A response to the Oireachtas Joint Committee on Health and Children’s Consultation on Public Health (Standardised Packaging of Tobacco) Bill 2013

15 January 2014
1. Introduction

1.1 John Player, a part of the Imperial Tobacco Group, sells and markets tobacco products to the wholesale trade and to retailers who are registered with the Office of Tobacco Control in Ireland. The company currently employs 70 full-time staff and, in 2012, collected €488 million for the exchequer in duties and other taxes.

1.2 John Player holds a 21.4 per cent share of the legitimate tobacco market in Ireland. Our main brands include John Player Blue, Superkings, JPS, Golden Virginia, Drum and Rizla. We also distribute Marlboro cigarettes on behalf of Phillip Morris International.

1.3 Imperial Tobacco Group PLC ("ITG") is a FTSE top 25 company, the world’s fourth largest international - and second largest European - tobacco company. ITG has sales in over 160 countries worldwide and is the world leader in the premium cigar, fine-cut (roll-your-own) tobacco and rolling papers sectors.

2. Executive Summary

2.1 Tobacco is a legal product that is enjoyed by approximately 980,000 adults in Ireland according to the 2012 Eurobarometer (European Commission survey). This equates to 29 per cent of the adult population. This percentage of Irish adult smokers has remained largely consistent since 2006, despite Ireland having the most restrictive tobacco control regime in the 28 EU Member States. The EU average smoking rate has reduced over the same period.

2.2 Adults in Ireland make an informed choice to smoke for many and varied reasons. Those who chose to smoke, and to continue to smoke, do so despite the heavy tobacco control regulations in place in Ireland.

2.3 John Player supports the Health Minister's objective which is of stopping minors from smoking. However, there is no empirical evidence to support the contention that minors, or adults, take up smoking because of the colour or shape of the pack.

2.4 The Public Health (Standardised Packaging of Tobacco) Bill 2013 ("the Bill") fails to take into account the well-established research on the main reasons for smoking initiation by young people and the factors that influence quitters.

2.5 It is noteworthy that no Regulatory Impact Assessment ("RIA") has been conducted in advance of this Bill being published.

2.6 Germany, which permits prominent advertising and the open display of tobacco products in shops, and has no plans for standardised packaging, has significantly fewer young people taking up smoking than in Ireland, which has some of the most draconian anti-smoking laws in the world. Germany has a tobacco control strategy with education at its core, and it is delivering proven results.
2.7 John Player believes that the standardised packaging proposal in the Bill, if enacted, would lead to confusion in the Irish market and to increased criminal activities and smoking of illegally sold cigarettes.

2.8 In a market economy, the role of packaging is crucial for manufacturers of consumer goods such as cigarettes. Packaging contains and protects a product. It also provides information to consumers, including information required by law (for example, in the context of tobacco products, health warnings). The physical shape, colour and design of the package enable manufacturers to differentiate their product from their competitors’ products.

2.9 Packaging also gives reassurance to customers about the provenance, type and quality of the product.

2.10 The importance of intellectual property that is embodied in packaging cannot be overstated.¹

2.11 Standardised packaging would be illegal under national, European and International law and would put Ireland in the position of breaching important International Treaties, laws and Agreements.

2.12 John Player would be entitled to adequate compensation if the Bill was enacted, given that the company would be effectively deprived of the benefit of its trademarks.

2.13 Furthermore, the enforced removal of branding would increase demand for illicit products by making it easier for criminals to produce counterfeit products, and to sell both standardised and branded packaging products to minors and other smokers. This would lead to increased smoking among minors.

2.14 Standardised packaging of tobacco products would be a dangerous precedent, as it would severely curtail consumers’ ability to make a choice about which products they want to buy. It would be a precedent for similar restrictions on choice by consumers in other businesses and sectors in the fast moving consumer goods sector.

2.15 John Player believes the Bill to be misconceived as it would not reduce youth smoking.

2.16 In commenting on central aspects of the Bill below, John Player reserves its position on each and every aspect of the Bill.

¹ See generally, Packaging in a Market Economy, June 2012, Dobson and Yadav, 28 June 2012
3. Recommendations

3.1 The Minister has confirmed that a RIA in respect of the Bill has not been conducted\(^2\). This constitutes a breach of the Government’s Guidelines on Better Regulation\(^3\) which are not intended to be applied selectively. It is incumbent on the Department of Health to undertake a rigorous and comprehensive assessment of the impact of the existing tobacco control measures.

3.2 The Department of Health and Children (“the Department”) has not properly evaluated existing tobacco control measures in Ireland, including the recently introduced pictorial health warnings (“PHWs”), to evaluate their effectiveness in delivering the outcomes and benefits intended.

3.3 It is therefore impossible for the Department to assess whether further tobacco control measures would have an appreciable effect on improving public health over and above existing measures.

3.4 Before taking any further steps, Ireland should assess the impact of standardised packaging in Australia and objectively assess any robust and independent ‘real world’ data when it becomes available.

3.5 John Player understands that the Australian Health Authorities intend to conduct a study into the impact of standardised packaging in December 2014.

3.6 The Department should also reflect on its own advice of December 2010 when it advised the European Commission that it was in favour of standardised packaging but only if there was robust evidence and only if it was mandatory for all EU Member States.\(^4\) What has changed since then?

3.7 The Department should engage with their German counterparts - who have a significantly lower youth smoking rate than Ireland - to explore how they have successfully reduced youth smoking rates, and consider how such proven measures could be implemented successfully in Ireland.

\(^2\) Ministerial reply to PQ, 19\(^{th}\) December 2013
\(^3\) http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Better_Regulation_Website_Content.pdf
\(^4\) Irish Ministry of Health submission to the consultation on the possible revision of the EUTPD, December 2010
4. Heads of Bill

4.1 John Player believes that the measures in the Bill are, at minimum, premature, given the absence of evidence about the effects in practice of standardised packaging. It is also premature given that the proposed revised Tobacco Products Directive has not been passed yet and it is noteworthy that the proposed revised Directive does not include provisions for standardised packaging.

4.2 John Player comments below on a number of key points about the Bill and reserves its rights in relation to the totality of the Bill.

4.3 Purpose of Legislation (Head 3)

4.4 The Minister in his evidence to the Health Committee declared that his main objective is to prevent children from starting to smoke. This objective would not be realised by the proposed measures because the Bill does not address the reasons why people smoke or begin to smoke in the first place. Rather, the Bill would induce a range of unintended and unhelpful consequences such as allowing criminals to target minors by selling them increased amounts of illicit products without any regard for the law.

Lack of Evidence

4.5 Both the Systematic Review and the British Medical Journal July 2013 study do not provide any credible evidence to justify the introduction of standardised packaging.

4.6 In summary:

- The so-called systematic review is not independent. Its authors have well-established links with, and receive funding from, organisations that have been well known advocates of standardised packaging for many years;
- The review fails to show a causal link between tobacco packaging and smoking behaviour (including initiation, prevalence and consumption);
- The review does not demonstrate that standardised packaging is necessary to achieve the Government's public health objectives of affecting smoking behaviour;

4.7 The systematic review is peppered with very qualified language. For example, the conclusion reached was that "there was consistency in study findings regarding the potential impacts of plain packaging. This consistency of evidence can provide confidence about the observed potential effects of plain packaging. If and when introduced, existing evidence suggests that plain packaging represents an additional tobacco control measure that has the potential to contribute to reductions in the harm caused by tobacco smoking".

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5 Minister for Health evidence to Health Committee, December 2013
6 Plain tobacco packaging: A systematic review (Moodie et al, 2012)
7 Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study, July 2013
4.8 This, manifestly, does not amount to the standard of robust and compelling evidence that should be required to support the claim that standardised packaging would have an impact on smoking behaviour.

4.9 Subjective judgements about the "likely impact" will provide opinion, not evidence. It cannot properly form the basis for something as draconian and unprecedented as standardised packaging.

4.10 The study by Wakefield et al published in the British Medical Journal published on 22 July 2013 was a very early assessment of the effects of the introduction of standardised packaging in Australia at the end of 2012. The report of the study is heavily tentative and qualified, which is not surprising given the very short period since the measures were introduced and the present of confounding factors.

4.11 While the Government’s Explanatory Note accompanying the Bill states that “this is an evidence based public health measure”, the only empirical evidence that can be taken into account is that from Australia, where standardised packaging was introduced in October 2012. A comprehensive KPMG report published in October 2013 indicates that overall consumption has remained stable since standardised packaging was introduced. According to the same report, the market share of illicit products has significantly increased during this period. We understand that the Health Authorities in Australia plan to conduct research on the impact of standardised packaging in December 2014.

4.12 The reality is as follows:

• Young people do not decide to smoke on the basis of tobacco branding and packaging;
• Branding and packaging do not cause smoking initiation or relapse by quitters;\(^8\);\(^9\)
• People smoke because they choose to do so.

4.13 Branding enables manufacturers to compete for existing consumers and gives consumers the opportunity to choose between products of competing manufacturers. It provides necessary information to consumers, including information about the provenance of the cigarettes and their type and quality. Standardised packaging would not stop people from smoking.

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\(^9\) Tobacco packaging regulation: An international assessment of the intended and unintended consequences, Deloitte, May 2011
Unintended Consequences 1 – Increase in Illicit Market

4.14 It is likely that the introduction of standardised packaging would flood the Irish market with cheap illegal tobacco products and would benefit only organised criminals. It would, undoubtedly, make it cheaper and easier to produce counterfeit standardised tobacco packaging,\(^{10}\) which would increase profit margins for criminals, providing them with a powerful incentive to increase their supply of illicit products.

4.15 According to the standardised packing advocates’ own rudimentary surveys,\(^{11}\) branded illicit products would be preferable to consumers than unbranded legal products. Given this continued demand, standardised packaging would lead to an unfulfilled supply vacuum for branded products which criminals would supply, and the consequential development of even more market share under the control of organised crime. Importantly, the criminals will have no qualms about selling their products to minors.

4.16 Covert track and trace systems - often presented by the standardised packaging advocates as a solution to the impact that such packaging would have on illicit trade - are not an adequate solution because they are only used on genuine products and are not applied by the manufacturers of counterfeit products or illicit whites. Minister Noonan has also advised that a track and trace system would be unlikely to assist in tackling the problem of cigarette smuggling in Ireland.\(^{12}\)

4.17 Approximately 89 per cent of illegal tobacco seizures by Revenue in 2012 were illicit whites. These are genuine products that are legally manufactured by small producers in Asia, Eastern Europe, and the Middle East. They are often exclusively made for smuggling into high-tax countries and illegally sold in every Irish city and town for half the price of legal Irish duty paid tobacco products.

The Illicit trade has increased in Australia in the first six months since the introduction of standardised packaging according to a report prepared by KPMG.\(^{13}\)

Unintended Consequences 2 – Breaches national and EU law and International treaties

4.18 Standardised packaging would directly conflict with existing and harmonised national, European and International laws which protect, as a fundamental right, the enjoyment of property, including intellectual property.

4.19 An additional consequence would be to undermine the authority of the EU to defend and promote the protection of intellectual property, both within the EU and beyond.

\(^{10}\) Mike Ridgway, UK packaging manufacturers’ spokesman, July 2013
\(^{11}\) Irish Cancer Society plain packaging FAQs
\(^{12}\) Ministerial reply to PQ, 18 December 2013
\(^{13}\) KPMG report: Illicit Tobacco in Australia, October 2013
4.20 Standardised tobacco packaging would be contrary to:

- the right to property and other rights under Bunreacht na hÉireann;
- the right to the free movement of goods guaranteed by Article 34 of the Treaty on the Functioning of the European Union (“TFEU”) as the proposed measures are not appropriate or necessary to achieve the objectives being pursued, and would be disproportionate;
- fundamental human rights guaranteed by the Charter of Fundamental Rights of the EU and Irish and EU Trade Mark law.

Standardised tobacco packaging would also breach Ireland’s obligations under International treaties and stipulated by the World Trade Organisation of which Ireland is a member state, including:

- the Agreement on Trade Related Aspects of Intellectual Property;
- the Paris Convention for the Protection of Industrial Property; and
- the Technical Barriers to Trade Agreement.

The deprivation of property rights would require the payment of compensation reflecting the value of John Player’s intellectual property. The Irish Government would also face the possibility of enforcement action at an EU and International level.

The European context and International context

4.21 The EU reached political agreement on a revised Tobacco Products Directive (“EUTPD”) in December 2013.

In its own submission to the European Commission’s consultation on a draft Tobacco Directive in December 2010,² the Department of Health stated that while it was in favour of standardised packaging, it should only be introduced if it was mandatory for all Member States. It is not clear what new evidence has emerged to warrant a solo introduction by Ireland in the EU of standardised packaging.

4.22 The incongruity of introducing standardised packaging in Ireland when not applied across the EU is highlighted by the fact that the proposed legislation if enacted would not apply to approximately one third of the tobacco market in Ireland which is the non-Irish duty paid channel for travellers to and from Ireland.

4.23 Standardised packaging legislation was introduced in Australia in 2012. This legislation has been challenged in the national courts. Actions against Australia have been brought before the World Trade Organization’s Dispute
Settlement Body by Ukraine, Honduras, Cuba, the Dominican Republic and Indonesia. A major tobacco company has also separately brought international arbitration proceedings against the Australian government claiming billions in damages.

Irrespective of the outcome of these challenges, the applicable legal frameworks in Ireland and Australia are different. Specifically, the provisions of the Irish Constitution in relation to the protection of intellectual property rights differ in material respects from the equivalent provisions of the Australian Constitution.

4.24 Application of the Act (Head 4)

Revenue figures suggest that 20 per cent of all cigarettes consumed in Ireland in 2012 were non-duty paid. Revenue do not measure non-duty paid roll-your-own tobacco.

Industry estimates of the non-duty paid market, which include roll-your-own tobacco, are closer to 28 per cent.

4.25 Taking 24 per cent as a mean average, standardised packaging would not apply to approximately one third of the Irish tobacco market as many Irish smokers, who do so already, would continue to source genuine and/or illicit branded packs from other EU countries or from illicit channels.

4.26 Offences (Head 13)

The offences listed in Subhead (1), (2), (8) and (9) would not apply to approximately one third of the tobacco market in Ireland i.e. the non-Irish duty paid channel.

4.27 We note that Subheads (3) and (10) acknowledge that many Irish consumers can bypass the proposed domestic standardised packaging laws and would continue to purchase tobacco products for consumption in Ireland from other EU countries and from the illicit market.

4.28 Subhead (5) appears to be pointless as branded cigarette cases or covers that are manufactured in other jurisdictions can be freely purchased by Irish consumers from the internet and/or when they are abroad.

4.29 Subsection (12) is a draconian sanction and differs substantially from the maximum 3 month suspension from the Register that applies to other offences under the Public Health Tobacco Acts.

4.30 Trade Marks Act 1996 (Head 15)

4.31 The proposed severe limitations on the use of tobacco companies’ trademarks, if enacted, would deprive John Player (and Imperial Tobacco) of the effective use of their trademarks to differentiate their products.

\[14\] Revenue Cigarette Consumption Survey 2012
4.32 Also, the proposed permitted display of the manufacturer’s name and brand variant on the package would be so minimal as to deprive consumers of adequate notice of the provenance, type and quality of the brand.

The proposed provision in the Bill that non-use of the trademarks as a result of the proposed legislation would not leave the trade mark holder open to a process of revocation by other entities would be of little practical value to the trade mark holder. This is because the enforced non-use of the trademark would fundamentally undermine its value and use.

4.33 **Short Title & Commencement (Head 16)**

4.34 It should be noted that John Player has not received any communication from the Department of Health on its plans to introduce standardised packaging for tobacco products in Ireland, including any transitional time line.

5. **Declaration of Interest**

John Player/Imperial Tobacco have a commercial interest in the manufacture and supply of legitimate tobacco products to the Irish market.