advertising and display of tobacco products in specialist tobacconists, which it is intended will come into effect in Northern Ireland on 1 July 2011?**

As mentioned under question 1, on publishing the Act, the DoH stated that a display ban would be implemented "in large shops from 1 October 2011 and in small shops from 1 October 2013." This timetable is currently set to be followed in England and Wales as well as in Scotland under the Tobacco and Primary Medical Services (Scotland) Act 2010.

Notwithstanding its view that the display ban should not, as a matter of principle, be pursued in light of the lack of an evidence base, the TMA is concerned that the Northern Ireland Executive is proposing to accelerate this process, without an appropriate or adequate evidential justification, to the earlier implementation date of July 2011 for all shops.

The new UK Government is at present reviewing the regulations of the Health Act and considering its options. In its November 2010 White Paper, the UK Government expressed the uncertainty over the introduction of the display ban, by stating at paragraph 3.26: "We are also considering options for the display of tobacco in shops, recognising the need to take action both to reduce tobacco consumption and to reduce burdens on businesses. An announcement will follow shortly".

Given the state of uncertainty surrounding the Health Act's legislation, we believe it is in the interest of all parties for the UK Government to consider a proper review of the evidence and the alternative solutions for a display ban and therefore the Northern Ireland Executive should reconsider the implementation of the display ban regulations in Northern Ireland in July 2011.

**Q20: Do you have any views or comments on the proposed timescale for introducing regulations to prohibit the sale of tobacco products from vending machines, which it is intended will come into effect in Northern Ireland on 1 October 2011?**

As stated above, the TMA can see no proper justification for denying adults access to tobacco vending machines, provided such machines have strict controls to prevent under-age access. We therefore cannot accept that regulations should be introduced to prohibit the sale of tobacco products from such machines nor that such a prohibition should be introduced as soon as 1 October 2011.

**Q21: Do you have any views on the conclusions reached by the Department to screen out from further assessment the implications of the proposals and is there any other evidence which you consider should have been taken into account?**

We believe the impact assessment does not take into account key evidence:

- 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 6 of the 10 Canadian provinces that have implemented a display ban. In Nova Scotia and Prince Edward Island youth smoking

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<sup>7</sup> Public health white paper, DoH, 30 November 2010, p. 37

amongst 15-19 year olds stayed the same between 2008 and 2009 and in Quebec, Manitoba, New Brunswick and Newfoundland it increased over the same period<sup>9</sup>. In this regard, the TMA notes that there is, as yet, no reliable statistical data from the Republic of Ireland on which to undertake a meaningful evaluation of the effectiveness of the display ban which was implemented on 1 July 2009.<sup>9</sup>

- A 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 had dropped by nearly 25% whilst chain stores had grown by 12%. Tobacco smuggling had also increased since the display bans were introduced<sup>10</sup>. These unintended adverse consequences should be noted.

In conclusion, we urge the Northern Ireland Executive to reconsider its proposed regulations with a view to ensuring that any measures introduced in relation to tobacco display and vending will give due and proper regard to the rights and freedoms of the TMA member companies and the other stakeholders who may be affected.

*To sincerely,*  
*Christopher Ogden*

CHD Ogden  
Chief Executive

<sup>9</sup> Health Canada, Canadian Tobacco Use Monitoring Survey, 2010

<sup>9</sup> The TMA notes, without commenting on the reliability of the study, the conclusion of the recently published study, McNeill, A. et al. Evaluation of the Removal of Point of Sale Display in Ireland, Tobacco Control, 2010, e-published ahead of print, page 4, which found that the introduction of the display ban has had no significant change on adult smoking prevalence.

<sup>10</sup> CCSA 'State of the Industry' report 2009.