



Response to call for evidence

The House of Commons Public Bill Committee's call for evidence on the Tobacco and Vapes Bill

Response

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Response from the British Brands Group

1 1. Introduction

The British Brands Group (the Group) is a not-for-profit member organisation of companies of all sizes producing branded consumer goods.

2 Branded products, and the trade marks that identify them, perform a range of positive functions that make for well-functioning markets:

- For **shoppers**, they provide a range of quality products with different characteristics at different price points, providing range and choice to shoppers and consumers, ensuring their needs are met in the optimum way.

Brands, which rest in the heads and hearts of us all, allow accurate, informed purchasing decisions to be made at speed, often in under a second for familiar brands. This assists significantly the task of shopping, increases shopper satisfaction and contributes to shopper and consumer welfare.

- Brands are drivers of **innovation**. Recent research of the UK grocery market¹ found that 57% of all innovations and 87% of all distinctive innovations came from branded companies. This is as important for consumers as for the economy, delivering ever better products.
- Brands must be responsive to **societal demands**, competing as they do on the basis of reputation and quality. These may be welfare, environmental and/or other societal considerations. Failure to be responsive opens the door for competitors to take market share.
- Brands strengthen **competition**. They compete not just on price but on quality, range, innovation and reputation as well. This delivers strong benefits to shoppers and consumers by delivering quality products at keen prices and to markets overall by making them investible, vigorous and dynamic.

3 2. Summary of response

Our response focuses on the proposed regulation of non-combustible nicotine products only. Such products are lawful products available to the public in an open and free market and, while nicotine is addictive, the NHS confirms it to be relatively harmless to health².

¹ Innovation in UK grocery 2019-2021, R Herbert for British Brands Group ([Link](#))

² Vaping myths and facts, NHS ([Link](#))

- 4 The Department of Health and Social Care states an objective of the Bill is to ensure vapes and nicotine products do not appeal to children and that all such products should be banned for sale to those under eighteen years old³. These are objectives we support.
- 5 We urge Parliament to ensure that the measures contained in the Bill are focused on this objective, proportional, measurable and do not over-reach in relation to non-combustible nicotine products. There are risks of unintended consequences where measures effectively restrict information to consumers, inhibit innovation and investment in the sector and/or reduce competition. Potential negative consequences may occur in vapes and nicotine products categories while also potentially having wider consequences on other unrelated categories and markets, dampening investment in quality and innovation, undermining confidence in trade marks and inhibiting the effective working of categories and markets that government may seek to regulate now and in the future.

6 **3. Secretary of State's powers**

Part 5 of the Bill (Product and Information requirements etc) gives the Secretary of State extensive powers to regulate the use of branding, trade marks and logos in relation to both the retail packaging and marking of non-combustible nicotine products (see paragraphs 90 and 91 of the [Bill](#)). These powers are significant and, if implemented, would affect directly and fundamentally the information available to consumers, the dynamics of competition, the climate for innovation and the investment appeal of the category.

- 7 Their implications and impact of such measures go well-beyond restricting the availability of products to those under eighteen. As such, these measures are disproportionate to the stated objectives of the Bill and represent significant over-reach.
- 8 Branding, trade marks and logos allow products to differentiate between each other. They are also recognisable at speed by consumers, allowing for fast, informed purchasing decisions. Were a Secretary of State to decide to remove this ability to distinguish and differentiate, the category would move markedly towards commoditisation. This would mean competition predominantly focused on price, reduced emphasis on quality (as returns could not be reaped effectively) and reduced incentives to innovate.
- 9 Such effects would not serve adult consumers well and are likely to give rise to unintended consequences. Heavy price competition may encourage rather than dampen consumption, a reduced focus on quality will likely have negative health effects, unlawful products will be harder to identify and make enforcement even more challenging and the door will be closed on new innovative products that may have less addictive effects.

³ The Tobacco and Vapes Bill: What you need to know, Department of Health and Social Care ([Link](#))

- 10 Brands, and the intellectual property rights that underpin them, are significant assets in which huge investments are made continually by the companies that have been granted them. The rights are supported by international treaties such as TRIPS and trade agreements. Any measure that reduces their operation on or efficacy in the market weakens rights and diminishes their value, while reducing the incentive and prospect of further future investment.
- 11 Furthermore, were the UK to impose such measures on legitimate markets where there are no concerns over adult health and where the impact would be felt by all consumers, not just those under eighteen, this would likely be considered disproportionate by the international community, giving rise to potential disputes, and by the business community nationally and internationally, reducing incentives and increasing the risks of investing in the UK, notably in those categories that are or may be in the future subject to regulation.
- 12 The Bill would also grant the Secretary of State similar powers in relation to displays of products and prices (Part 1, paragraphs 13 and 14).
- 13 We suggest and urge that the Secretary of State should not be granted such extensive powers to affect so fundamentally the effective operation of a market without the full and rigorous scrutiny of parliament.
- 14 **Proposal: the Secretary of State should not be granted powers to regulate the use of branding, trade marks and logos. Such significant intervention in the operation of markets should only be brought before Parliament with solid evidence of the efficacy of such measures. Given the major implications of such measures, including in relation to the UK's international obligations under TRIPS, any specific proposals should only be introduced through primary legislation, which is the only mechanism that would allow for full and proper scrutiny by Parliament.**

15 **4. Consumer information**

Quite apart from the Henry VIII powers that would be granted by the Bill which we consider so excessive, we suggest that brands, trade marks and logos, all of which operate overwhelmingly positively for consumers in markets, should not be considered regulatory tools

- 16 Brands and trade marks in particular, in addition to the design of products and their packaging, are used by shoppers and consumers to identify and understand products in complex markets where there are a range of different product types, attributes and choices.
- 17 Research by TNS⁴ confirms that shoppers engage System 1, fast-thinking techniques when determining what to buy in store, not being willing to expend the time and/or energy in the more analytical and rational System 2 approach for regular, lower price purchases. With System 1, colours and shapes are the predominant means of identifying and understanding products and shoppers will generally spend less than a second scrutinising packaging. Brands, logos, trade marks and designs therefore

⁴ Shoppers behaving badly, TNS, 2014

provide effective, very quick heuristics to inform shoppers. Restricting and inhibiting their efficacy would make searching more challenging and less reliable for all consumers, not just those under the age of eighteen. In this regard, it is a disproportionate measure in relation to the Bill's objectives.

- 18 Making it harder to distinguish one product from another by restricting the use of identifying elements would open the door to counterfeit and other products that may distort shopper decision-making, prompting them to choose products that may be unlawful, fund organised crime and harm health. Such unintended effects do not serve consumers well and have the added negative impact of making the work of enforcers more difficult.

- 19 **Proposal: branding, trade marks and logos should be excluded from potential measures to regulate non-combustible nicotine products.**

20 **5. Display, free distribution and discounting of products, advertising, brandsharing and sponsorship**

The Bill contains provisions to allow the Secretary of State to impose prohibitions, requirements or limitations on retailers in relation to the display of products, empty packaging and prices (Part 1, paragraphs 13 and 14) and to sponsorship (Part 6, paragraph 125). It would also make it an offence to give away or sell at a substantial discount in order to promote non-combustible nicotine products (paragraph 15), to advertise such products (Part 6, paragraphs 114-119) and to brandshare (paragraph 123).

- 21 These measures are disproportionately stringent and unnecessarily restrictive for legitimate products, operating in a free market where there are no public health benefit gains. The measures are indiscriminate, potentially affecting the whole market and all relevant consumers, not just those under eighteen on whom the Bill's measures are intended to focus.
- 22 Displays, packaging and advertising provide essential information to all consumers on the available products and their qualities, while price is a prime vector of competition. Meanwhile, providing free sample products and discounts are key measures to lower barriers to entry for new products, thereby being important tools to support the commercialisation of innovation and delivering vigorous competition in the interests of consumers. Lower prices for consumers driven by competition are traditionally seen as beneficial, so this regulatory intervention runs counter to established policy.
- 23 Taken individually and together, the measures in the Bill remove, or risk the removal of, fundamental commercial freedoms without justification. They also overreach significantly the policy goal of preventing under eighteens being able to access and use such products.
- 24 Sponsorship, taken broadly, has the potential to reach younger consumers who the Bill seeks to protect, so some restrictions in this area would be appropriate. However, sponsorship should be permissible in age-gated venues and where age ID is used to exclude these consumers.
- 25 **Proposal: powers to restrict the display of products and empty packaging, the offer of free or discounted products, advertising, brandsharing and sponsorship should not extend indiscriminately to non-combustible nicotine products.**

Measures should focus on the consumer groups to be safeguarded (under eighteens), while allowing the wider (adult) market to operate with optimum consumer information and vigorous competition, while being open to innovation and the ability to commercialise such innovation.

26 **6. Economic and commercial impacts**

Markets in which branding and communication operate effectively encourage long-term investment, encourage innovation and deliver growth. Competition is also likely to be more vigorous where barriers to entry are low and new entrants encouraged.

27 IP-rich markets are correlated positively with better jobs, higher paid jobs and better export performance⁵.

28 Drawing policy interventions too broadly in relation to non-combustible nicotine products would present barriers to such economic and commercial benefits, explaining why we urge policy measures to focus as specifically as possible on those consumers to be protected, avoiding wider negative consequences for consumers, competition, innovation and the economy.

29 **7. Conclusion**

With our specific focus on non-combustible nicotine products and on the premise that such products are relatively harmless to health and can have specific health benefits, the Bill's provisions are drawn unduly widely to meet the stated objective of preventing the use of such products by under eighteen-year-olds.

30 In relation to restrictions on advertising, retail display, provisions on prices and sponsorship, these are not sufficiently targeted to the objective such that they can be anticipated to have negative consequences on a legitimate market. Such consequences can be expected to include less informed consumers, less innovation and weaker competition. It is also likely to be considered over interventionist, untargeted, not based on evidence and disproportionate.

31 In relation to the powers granted to the Secretary of State, notably over the use of branding, trade marks and logos, these would represent significant interventions in the market, with wide implications ranging from consumer welfare to compliance with international treaties. If applied without solid evidence and without full scrutiny of Parliament, such an intervention risks undermining confidence in both the specific market for non-combustible vaping products and more widely.

32 The Group stands ready to discuss this response in greater detail, should this be helpful.

⁵ Trade Mark Incentives, IPO, 2011

Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, OHIM and European Patent Office, 2013

Brands – Reputation and Image in the Global Marketplace, WIPO, 2013