



The Anti-Counterfeiting Group
Campaigning Against the Trade in Fakes
www.a-cg.org



A joint response

Consultation on the future of tobacco control

- 1 The Anti-Counterfeiting Group (ACG) and the British Brands Group welcome the opportunity to respond to the Department of Health (DH) on its consultation on the future of tobacco control.
- 2 ACG is a trade association formed in 1980 to represent brand owners suffering attacks from counterfeiting, which now affects practically every product on the market, from household goods to clothing, car parts to pharmaceuticals. Members include many prominent manufacturers, specialist legal advisers and brand protection / investigation companies.

The British Brands Group is a trade body that provides the collective voice for brand manufacturers operating in the UK. Members range in size and supply a variety of branded products including food, drink, household, toiletry, pharmaceutical, DIY, clothing and sports goods.

- 3 Our joint response to the consultation concentrates on only one aspect, the **plain packaging of tobacco products**, which is being considered as one initiative to reduce the uptake of smoking, particularly among children and young people (para 3.63). This we believe represents both an invitation to counterfeiting and a potential and significant restriction on branding in the UK and branding's ability to contribute to consumers and the economy.
- 4 As the ACG focuses on criminal trade mark infringement as it affects all industry sectors and the British Brands Group is also cross sectoral, focusing on branding, we do not seek to comment on tobacco products specifically or the steps that the UK Government should or should not be taking to regulate the tobacco market. However, while we note the DH's statement that no specific plan for plain packaging is being considered and indeed the consultation includes little on what plain packaging entails, we consider it possible that such a proposal may gather momentum, not just as a means of regulating tobacco but also other sectors subject to high levels of regulation. It therefore represents a potential "thin end of the wedge" and we feel we must respond, calling for the development of policy in this area to be informed, proportional and evidence-based.
- 5 In **summary**, we see responsible brand communication on pack as providing a number of positive contributions, all of which need to be considered when seeking policy solutions to specific problems. While brand imagery of course promotes, it also informs, reassures, aids recognition and safeguards. These functions are important to consumers, manufacturers, distributors, vigorous competition and the effective, efficient

working of markets. Where such imagery performs a promotional role, it must be understood whether – and the extent to which – the promotion is of one product over another or the promotion of product consumption (we suspect the former predominates). We are struck by the shortage of evidence to inform policy in relation to tobacco products and that a significant new policy initiative – graphic picture warnings on pack – has yet to be introduced, let alone evaluated. Finally, we are concerned that packaging regulation may be used to try to achieve policy goals – in this and other sectors – where the tool is ill-suited to the task.

- 6 **Branding**, we submit, helps markets work well. It does so in a variety of ways including the provision of choice to consumers, ever-improving performance, a high level of consumer protection and enhanced competition. The features of branding that help deliver these benefits include distinctiveness (the ability to differentiate one offer from another), consistent delivery of the brand's promise, a guarantee of quality, continuous innovation and a high dependence on building reputation. As a product's rapport with consumers strengthens over time, so its brand equity grows.
- 7 The value that rests in brand equity is substantial. Branding provides companies with an assurance of future cash flow through more loyal consumers, assists the efficient and effective commercialising of innovation and yields higher returns through the added value provided. Over 40% of a company's market value may be attributed to its brands (for example, in the case of Nike it is 84%¹) and the value of the world's top 250 branded companies has been estimated at \$2.2 trillion¹. That such value arises from companies' disciplined focus on consumers, investment, innovation effort and concern for reputation contributes to branding as a positive force with many winners.
- 8 Wherever value is created, it is open to exploitation by others, often illegally. The World Customs Organisation put the annual value of fake goods worldwide at \$705 billion in 2006. European figures overall suggest that the worldwide trade in all types of fakes – including via the Internet – costs the global economy at least US\$1000 billion per year. Without doubt, fake cigarettes pose a huge challenge to law enforcement coupled with the problem of smuggled genuine products, evading millions in duty each year. 35% of EU Customs seizures recorded last year were of fake or illegally smuggled cigarettes. Removing one of the main aids to brand protection (packaging and associated identifiers) will at a stroke increase the challenge of detection exponentially and expose consumers to increased risk from potentially dangerous fakes.
- 9 For many products, **packaging** is a powerful force in building brand equity, with the distinctive packaging of products such as "Marmite" spread, "Coca-Cola" drinks, the "Mars" bar and "Toblerone" chocolate being strong examples. A range of packaging features, including shape, colours, names, designs, labels and typefaces, all play their part in distinguishing one product from another and communicating their unique stories. Good packaging informs consumers and reduces their search costs. To remove this means of establishing and maintaining a product's identity would open the floodgates to imitators and expose consumers to unacceptable levels of additional risk – both to their health and of economic loss – if fake versions of the product can be completely indistinguishable from the genuine item (see below).

¹ Source: Brand Finance

- 10 The key functions of pack design can be summarised as:

providing information – on the characteristics of the product, including its quality, heritage and brand “personality”;

aiding recognition – allowing consumers to distinguish one product from another, different product variants and different products from the same stable;

increasing attractiveness and appeal of one product over another – presenting the product in the most positive light, differentiating it from others and enhancing its competitiveness;

providing protection - modern packaging incorporates holograms, invisible markings and other devices which provide protection for the product against illegal dealings of all kinds.

These functions allow consumers to identify quickly (often in 2 seconds or less) whether a product is or is not for them, inhibit confusion and mistaken purchases, and aid product switching. They help consumers make informed, safe purchasing decisions and thereby help markets work well. They also perform these functions to some extent throughout the life of the product, and not just at point-of-sale.

- 11 Under **plain packaging proposals**, as we understand them, the intention is to remove all distinctive colours, shapes, logos, designs, typeface and any other brand imagery from packaging, leaving the brand name (or word trade mark), generically depicted, as the only distinguishing feature. Under such proposals all products would look essentially similar and undifferentiated with the result that consumers would find it much more difficult to distinguish between products and companies would find it much more difficult to maintain their brands. This would have negative ramifications for consumers, manufacturers, retailers and the market, irrespective of the product category or sector in which they were implemented.

- 12 We consider these ramifications to be as follows:

For consumers:

- less available information, making it harder to identify quality differences and to make an informed buying decision;
- harder to distinguish between products, making it more difficult and complex to exercise choice;
- higher risk of a mistaken purchase (whether of the wrong variant or product);
- more susceptible to products of inferior quality and counterfeits.

- 13 **For manufacturers:**

- more difficult to distinguish their products and set them apart from competitors, making it harder to add and earn a return from consumer value;
- more difficult to explain their products’ qualities and values to potential new consumers and product switchers;
- more difficult to launch new products and product variants / improvements involving investment in quality, innovation and sustainability as such investment would be difficult to recoup;

- diminished competitive advantage;
- more difficult to prevent free-riding, with products looking alike and harder to add “personality” (which is hard to copy);
- reduced negotiating leverage with wholesale and retail customers;
- a greater emphasis on price-based competition (as opposed to competition based on price and quality);
- increased costs and supply chain complexity as special UK packs would be required were the UK to impose plain packaging unilaterally;
- a greatly increased threat of counterfeiting, diluting their market and affecting profitability, jobs and investment.

14 **For retailers:**

- more dissatisfied shoppers, due to increased complexity of consumer decision making and likelihood of mistakes;
- more difficult to differentiate from other retailers’ offers.

15 **For the market:**

- reduced competition, as players are less able to differentiate and compete on quality attributes, resulting in “market fortification” and stable market shares for incumbent players;
- higher barriers to entry for new producers and new products seeking to compete on quality (although barriers are arguably reduced for those competing on price and/or lower quality);
- a potential barrier to the free movement of goods in the internal market, were special packaging required for the UK market;
- a more conducive environment for free riders and counterfeiters, as competitors’ packaging will be easier to replicate and consumers will be less able to distinguish;
- a potential increase in illicit parallel trade from other European markets were packaging in other countries more consumer-friendly, with significant excise duty and VAT implications where these apply.

16 **For enforcement authorities:**

- greater difficulty for Trading Standards Officers, Customs and Police in identifying legitimate products and distinguishing them from counterfeits, with implications for health and safety and their ability to crack down on the illegal trade.

17 It is notable that proposals for plain packaging would push the affected market in the opposite direction to that to which the UK Government currently aspires – helping consumers make informed purchasing decisions, providing high levels of consumer protection, empowering consumers, promoting innovation and promoting competitive markets. It is also likely to increase rather than decrease the burden on already over-stretched enforcement organisations.

- 18 While we wish to focus on the general implications of plain packaging in a market, rather than specifically for tobacco products, we do have some observations on the statements and evidence included in the paper “**Consultation on the future of tobacco control**”.
- we note that plain packaging is linked to the objective of reducing the uptake of smoking amongst children and young people. However the motivations given for smoking uptake are being “cool” and to “fit in”, rather than brand imagery on packaging (para 3.66), suggesting the problem and the solution are disconnected. It may well be that pack imagery, in so far as it performs a promotional role, promotes a particular tobacco product over another, rather than the uptake of smoking or smoking *per se*, in which case the solution may be particularly ill considered;
 - the Canadian research quoted identifies views of 14-17 year olds. Such views however are not necessarily a strong indicator of actual behaviour. It is only through monitoring consumers in test markets that behaviour can be assessed and predicted, and the potential achievement of policy objectives evaluated;
 - while it is stated that studies show plain packaging reduces the appeal of tobacco products, the extent of any reduction is not indicated. Is it or is it not significant? One might expect the presence of powerful health warnings on a significant part of the pack (plus the new, shocking, graphic pictures that will soon also feature on pack) to reduce the appeal function of brand imagery while leaving other functions of such imagery still able to function;
 - teenage smokers may well consider that plain packaged tobacco products look cheap (para 3.68), though presumably this is in comparison with packaging carrying brand imagery. This is not evidence that, were *all* tobacco products in plain packaging, *all* such products would be considered cheap. Consumers may well find other, albeit less efficient, means of identifying quality differences;
 - We understand the need to increase the salience of health warnings (para 3.69). However it should not be assumed that salience increases with size. Consumer behavioural and attitudinal research is required to determine the optimum approach to such warnings;
 - Brand imagery on pack functions throughout the life of the product and not just at point of sale. We consider it flawed to suggest that switching decisions – and the differentiation function of brand imagery on pack – only takes place at point of sale (para 3.78). Dissatisfaction with a product and/or preference for a different or new product may arise at any time, prompted by a range of factors including experience, trial and word of mouth. Brand imagery on pack helps consumers make reliable connections, for example between a product purchased and a product experienced or recommended at an earlier date.
- 19 These observations help to illustrate our concern that policymaking in the area of plain packaging has yet to be supported by robust evidence. Our concerns deepen when we see it acknowledged that research evidence in relation to tobacco products is speculative but that “the assumption is that changes in packaging will lead to changes in behaviour” (para 3.75). New policies must be based on robust evidence so that any potential change in behaviour can be predicted with some certainty and gauged against the policy objective.

- 20 In **conclusion**, we see the DH's suggestion for plain packaging of tobacco products to be a move in the opposite direction to other Government policies, leading to less informed, empowered consumers, less competition and markets that work less well, with the burden on enforcement authorities becoming heavier not lighter. At the same time we see no assurance that the stated policy objective will be achieved.
- 21 In seeking to de-normalise the tobacco market in this way, it risks making the market less efficient. Current problems in the market, such as high levels of parallel traded and counterfeit products, are likely to be exacerbated rather than eased by the measure.
- 22 We urge the DH to seek robust evidence that plain packaging will indeed deliver its policy objective. We suspect that the *promotional* function of brand imagery on packaging is being exaggerated. We believe there may be confusion over just what is being promoted (consumption or one product over another?) and that the impact of large health warnings is being ignored. In particular, the impact of graphic and shocking picture warnings due to feature on-pack later this year has yet to be assessed. We consider it reasonable to expect their effect to be fully researched and evaluated before any further regulation of packaging is considered.
- 23 Finally, we urge that the other functions of brand imagery on pack are given due weight and the implications of their removal assessed, as we foresee real dangers for consumers, competition and the efficient working of the market were these functions to be lost.
- 24 As we hope we have shown, responsible use of brand imagery on packaging plays a significant and positive role while inbuilt security devices in packaging provide positive protection against counterfeiting. We foresee significant risks were ill-considered and unsubstantiated regulation to encroach further into packaging, not just in the tobacco sector but also in others.

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