



# Consultation

Standardised packaging of tobacco products

## A response from the British Brands Group

- 1 The British Brands Group welcomes the opportunity to respond to the Department of Health's consultation on standardised packaging of tobacco products.
- 2 The British Brands Group is a trade association that provides the collective voice for brand manufacturers (a list of members is available on request). It is a cross-sectoral organisation and members include tobacco companies. Our response is confined to the implications for branding in the UK generally and is made at the request of the full membership. Our goal is for policy to be well-informed, evidence-based, proportionate and focused on its stated objectives.
- 3 The Group has commissioned significant studies over the years on the contribution of brands to the economy, society and consumers, how consumers respond to packaging and the consumer, competition and economic importance of packaging. This knowledge is reflected in this response, with links provided to relevant studies. All the information is freely available on our website ([www.britishbrandsgroup.org.uk](http://www.britishbrandsgroup.org.uk)).

4 **1 Which option do you favour?**

In the context of the policy objectives laid out in paragraph 3.1 of the consultation document, we have seen no convincing evidence that standardised packaging will deliver on any of the four policy goals. On the contrary, it risks wider and significantly damaging consequences.

We therefore strongly recommend the 'do nothing' option in relation to tobacco packaging.

5 **2 If standardised packaging were to be introduced, would you agree with the approach set out in paragraphs 4.6 and 4.7 of the consultation?**

The approach in paragraph 4.6 certainly represents a substantially standardised approach. However we do not consider that standardised packaging should be introduced unless there is clear evidence that it will meet the policy objectives and no other measure would achieve those objectives to the same or greater extent and in a more proportionate way.

In relation to paragraph 4.7, were brand imagery to be so influential in encouraging the take-up of smoking, preventing those who have given up from resuming and causing harm from second-hand smoke (and we do not believe it is influential), then it seems inconsistent to permit those in the trade to be exposed to such influences but not the general public. This inconsistency leads us not to agree with the approach.

6 **3 Do you believe that standardised tobacco packaging would contribute to improving public health over and above existing tobacco control measures by one or more of the following:**

• **Discouraging young people from taking up smoking**

We do not believe standardised packaging will discourage young people from taking up smoking.

We are not aware of any product category in any market where differentiated packaging designs prompt the purchase and use of a product.

There is extensive evidence on why young people take up smoking but we are not aware of any that include differentiated packaging or brand imagery alone as a reason, let alone a significant one.

7 • **Encouraging people to give up smoking**

We believe that standardised packaging will have no significant incremental effect over differentiated packaging with respect to people's ability to give up.

Once the tobacco display ban is in place, pack designs (whether differentiated or standardised) will have no influence on individuals at point of sale. Any influence will only be exerted post purchase and we expect the relative influence to be minimal.

Differentiated packs signal individual tobacco products and also signal tobacco generically. Standardised packaging will continue to signal tobacco, arguably more powerfully as it will be essentially consistent across the category. Such generic signals would therefore continue to operate. We explore this further later.

Separately, research has indicated that standardised pack designs studied are less attractive and less preferred than differentiated designs. This is a relative assessment that would not apply were standardised packaging introduced as there would be no alternatives. The 'attractiveness' of standardised packs will be driven primarily by an individual's attitude to the product. The comparative analysis in the studies is not evidence that standardised packs would help people give up.

8 • **Discouraging people who have quit or are trying to quit smoking from relapsing**

We have seen no evidence that standardised packaging will have an incremental effect over differentiated packaging on relapse rates, for the same reasons as given above. Standardised packaging will signal to individuals that the product inside the pack is a tobacco product, in much the same way as differentiated designs do. The only difference will be that it will be much harder to distinguish between varieties.

We suspect that, of all the forces at work that may encourage or discourage people from using a particular product, the clear signalling of choices and differentiated pack designs will be of limited effect.

9 • **Reducing people’s exposure to smoke from tobacco products**

We cannot envisage any circumstance where pack design, either differentiated or standardised, will have an effect on people’s exposure to the second-hand effects of any product.

- 10 Prior to moving on to the next question, we wish to re-emphasise the lack of evidence on the possible impact of standardised packaging. In Australia, the previous Australian Minister for Health, Nicola Roxon, conceded that plain packaging will “probably not” help current smokers quit, and admitted that using it to discourage people from starting is an “experiment”. This was reported in the press:

Some members of the WTO argued that Australia had not provided adequate scientific evidence linking tobacco plain packaging to a decrease in tobacco consumption.

That is, they questioned the ability of the legislation to achieve its objectives.

Roxon has to date chosen to ignore the concerns expressed by these member nations, although she conceded last month that there was no proof plain cigarette packaging would cut smoking rates. ([The Australian](#), 29 July 2011)

In the UK, the previous Government stated:

Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need strong and convincing evidence of the benefits to health, as well as its workability, before this could be promoted and accepted at an international level - especially as no country in the world has introduced plain packaging. (Gillian Merron, Minister of State (Public Health), [House of Commons Public Bill Committee](#), 25 June 2009 )

That such strong and convincing evidence continues to be elusive is indicated by the Department’s written response to the Health Committee in relation to its inquiry into the Government’s alcohol strategy:

Plain packaging is not an intervention widely used for alcohol and we are not aware of any research on this. ([Written evidence](#) from the Department of Health, May 20120)

It is implausible that differentiated packaging will have one effect in one category of consumer products (in terms of prompting purchase and consumption) but a completely different effect in another category, irrespective of differences between the products.

- 11 **4 Do you believe that standardised packaging of tobacco products has the potential to:**

• **Reduce the appeal of tobacco products to consumers?**

Branding differentiates one offer from another and is integral to vigorous competition between rivals. In the tobacco sector, brand-building by companies is already severely limited, with no advertising, sponsorship, public relations, promotion or point-of-sale display available.

Pack designs are predominantly brand signallers and may well also be brand builders. At issue however is whether they may also be category builders (i.e. increasing the consumption of products overall as opposed to increasing consumption of one variety at the expense of another). We do not believe that pack graphics alone have the power to grow categories and can think of no instance where they have done so.

As we have discussed above, research indicates that some standardised packaging designs are less appealing than branded designs. This is also evidence that people see the world relatively, comparing one situation with another and making choices accordingly ([Accountability is not enough](#), 2012 Brands Lecture, pages 7-8). This research however does not evidence that standardised packaging would reduce the appeal of tobacco products, just that the standardised packaging tested is less appealing than differentiated packaging. Under the proposed scheme there would be no differentiated packaging, no comparison and no alternative. Standardised packaging would most likely be appealing or unappealing depending on an individual's preference for the product.

For these reasons we have not seen convincing evidence that standardised pack designs will reduce the appeal of tobacco products.

12 • **Increase the effectiveness of health warnings on the packaging of tobacco products**

It is likely that, by removing distinctive elements from tobacco packaging, health warnings will become more prominent. However this is not to say that the warnings will become more effective at influencing behaviour in the intended manner.

In order for the health warnings to influence individual behaviour, the following conditions would need to apply:

- individuals would need to read the warnings;
- the warnings would need to influence individuals' attitudes; and
- individuals' attitudes would need to influence their behaviour.

We are not aware of evidence that any of these conditions would be more applicable were the health warnings to be more prominent.

There is however the potential for the increased prominence of health warnings to have unintended consequences counter to the policy goal. It is likely that, through the well-established process of "associative learning", a link between two (or more) stimuli is formed, with individuals using warnings as a distinctive cue for tobacco generally, a cue to the category. Thus standardisation is likely to inhibit people's ability to distinguish between brands but not affect the recognisability of the category as a whole.

While the consultation does not address any proposal to increase the size of health warnings specifically, we wish to state that such a measure may amount to a significant move towards standardisation, reducing the ability to differentiate between products. This would generate the same concerns expressed in this response about vigorous competition and incentives to invest in quality, R&D, innovation and reputation.

13 • **Reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking**

There is already UK legislation that makes misleading packaging unlawful. The Consumer Protection from Unfair Trading Regulations (CPRs) state:

**Misleading actions**

5.—(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

- (2) A commercial practice satisfies the conditions of this paragraph—
- (a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and
- (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise. ....
- (4) The matters referred to in paragraph (2)(a) are—
- (a) the existence or nature of the product;
- (b) the main characteristics of the product (as defined in paragraph 5); .....
- (k) the consumer's rights or **the risks he may face**.
- (5) In paragraph (4)(b), the “main characteristics of the product” include—
- .....
- (c) **risks of the product**; ....
- (q) **results to be expected from use of the product**; [Emphasis added]

We do not consider that standardised packaging provides any greater protection of consumers against being misled than the provisions of the CPRs.

14 • **Affect the tobacco-related attitudes, beliefs, intentions and behaviours of children and young people**

It is probable that standardised packaging will affect the attitudes, beliefs, intentions and behaviours of children and young people but it is currently impossible to predict how. It can be anticipated that the tobacco category will be perceived as a largely homogenous, commoditised market with a single form of distinctive packaging, as opposed to the usual differentiated market. It is unknown whether and to what extent such characteristics would affect attitudes, beliefs, intentions and behaviours relating to the product itself.

The category is also likely to be seen as one with a high and intrusive level of regulation which may reinforce perceived qualities of edginess, non-conformity and / or rebelliousness. This would give strength to forces already at play:

Smoking thus arises out of the process of at least partially self-defined and initiated social exclusion. As Connop and King observe, ‘Smoking’s negatively charged public image’ is in part precisely what attracts these youths to it, a fact that suggests that the widely advocated policy of denormalisation could have significant counterproductive consequences in terms of young smoker reactance. (Erik Bloomquist, “ [Global tobacco : The Plain Risk to Global Tobacco](#) ”, Berenberg Bank, 2011)

While ‘branding’ is a range of techniques deployed by companies to differentiate, build reputation and create loyalty, the ‘brand’ itself – the end result – rests in the minds of individuals and is formed by a wide range of influences and experiences over an individual’s lifetime, many out of the control of the company ( [Posh Spice and Persil](#), 2001 Brands Lecture). As discussed above, in the tobacco sector, the scope for companies to build brands is already severely limited. It would be naïve however to think that standardised packaging would kill brands. It is not an option to brainwash the population! Brands would continue to be created and to develop, shaped predominantly by individuals using such mechanisms as word-of-mouth and the range of digital

communication now available to them. Brand building may be less efficient and quite possibly more unpredictable and less accurate but it would still occur.

15 **5 Do you believe that requiring standardised tobacco packaging would have trade or competition implications?**

*Trade implications*

Were differentiated packaging to have the consumer appeal that underpins the premise for standardised packaging (which we don't believe it has), then there are likely to be trade implications, particularly were the UK the only EU country to introduce standardised packaging.

The presumed appeal of differentiated packaging would create demand for parallel-traded products between the continental EU and the UK, with the market favouring differentiated packs because of their (alleged) stronger appeal than standardised packs. As differentiated packs would not comply with UK law, traders would tend to use unregulated distribution channels such as the car boot where age controls would not apply, circumventing Government attempts to prevent access of young people to tobacco products, counter to the policy objective.

Any increase in illicit trade would place additional pressure on already over-stretched enforcement bodies, increasing costs at a time when cost reductions are required or reducing the efficacy of enforcement.

16 *Competition implications*

Standardised packaging would represent a unique, fundamental and substantial shift from a differentiated marketplace in which competitors are able to reap returns from investments in quality, innovation and reputation to a commoditised, generic marketplace with competition focused predominantly on price.

This is likely to be the most far-reaching effect of a standardised packaging policy, with disadvantages to individuals, society, companies and the economy. The downsides of such a shift are likely to outweigh significantly any possible advantages. Investments in quality, innovation and reputation will be dis-incentivised as any consequent benefit to consumers could not be communicated.

Meanwhile, the shift to predominantly price competition would most likely give rise to the introduction of 'price fighting' products, leading to more lower-priced products in the market which in turn may encourage people to smoke and / or smoke more, at odds with the policy objective of standardised packaging.

Standardised packaging would raise barriers to entry to new market entrants seeking to compete on any basis other than price, as any other proposition would be incapable of efficient and effective communication. This would deprive consumers of choice and inhibit the development of new, better and / or less harmful products.

17 **6 Do you believe that requiring standardised tobacco packaging would have legal implications?**

The experience of Australia, which is in the process of introducing standardised packaging, suggests that such a measure would have legal implications, potentially provoking challenges on a number of fronts.

Of most relevance in the context of branding and standardised packaging are intellectual property rights (IPRs), with a pack comprising a range of such rights including trade marks, design rights, patents and unregistered rights including copyright.

Millions have already been invested over many years by legitimate tobacco manufacturers in reputation through quality and differentiated market positioning. This investment is underpinned by – and encapsulated in – IPRs, making these potentially the most valuable of corporate assets. These IPRs are granted by the state and protected by international agreements, notably TRIPs. Interference with or the removal of such rights may breach international agreements and obligations, be open to challenge and may have wide consequences:

The issues surrounding “plain packaging” are controversial. There are compelling arguments that such laws would offend international laws, in particular the Paris Convention and the TRIPS Agreement. These are arguments that are likely to be aired sometime soon – whether in Australia or the United Kingdom, and whether domestically or before a WTO Panel. The outcome of the debate, however, will extend far beyond the tobacco industry as it will lead to authoritative interpretations of numerous provisions in intellectual property treaties; accordingly, what is decided may fundamentally affect the future of trade mark law. (Trade marks without a brand: the proposals on “plain packaging” of tobacco Products, Phillip Johnson, EIPR, 2012)

Were IPRs to be withdrawn by the state, the prospect of compensation to IPRs holders may also arise.

In addition, there may be implications under the Human Rights Convention, as highlighted by Christopher Morcom QC:

[There] is the possibility that similar legislation in the UK might be contrary to the Human Rights Convention, as incorporated into UK Law. The basis for the argument is that trade marks are rights of property, which are recognised under Article 1 of the First Protocol of the Convention. ([IPKat](#), 29 July 2011)

18 **7 Do you believe that requiring standardised tobacco packaging would have costs or benefits for manufacturers, including tobacco and packaging manufacturers?**

We believe manufacturers to be best placed to address this question in terms of specific costs.

Suffice it to say, tobacco is primarily a branded sector with the brand representing a significant proportion of each affected company’s market value. For example, a 2012 league table of the world’s most valuable brands ranked the Marlboro brand seventh in the world at \$73,612 million ([Brandz Top 100 Most Valuable Global Brands](#), 2012) while a Brand Finance report valued the UK’s Pall Mall brand at \$3,087 million, 24% of its enterprise value ([Brand Finance Global 500](#), 2012). These values have been attained through significant investment over many, many years.

The goodwill attached to each branded product is communicated to – and recognised by – consumers via trade marks and other distinctive elements used on pack. Depriving tobacco companies of their ability to differentiate and signal their products represents a huge cost to them.

19 **8 Do you believe that requiring standardised tobacco packaging would have costs or benefits for retailers?**

We do not perceive any benefits for retailers arising from standardised packaging. We do however foresee a significant increase in search costs for retailers (and consumers). These are most likely to be in areas of 'cost-to-serve' (it being far more time consuming to identify products in standardised packaging in comparison to differentiated packaging), transactional errors (there are likely to be many more errors with standardised packaging) and consumer dissatisfaction (necessitating more time spent with customers), leading to loss of reputation.

20 **9 Do you believe that requiring standardised tobacco packaging would increase the supply of, or demand for, illicit tobacco or non-duty-paid tobacco in the United Kingdom?**

*Parallel trade*

We have expressed the view above that parallel trade will increase if differentiated packaging has the strong appeal on which the standardised packaging proposal is premised, particularly so if the UK is the only EU country to introduce the measure. We believe this situation will also apply in relation to grey trade (i.e. the importation of tobacco products from outside the EEA).

21 *Counterfeiting*

We refer to submissions from the Anti-Counterfeiting Group and others which have specialist knowledge in this area for a detailed response.

In brief, we consider that standardised packaging would likely increase the *supply* of counterfeit tobacco products, and this may in turn have a knock-on effect on *demand* where people have access to more, cheaper tobacco products, albeit of poor quality.

Any increase in fakes would pose a significant threat to the Government's tobacco strategy. Fakes are more likely to be distributed through illicit supply chains, circumventing age controls and making (low quality) tobacco products available to young people, contrary to the policy goal.

22 **10 People travelling from abroad may bring tobacco bought in another country back into the United Kingdom for their own consumption, subject to United Kingdom customs regulations. This is known as 'cross-border shopping'. Do you believe that requiring standardised tobacco packaging would have an impact on cross-border shopping?**

Our comments on parallel trade also apply in the case of cross-border shopping. Were differentiated packaging to have the strong appeal on which standardised packaging proposals are premised, then it is logical to expect people to express a strong preference for differentiated packs in their buying behaviour.

23 **11 Do you believe that requiring standardised tobacco packaging would have any other unintended consequences?**

Were the UK to introduce standardised packaging without strong evidence for doing so and without a high degree of certainty that it would achieve the policy goals sought, and were the UK to withdraw previously-granted IPRs (which it must do for the policy to have

effect), it would send a strong negative signal to both domestic and international business. It would provide evidence that the Government is willing to confiscate IPRs and interfere in the fundamental functioning of the free market on spurious grounds. It would be a wholly hostile message to business, potentially damaging inward business investment, investments in innovation, quality and reputation and the UK's own reputation and "brand" at home and abroad.

24 **12 Do you believe that requiring standardised tobacco packaging should apply to cigarettes only, or to cigarettes and hand-rolling tobacco?**

We do not believe standardised packaging will achieve the desired goals, whether in relation to cigarettes or hand-rolling tobacco.

25 **13 Do you believe that requiring standardised packaging would contribute to reducing health inequalities and/or help us fulfil our duties under the Equality Act 2010?**

How we as individuals respond to packaging designs, build brands in our minds and develop mental shortcuts and signals to guide us through the complexities of life are elemental human functions common to everyone. We do not envisage that standardised packaging will have a different effect on one group of individuals as opposed to another.

26 **14 Please provide any comments you have on the consultation-stage impact assessment. Also, please see the specific impact assessment questions at Appendix B of this consultation document and provide further information and evidence to answer these questions if you can.**

The impact assessment questions are aimed primarily at the manufacturing and retailing industries and we consider them best placed to answer them.

27 **15 Please include any further comments on tobacco packaging that you wish to bring to our attention. We also welcome any further evidence about tobacco packaging that you believe to be helpful.**

We accompany this submission with our recently published report "[Unwrapped. The hidden power of packaging](#)". We also attach a report "[Packaging in a market economy. The economic and commercial role of packaging communication](#)" by Norwich Business School which underlines the significance of packaging to consumers, competition and the economy. Standardised packaging would fundamentally and negatively affect many of the functions outlined in this report.

28 We consider standardised packaging to represent a policy move diametrically opposed to mainstream Government policies, leading to less informed, empowered consumers, less competition, less innovation, reduced or no growth and markets that work less well, with the burden on enforcement authorities becoming heavier rather than lighter.

J A Noble

30<sup>th</sup> July 2012