Submission to the Department of Health regarding proposal to introduce standardised packaging of tobacco products

PJ Carroll and Co.

21 February 2014
1. INTRODUCTION

1.1. Background

PJ Carroll and Co (PJ Carroll) is pleased to submit this document for review by the Department of Health (Department) regarding the General Scheme of the Public Health (Standardised Packaging of Tobacco) Bill 2013 which proposes to introduce standardised or plain packaging of tobacco products in Ireland (Proposal).

As requested we are providing a document briefly outlining our views on the issues and have set out in Appendix A our views on each head. Although we have raised issues with specific heads we object to the Proposal in its entirety and our arguments should be taken as applying to each and every head. We believe the Proposal is fundamentally flawed and legally unsound. It would not achieve its stated objectives. To the contrary, it would lead to unintended consequences that would adversely impact adult customers, retailers, business and government.

Among other things, the Proposal would also result in a significant interference with fundamental and constitutional rights. In light of the evidence coming out of Australia, there is nothing to suggest that such interferences are necessary. Even if such interferences could, in principle, be justified (which we do not accept), it would require the payment of significant compensation by the State in respect of the removal of legitimately held trademarks and other intellectual property rights.

1.2. About PJ Carroll

PJ Carroll is one of Ireland's oldest continuously operating businesses, founded in 1824 by Patrick James Carroll in Dundalk. Growing from a small shop, PJ Carroll eventually grew to be one of the largest employers in the Dundalk region. We ceased operation at that site in 2008 and are proud that our factory is still an important part of Dundalk as part of the campus of Dundalk Institute of Technology. Our factory employed thousands of people over the years, and we continue to support hundreds of pensioners in the region. PJ Carroll became part of the Rothmans group in 1990. Following the merger of Rothmans and British American Tobacco (BAT) in 1998 we became part of the BAT group of companies. The BAT group of companies (employing 55,000 people worldwide) is one of the largest cigarette manufacturers in the world, and has 44 cigarette factories in 39 countries.

We are Ireland's third largest legitimate cigarette producer, with a market share of approximately 17.1% of legitimate tobacco sales in Ireland.

We are committed to complying with Irish laws and regulations. Such laws and regulations control and regulate the way we manufacture, distribute and market tobacco products and also determine the levels of excise duty and other taxes applicable to the sale of tobacco products. We are competing not only against other Irish and European tobacco manufacturers but also against illicit tobacco suppliers who are not subject to any such regulatory constraints.

PJ Carroll and BAT acknowledge that smoking is a cause of serious and fatal diseases, including lung cancer, emphysema, chronic bronchitis and heart diseases. As noted below, stringent regulations already exist in respect of tobacco products in Ireland, including a retail display ban, and graphic health warnings exceeding the 30% text warning requirements specified under the World Health Organisation (WHO) Framework Convention on Tobacco Control. If the Irish Government (Government) wishes to impose further restrictions on lawful businesses which are already subject to
stringent regulation, it is obliged to establish that such additional regulation is lawful, necessary, evidence-based and proportionate.
2. EXECUTIVE SUMMARY

PJ Carroll strongly objects to the Proposal on a number of grounds including:

2.1. The State has followed a flawed process:

2.1.1. Problems with the Regulatory Impact Assessment process

While we welcome the opportunity to engage with the Department in relation to tobacco regulation, the Regulatory Impact Assessment process has not been undertaken in accordance with the principles of proper regulation espoused by the State.

The timing of this Regulatory Impact Assessment process is extraordinary, coming almost at the end of the hearings before the Joint Oireachtas Committee on Health and Youth (the Joint Oireachtas Committee) in respect of the Proposal. A rigorous Regulatory Impact Assessment should have been undertaken before (rather than after) any decision was taken by the Government in respect of the issue, so as to inform such decision making. The Regulatory Impact Assessment should also have preceded and informed the Joint Oireachtas Committee hearings in respect of the Proposal.

The need for the Regulatory Impact Assessment to be timed before the Joint Oireachtas Committee began its consideration of the Proposal is all the more important given the significant adverse impacts of the Proposal, the emerging real world evidence from Australia of the impact of plain packaging, and the impact (if any) of existing tobacco regulation in Ireland. Due to the timing of the Regulatory Impact Assessment, the Joint Oireachtas Committee will not have had the opportunity properly to review, consider and debate these issues.

We are also concerned at the inadequate time allocated to stakeholders to submit their views for consideration in the Regulatory Impact Assessment, as set out in our letter of 12 February to the Department. Given the complexity and the impact of the Proposal, sufficient time should have been granted to allow interested parties to give a fully considered response.

2.1.2. Timing of the Proposal – World Trade Organisation dispute and Australian Department of Health’s review

The Proposal should not be implemented before the World Trade Organisation (WTO) dispute regarding Australia’s plain packaging measures is determined, and the Australian government's review of its policy is concluded. Australia’s plain packaging laws are currently the subject of a dispute at the WTO. It would be premature to introduce the measure without awaiting the outcome of the WTO proceedings. Such precipitancy could leave Ireland exposed to significant risks with regard to its obligations under international law.

Furthermore, the Australian Department of Health's post-implementation review (PIR) of the Australian plain packaging policy will begin in December 2014 and will be completed within six months of that date. The PIR will seek to measure the outcomes of the plain packaging policy against the objectives. It would be prudent to await the analysis of the impact of the Australian legislation before introducing the Proposal in Ireland.

2.2. The removal of legitimately held trademarks and other intellectual property rights would contravene Irish, European and international trade laws and also breach fundamental and constitutional rights: The Proposal would effectively deprive PJ Carroll of its right to use its
legitimately held trademarks and other intellectual property, thereby violating the trademark protections afforded by the law of the European Union (EU), e.g., under the Council Regulation (EC) No 207/2009 on the Community trade mark (CTMR). Plain packaging would also violate the protections afforded to international trade under WTO agreements and to foreign investors under the many bilateral investment treaties in existence with countries around the world. The infringement of PJ Carroll’s trademarks could result in a significant claim for compensation, resulting in a significant liability for the State.

Further, PJ Carroll has well established rights under the Irish Constitution and under EU law, including the right to property (which includes intellectual property), the right to use its trademarks, the right to carry on business, the right to trade in a competitive market, and the right to communicate with its customers.

The Proposal would also amount to a clear obstacle to free movement of tobacco products within the EU, contrary to Article 34 of the Treaty on the Functioning of the European Union (TFEU) and Article 13(1) of the current Tobacco Products Directive 2001/37/EC.

The Government is not entitled to arbitrarily interfere with these legal rights or to introduce unreasonable, unnecessary, discriminatory or disproportionate measures which would curtail them. Plain packaging would do just that.

2.3. The Government has provided no evidence that the Proposal would achieve reduced smoking incidence: There is no credible evidence that plain packaging would stop people taking up smoking or encourage current smokers to quit. As established by successive Eurobarometer surveys conducted at the request of the European Commission, the Irish smoking rate, which remains above the EU average, is approximately 28%, despite Ireland having one of the strictest regulatory regimes in Europe. Extensive research has been carried out into the reasons why people start to smoke. A large body of evidence establishes that peer pressure, parental influence, social and cultural norms, price and access are the key drivers, not packaging. Any evidence in support of the Proposal rests on attitudes, perceptions and intentions, rather than actual behaviour. Research cited by Minister Reilly in support of his proposals, for example Moodie et al 2012¹, refers only to respondents’ subjective perceptions of plain packaging, not whether such packaging would actually lead to a change in smoking behaviour. Research indicating that respondents find plain packaging of tobacco products less attractive alone compared to branded packaging does not establish that the respondents' smoking behaviour will be affected by a change in the packaging.

The Government should also assess the impact (if any) of previous public health measures such as graphic health warnings, and the retail display ban. The Regulatory Impact Assessment must take account of these measures and explain why further measures are required and the additional costs and benefits of introducing an additional measure.

2.4. The Proposal would only further benefit an already thriving illicit trade: Plain packaging would provide an incentive for and reward criminals, increase the vulnerability of youth to the illicit trade, lead to job losses, and reduce tax revenue. Ireland already has a huge black market in tobacco

products, taking money out of the pocket of retailers, and costing the state up to €569\(^2\) million per annum. Evidence from Australia demonstrates that plain packaging would make this problem worse. Criminals do not abide by tobacco control laws. The black market is, therefore, effectively unregulated. It is the easiest point of access to tobacco for youth. It is also an easy source of funding for organised crime.

The Regulatory Impact Assessment must provide a full overview of the impact of illicit trade, including the expected increase as a result of plain packaging. The Government should fully understand the implications of the increase in illicit trade in Australia. If necessary, the Department should undertake a visit to Australia to understand the impact of plain packaging in the same manner as Sir Cyril Chantler, who is conducting an independent review of the evidence regarding plain packaging for the UK Government, has announced he intends to do.\(^3\)

2.5. **The Proposal could lead to significant costs for the State:** It is vital that the Government fully understands the costs of implementing the Proposal. The costs associated with the Proposal include loss of jobs and loss of revenue resulting from an increasing black market, including loss of excise duties, loss of VAT, and loss of PAYE. Further, as noted above, the need to compensate trademark owners for the removal of their intellectual property entailed by the Proposal would result in significant costs to the State. As part of this Regulatory Impact Assessment process the Government must provide a full evaluation of the costs of this proposal and understand its impact on various groups. Several retail and business groups have already made this point to the Joint Oireachtas Committee.

2.6. **There are better ways:** The State has failed properly to explore alternatives which offer a more effective and proportionate approach to support youth smoking prevention and the stated aims of the legislation. A range of alternative measures are available. The industry is working with retailers to combat youth smoking. One of our key recommendations for the Department is that proxy purchases should be criminalised and this would be a more effective means of advancing the Department's objective. In addition, the Department should be exploring educational initiatives to achieve its aims. Germany has demonstrated that focusing on education has a real and demonstrable impact on youth smoking levels.\(^4\) We also see it as vitally important that governments do not implement policies that create conditions that encourage illicit trade and that they establish strong border controls and effective enforcement of laws to combat illicit trade.

2.7. **Ireland's reputation:** Ireland has made the protection of intellectual property rights a pillar of its international business offering. The removal of legitimately held trademarks and other intellectual property rights would undermine and damage Ireland's hard won position as the best country in the world for business as announced recently by Forbes magazine. If the Proposal is introduced, businesses across all sectors would be on notice that their trademarks are not safe in Ireland. The Regulatory Impact Assessment must take account of the impact of the Proposal on Ireland's intellectual property offering and the impact this will have on our attractiveness as a business location.

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\(^2\) Illicit trade in Ireland report- Retail Ireland/Grant Thornton 2012. The estimate of approximately €569 million is dependent on the extent to which duty paid imports are being resold.


\(^4\) Drugs and Addiction Report 2012, carried out on behalf of the German Federal drug authorities (May 2012) and an investigation by the Federal Centre for Health Education into tobacco consumption by youths and young adults (February 2011)
3. THE STATE HAS FOLLOWED A FLAWED PROCESS

3.1. Problems with the Regulatory Impact Assessment process

3.1.1. Need for a genuine Regulatory Impact Assessment

The Programme for Government, the Cabinet Handbook and the Taoiseach’s Departmental Guidelines all state that a Regulatory Impact Assessment should be conducted at an early stage before any decision to regulate has been taken. In order to protect Irish taxpayers, jobs and businesses it is necessary for potential laws to be costed before they are introduced into the Dáil. It is also necessary to ensure that stakeholders who would be affected by such measures are consulted in the development of such laws.

In addition, the WTO TBT Agreement, to which Ireland is a party, requires that countries "ensure" that labelling and packaging requirements do not operate as "unnecessary obstacles to trade" and do not discriminate against imported products. An objective impact assessment is effectively required to comply with this obligation. The questions WTO members will pose and the comments that will be submitted can only be addressed if a proper impact assessment has been conducted that objectively reviews the evidence and examines whether it is sufficient to warrant the measure. WTO Members are entitled to know whether Ireland has examined the evidence relating to the contribution of the measure to the protection of public health and whether equally effective alternative measures that are reasonably available and are less trade and trademark restrictive were examined.

It is difficult to see how the Regulatory Impact Assessment announced by the Department can be reconciled with the robust, independent and transparent process envisaged by the Programme for Government, the Cabinet Handbook and the Taoiseach's Departmental Guidelines, or how it could enable the Government to satisfy questions posed by WTO members.

A rigorous Regulatory Impact Assessment should have been carried out before the Proposal was published, before any commitment was given or decision was taken to introduce the measure and before the Joint Oireachtas Committee considered the Proposal. This would have assisted the Joint Oireachtas Committee and contributed to a thorough, informed, and meaningful debate. Instead, the decision to delay the Regulatory Impact Assessment process has obstructed the proper exploration of the issues and also hindered effective debate about the Proposal.

The Programme for Government (P10) is very clear:

"We will require Departments to publish Regulatory Impact Assessments before Government decisions are taken."

The Cabinet Handbook (P28) is to similar effect:

"3.3 Regulatory Impact Analysis. Any Memorandum a) seeking approval for legislation involving changes to the regulatory framework including the transposition of EU Directives and Regulations must be accompanied by a Regulatory Impact Analysis. The Regulatory Impact Assessment should be conducted in advance of the Memorandum seeking approval for the General Scheme of a Bill. The Regulatory Impact Assessment should be summarised as part of the Memorandum and the Regulatory Impact Assessment document should be included as an Appendix to the Memorandum."
Likewise the Taoiseach's Regulatory Impact Assessment Guidelines (P5) are explicit:

"When is a Regulatory Impact Assessment required? 2.3 Where primary legislation (a Bill) is proposed, a Memorandum is brought to Government seeking approval for the General Scheme of the Bill (also known as the Heads of a Bill). As described in para. 1.5, a Regulatory Impact Assessment should be commenced at the earliest possible stage (even if it is initially in a very rough format) and must be conducted before this Memorandum goes to Government seeking permission to regulate. The Memorandum and scheme/Heads must be accompanied by a draft Regulatory Impact Assessment."

3.1.2. **Appropriate timing of a Regulatory Impact Assessment**

If a Regulatory Impact Assessment is intended as a genuine evaluation of the need for a particular measure, and an objective assessment of the advantages and disadvantages of the possible regulatory alternatives, then that process must logically be undertaken before (rather than after) the announcement of the Department's determination in respect of the measure.

The introduction of the Proposal and the commitment to introduce the measure before (rather than after) a comprehensive independent and robust Regulatory Impact Assessment calls into question what (if any) evidence was relied on to support the Proposal. It also calls into question the credibility of a Regulatory Impact Assessment process which is only undertaken retrospectively, after the Proposal has already been published, and after a public political commitment has been made to introduce the measure this year, a commitment which apparently applies irrespective of the outcome of any such process. This commitment is demonstrated by Minister Reilly's public declaration that the measure will be enacted in 2014 and by the public confirmation on 13 February 2014 by a Government TD and member of the Joint Oireachtas Committee that the decision has been made by the Government that the Proposal will be implemented.

3.1.3. **Scope of a Regulatory Impact Assessment**

The Regulatory Impact Assessment should consider both the public health goals (and whether they would actually be advanced), and also other possible consequences of the Proposal, including its effect on competition, on illicit trade, on validly registered trademarks and other intellectual property rights, and on Ireland's reputation as a State which respects and protects such rights. The process should also consider (and demonstrate) the cost of the Proposal and whether it is lawful, necessary and proportionate given its impact on legal and property rights and on competition or whether there are other less intrusive means of advancing the stated goals.

In doing so, any such process would also have been required to consider the timing of any proposed measure and whether it was necessary or proportionate to introduce such a measure in advance of the determination of the WTO dispute settlement proceedings currently examining the validity of similar measures adopted in Australia. It should also have considered the desirability of awaiting the emergence of further international evidence before implementing a measure with such a radical impact on existing rights.

Furthermore, even if the Proposal could be justified (which it cannot), the Regulatory Impact Assessment process would need to consider the extent to which the deprivation of property rights, including trademarks, would require compensation, and to quantify the financial exposure for the State in that regard.
The State has not produced any credible evidence to suggest that the Proposal would achieve its stated purposes, nor that it would achieve the Department’s overall public health goals. Moreover, it appears that the State has failed properly to take into account the likely serious, deleterious and unintended consequences of the Proposal, as outlined below. Even assuming the Proposal to be capable of contributing to its stated purposes (which we do not accept), it is difficult to see how the State could regard the Proposal as justified, proportionate or necessary to achieve its stated purposes (or the Department’s overall public health goals), or determine whether any such contribution to its stated purposes would be sufficient to justify the significant harmful consequences of the Proposal, without a proper analysis of the full range of the Proposal’s impacts. Such analysis must necessarily demonstrate that the same contribution could not have been achieved through less intrusive measures.

3.1.4. **Key questions the Regulatory Impact Assessment must answer**

On the basis of the issues outlined above, we believe it is critical that a Regulatory Impact Assessment addresses the following issues:

1. The Regulatory Impact Assessment must fully consider the legal issues and explain the legal basis for the measure. As set out below, plain packaging is unlawful. The Government cannot introduce plain packaging merely because lawful products are controversial. Plain packaging would violate fundamental rights, as well as create market distortions and barriers to trade in breach of both EU and international law.

2. The Regulatory Impact Assessment must set out the full and expected costs of this proposal to the State arising from any potential increase in illicit trade. The Australian experience has already started to demonstrate such an increase and it is vital that the Government fully understands the potential loss of revenue and damage to communities arising from such a proposal.

3. The Regulatory Impact Assessment must fully understand the economic impact of this proposal on retailers and legitimate business. Retailers have already outlined their concerns to the Joint Oireachtas Committee and have set out why they think this will impact on their livelihoods. It is vital that this Regulatory Impact Assessment take account of this and provide some evaluation of the potential costs.

4. The Regulatory Impact Assessment must also take into account likely costs arising from the need to make compensatory payments to the holders of the trademarks which will be removed by plain packaging. It is vital for the Government to take account of the value of the trademarks being removed, and the likely liability for the State.

5. The Regulatory Impact Assessment must set out the benefits of proceeding with the Proposal at this time, given that there is increasing evidence that Australia’s plain packaging measure is having no effect in reducing smoking rates, while encouraging illicit trade.

6. The Regulatory Impact Assessment must set out why the Government cannot wait for the resolution of the WTO dispute regarding Australia’s plain packaging measures before moving forward with the Proposal. It should provide an overview of the benefits of
proceeding at this time, as well as the potential costs and risks to Ireland if it passes legislation which is subsequently found to be in breach of international trade law.

7. The Regulatory Impact Assessment must also understand the impact of this proposal on Ireland's reputation as a good place to do business. Given that intellectual property rights are an important part of that measure, the Government should consider the risk of losing Ireland's recently gained position on the Forbes ranking as a result of the Proposal.

8. The Regulatory Impact Assessment should also provide an understanding and assessment of the impact of previous public health measures such as graphic health warnings and the retail display ban. The Regulatory Impact Assessment must take account of these measures and explain why further measures are required and the additional costs and benefits of introducing an additional measure.

3.2. Timing of the Proposal – WTO dispute and Australian Department of Health’s PIR

As the Department will be aware, Australia’s plain packaging laws are the subject of settlement proceedings at the WTO. According to the five states which are involved as complainants in the current WTO proceedings, Australia's plain packaging laws create illegal barriers to world trade. By seeking to press ahead without awaiting the outcome of the WTO challenges, the Government is seeking to pre-empt those processes. In doing so the Government risks wasting public resources and introducing legislation that will need to be repealed.

Furthermore, the Australian Department of Health's PIR of the Australian plain packaging policy will begin in December 2014 and will be completed within six months of that date. The PIR will seek to measure the outcomes of the plain packaging policy against the objectives. It would be prudent for the Government to wait for the analysis of the impact of the Australian legislation before introducing the Proposal in Ireland.
4. PLAIN PACKAGING CONTRAVENES IRISH AND EUROPEAN LAW, AND BREACHES WTO AGREEMENTS

We have fundamental concerns about the validity of the Proposal and the assumptions on which it is premised. The following is a general overview of our legal objections to the Proposal. However these arguments should not be taken as exhaustive and we reserve the right to make additional legal and factual arguments as appropriate and necessary.

- Plain packaging would effectively deprive PJ Carroll, a lawful business, of its right to use its legitimately held trademarks and other intellectual property. This would contravene Irish, European and international trade law.

- Depriving legitimate businesses of their valuable trademarks would lead to significant costs for the State. This needs to fully evaluated and incorporated into the decision making process.

- Plain packaging would also breach fundamental and constitutional rights.

- It would be a barrier to the internal market, and would thereby infringe EU law.

- It would have negative consequences for consumers by restricting consumer choice and communication and by restricting competition.

4.1. Removal of trademarks

Plain packaging undermines the effective protection under EU law\(^5\) and WTO agreements\(^6\) of trademarks and other intellectual property rights. Plain packaging would effectively deprive PJ Carroll of its right to use its trademarks and other intellectual property. PJ Carroll is the rightful owner of trademarks and is entitled to use its marks on lawful products.

The Proposal would extinguish the key functions and value of trademarks in distinguishing a manufacturer’s products from those of a competitor, and as a guarantee of quality and origin. The function of trademarks is to indicate the origin of the product and to identify the product by distinguishing it from its competitors. Trademarks are essential for product differentiation and thus for competition in the market. They are an important tool to permit market penetration and trademarks facilitate international trade. Trademarks can only perform these functions if they can be effectively used on the products for which they were registered.

The introduction of plain packaging in contravention of the legal protections referred to above would undermine the very basis upon which trademarks and other intellectual property rights are created and protected internationally, with implications far beyond the tobacco sector. Given the lack of

\(^5\)The WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), the Paris Convention for the Protection of Industrial Property (the Paris Convention) (the EU is a signatory to the TRIPS Agreement and to the Paris Convention), Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (the TMD) and Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (CTMR) together with the harmonised European and international system of protection for other intellectual property rights including, inter alia, patents and design rights.

\(^6\)WTO General Agreement on Tariffs and Trade (GATT), the WTO Agreement on Technical Barriers to Trade (TBT), the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), and the Paris Convention for the Protection of Industrial Property (the Paris Convention).
credible evidence demonstrating the effectiveness of plain packaging, it is hard to see how the removal of trademarks can be justified, proportionate or necessary to achieve the public health goals of this Government.

In any event, any such destruction of trademarks and other intellectual property must, even if it could be justified (which it cannot), be accompanied by compensation, which would in these circumstances be considerable. The Government is not entitled to arbitrarily deprive private citizens and corporations of their property without compensation and we believe that the Proposal does exactly that.

4.2. **Interference with constitutional and fundamental rights**

Trademarks and goodwill are forms of private property and thus constitutionally protected. The right to property is also protected by the European Convention on Human Rights and the EU Charter of Fundamental Rights. The Proposal would encroach on the constitutional and fundamental rights protections granted to such property rights generally.

By removing the companies' ability to use their trademarks, plain packaging entails, to all intents, the suppression of manufacturers' and consumers' fundamental rights to communicate. This right to freedom of commercial communication is protected by the Irish Constitution and the European Convention on Human Rights. The plain packaging measure would clearly restrict the supplier's ability to communicate information about its products to consumers, namely product origin and differentiation from other goods in the market. In addition, consumers' rights to receive information about tobacco products would also be unjustifiably restricted.

Consequently, the proposed measure would go to the very essence of two fundamental rights – interfering with the right to freedom of commercial communication and also with the right to property. The provisions would seek to limit such rights for the purposes stipulated in the Proposal but do so without any evident regard for fundamental constitutional requirements of proportionality, and without any evident concern for the extinguishment of the rights that they entail. There is no evidence to suggest that plain packaging would achieve the stated regulatory objectives. In the absence of proper consideration of less restrictive alternatives, the introduction of plain packaging is disproportionate and cannot be justified. The deprivation of property and violation of other legal rights cannot be justified by virtue of the stated objects of the Proposal, having regard to the lack of proportionality of the provisions.

4.3. **Plain packaging would be a barrier to the internal market, and would infringe EU law**

The Proposal would amount to an obstacle restricting the free movement of goods, enshrined in Article 34 TFEU. The Proposal would restrict free movement of goods by imposing additional restrictions on tobacco products in Ireland and interfering with the ability of manufacturers to communicate with consumers in order to differentiate their products.

For any such obstacle to EU trade to be proportionate (and therefore lawful), it would not only have to be justified in terms of its impact on public health, but it would also be necessary to demonstrate that the same results could not be achieved through less restrictive measures. As outlined above, the Proposal cannot be justified on these grounds.

Article 13(1) of the current Tobacco Products Directive 2001/37/EC specifically stipulates that Member States cannot, for considerations related to the requirements of the Directive, prohibit or restrict the import, sale or consumption of tobacco products which comply with the Directive. In this respect it is
important to note that the EU Court of Justice has confirmed the legality of the current Tobacco Products Directive for, *inter alia*, the following two reasons: (i) it contains Article 13(1) which "guarantees the free movement of products which comply with its requirements"7 (concerning, amongst others, "presentation"8 of tobacco products); and (ii) the requirements of the Directive leave sufficient space on the pack for manufacturers to affix their trademarks, allowing them to continue to distinguish their products by using distinctive signs.9 Consequently, any legislation introducing standardised packaging in Ireland would clearly infringe EU law.

4.4. **Plain packaging would be anti-competitive**

Prohibiting a legal industry from exercising its intellectual property rights in respect of lawful and regulated products would be anti-competitive. In order to compete, it is necessary for companies to use trademarks as a means of communication to differentiate products for consumers. Competitive opportunities are protected internationally by WTO GATT and the WTO TBT Agreement.

In Ireland and other developed countries, the legal tobacco market is a mature and declining market, with a trend of declining smoking prevalence over the past several years. Within a declining market, brands – of which trademarks are a core component – are key to enable businesses to compete for and obtain market share. Such competition within the mature and declining legal tobacco market does not increase tobacco consumption overall. Preserving the right to use trademarks is fundamental to enable the healthy competition that increases consumer choice and benefits consumers. Plain packaging would leave legitimate tobacco businesses only two points on which to differentiate themselves from their competitors: word marks and price. This would be insufficient to enable healthy competition, or to preserve the incentive for consumers to pay for premium products.

The removal of the ability of companies to compete other than on price, entailed by the Proposal, would make market access for new market entrants very difficult if not impossible. One can think of few greater barriers to market entry than to require traders to divest themselves of valuable trademarks as a precondition to trading in this market.

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5. THERE IS NO CREDIBLE EVIDENCE TO SUGGEST PLAIN PACKAGING WOULD WORK

- Plain packaging will not contribute to the stated purposes of the Proposal, or (more importantly) to the real goal of achieving an actual reduction in smoking prevalence.

- There is no credible evidence that demonstrates that plain packaging would work. Any evidence in support of the Proposal rests on attitudes, perceptions and intentions, rather than actual behaviour.

- Extensive evidence shows that the influence of peers and family, access to cigarettes and price are the main factors in the decision to smoke, not packaging.

- Sales data and other evidence demonstrate that plain packaging has not reduced smoking prevalence or smoking consumption in Australia.

There is no credible evidence to suggest that the plain packaging of tobacco products would be effective in discouraging youth initiation, or in encouraging cessation by existing smokers. While there are studies examining the effect of plain packaging on people’s intentions, attitudes and impressions, these measure perceptions which are not predictive of actual behaviour. They examine the subjects’ stated views of plain packaging, but do not observe actual smoking behaviours, and do not make the key link between plain packaging and smoking behaviour.

The example of family and peers, price, and access to cigarettes, either illicitly or through proxy purchases, have all been consistently identified by independent peer-reviewed research as causal factors in relation to youth initiation. The packaging of tobacco products, already subject to a point of sale display ban, is not considered a driver of initiation.

Successive Irish Governments have already introduced a range of measures that severely restrict the sale and marketing of tobacco products, including the introduction of a retail display ban in 2009, and the recent introduction of graphic health warnings (which exceed the 30% text warning requirements specified under the WHO Framework Convention on Tobacco Control). We suggest that the Government should wait until the impact of these measures are fully known, including any unintended consequences associated with the measures, before considering the introduction of further tobacco control measures such as plain packaging.

5.1. The Government has not established how the stated purpose of the Proposal contributes to actual reduction in smoking prevalence

The stated purpose of the Proposal is to:

(a) reduce the appeal of tobacco and tobacco products,

(b) increase the effectiveness of health warnings on tobacco products, and

(c) reduce the ability of the packaging of tobacco and tobacco products to mislead consumers about the harmful effects of smoking in the public interest,

by providing for the standardisation of the labelling and physical features of retail packaging of tobacco products and the requirements for the appearance of cigarettes.
The Government has not established how achieving these stated purposes would contribute to the real public health objective of actual reduction in smoking prevalence. We do not believe that plain packaging is necessary or will meaningfully contribute to these stated purposes, or (more importantly) to the ultimate goal of reducing smoking prevalence.

5.2. There is a lack of any credible evidence

There is no evidence that plain packaging would have any effect on the appeal of cigarette smoking itself. Research cited by Minister Reilly in support of his proposals, for example Moodie et al 2012 (and a follow up in 2013 (the 2013 Update)), only evaluates the comparative appeal between branded and plain packs, not the appeal of tobacco products or of smoking itself. Asking people to compare branded packs to plain packs is the wrong question. The studies do not address the appeal of cigarette smoking itself if all cigarettes are sold in plain packaging. Furthermore, the studies do not relate comparative evaluations between branded and plain packs to smoking behaviours or establish how people would behave if all cigarettes are sold in plain packs and such packaging is not unusual.

One of the key purported objectives of the Proposal, as set out by the Government, is to avoid consumers being misled about the harmful effects of smoking. However, it is clear that consumers are fully informed of the harmful effects of smoking, including by the warnings which have appeared on Irish products for more than 30 years. Health warnings, including recently introduced graphic pictorial warnings, now occupy a substantial proportion of the pack.

There is no evidence that branding, trademarks, and packaging neutralise consumers’ existing awareness of the risks of smoking or prevent consumers from seeing and assimilating the existing health warnings. Research undertaken for the U.K. Department of Health demonstrates that the picture warnings in the UK, which are substantially the same as the current warnings in Ireland, are seen and assimilated by consumers on branded packs. The report states that:

For adults (aged 18 years and older) “Overall, recall of at least one health warning message was high, 93% of smokers pre 1st October 2008 and 100% post 1st October 2008 could name at least one warning message. Post 1st October 2008, awareness of the picture health warnings was high, only 6% of smokers did not name one of the new warnings messages when asked.”

For youth (aged 13-17) “Awareness and recall of the picture health warnings was high. Post 1st October 2008, 85% of young people correctly described one of the health warning messages, though for a majority of young people, the message most remembered was the front of packet message ‘Smoking Kills.’ (Public Health Research Consortium. “Evaluating the Impact of Picture Health Warnings on Cigarette Packets”, National Centre for Social Research, (2010)).

Furthermore, the research cited by Minister Reilly in support of the Proposal does not establish that any branded cigarette packs are viewed as not risky or that people would smoke less if all cigarettes were sold in the same coloured plain packs. There is no basis to conclude that plain packaging would impact on people’s risk beliefs or their smoking behaviour.

To the limited extent that the Moodie et al 2012 addresses the critical issue of whether plain packaging would affect smoking behaviour, the author only states that:
"the studies in this review show that plain packaging is perceived by both smokers and non-smokers to reduce initiation among non-smokers and cessation-related behaviours among smokers." (emphasis added)

The perceptions of individuals, which Moodie et al 2012 acknowledges as being mixed, are not predictive of actual behaviour. Indeed the PHRC Review expressly cautions against the use of this evidence, stating that:

"Some caution is required in interpreting these findings, as expressed smoking-related intentions are not always predictive of future smoking behaviour (Ajzen & Madden 1986, Sheeran 2002) and perceptions of the impact of a future policy measure on the behaviour of others are of course subjective."

Even the 2013 Update states that additional studies reviewed merely "suggest that plain packaging would: reduce the appeal of cigarettes and smoking; enhance the salience of health warnings on packs; and address the use of packaging elements that mislead smokers about product harm" (emphasis added). Notwithstanding the methodological flaws in the studies, these effects that plain packaging may allegedly have are not predictive of a change in actual smoking behaviour. Therefore, the additional studies reviewed in the 2013 Update do not justify introduction of plain packaging because they fail to demonstrate a link between packaging and smoking behaviour.

Some of the more prominent studies reviewed in the 2013 Update are discussed in more detail below in Appendix B which we would strongly urge you to consider. These studies all suffer from several methodological flaws which undermine any evidential value they may otherwise have: no individual study is capable of being credible and reliable evidence that the introduction of plain packaging "is likely to lead to a decrease in the consumption of tobacco, including in particular a decrease in the risk of youth becoming addicted". Furthermore, a collection of studies which are all fundamentally flawed cannot together form credible and reliable evidence. In contrast, there is robust evidence to suggest that packaging is irrelevant to smoking initiation, cessation and relapse. The studies cited in support of plain packaging fail to respond to - or even consider - such evidence.

Minister Reilly has also been relying heavily on a misleading report commissioned by the Irish Cancer Society and the Irish Heart Foundation as evidence.¹⁰ This research, using a very small sample of 24 teenagers, concludes that teenagers found plain packs less appealing than branded packs. Again, this research fails to draw any connection between how appealing packs purportedly are and the decision to smoke.

Surveys of this nature, which do not examine the impact of cigarette packaging on people’s actual behaviour, are easily manipulated and held in low esteem by social scientists. In a recent US Court decision, which prohibited the FDA from implementing a proposed set of graphic health warnings, this sort of evidence was dismissed as ‘questionable social science’ that constitutes ‘mere speculation and conjecture’.

5.3. The real drivers of smoking initiation, cessation and relapse

We agree that youth should not smoke and that people who want to quit should be encouraged to do so. The Government has a key role to play in achieving these objectives. However, it does not make sense to pursue these goals through a plain packaging policy, as it is clear from the existing peer

¹⁰ Irish Cancer Society report on Plain Packaging impact on young people
reviewed evidence, funded by both governments and tobacco control bodies, that packaging is not a factor that influences either youth initiation or quitting behaviour.

Numerous government funded studies and other research have demonstrated that the real drivers of smoking initiation include factors such as parental influences, risk preferences, peer influences, socioeconomic factors, access and price. In a recent poll, even when specifically prompted to consider packaging as a significant element in their decisions to start smoking, and notwithstanding that respondents could choose more than one element, 97% of Ireland respondents did not choose packaging as a relevant factor. Indeed, the Irish Cancer Society's recent research paper states that "socialising remains a key driver for smoking regardless of smoking attitude and is the biggest barrier to giving up".

James Heckman, a Nobel prize-winning economist and a world renowned expert on youth behaviour, now based in University College Dublin, has reviewed a wide range of research addressing why youth take up smoking. He found that the available evidence suggests that there is usually more than one cause for youth smoking, and the main factors include price, parental influence, peer influence and access. He says:

"The available evidence in the developing literature on adolescent risky behaviour, including smoking, supports a multicausal model for youth smoking, as many factors have been empirically linked to youth smoking in this literature. These factors include price, parental influences, risk preferences, peer influences, and access."12

Similarly, government funded and other independent research establishes that the drivers for quitting smoking and relapse do not involve packaging. The recognised drivers of smoking cessation include concerns about current and future health effects of smoking, the cost of smoking, and pressure from family to quit. Evidence, also establishes that the drivers for smoking relapse include intrapersonal negative states such as frustration, anger, depression and boredom, interpersonal conflicts, and social settings.14


The studies relied on to support plain packaging do not examine the influence of any of the abovementioned well recognised drivers of smoking initiation, cessation and relapse, or address how plain packaging would impact on them.

5.4. The Australian experience

To date, Australia is the only state which has introduced plain packaging for tobacco products, doing so just over one year ago. As a result, Minister Reilly's Proposal is not based on a real-world evidential footing as the only real world example does not support the Proposal.

The initial evidence from Australia, based on industry sales data and independent research by KPMG (commissioned by BAT, Imperial Tobacco Australia Limited and Philip Morris Limited) and by London Economics (commissioned by Philip Morris), is that the legitimate tobacco sales remained on trend in 2012. KPMG's report utilised several different sampling techniques in its first bi-annual report which was published in October 2013, and concluded that:

- total consumption between 2012 and the last twelve months to the end of June 2013 was flat compared to a longer term annual decline since 2009;
- the level of illicit consumption grew from 11.8% to 13.3% (expressed as a percentage of total consumption); and
- this growth in the illicit market has been mainly fuelled by a major shift to illicit manufactured cigarettes, which saw sales of illicit cigarettes increase to 154%.

These outcomes suggest that there is an increasing illicit market and a deceleration of the longstanding decline in tobacco consumption in Australia.

This is further supported by the recently released London Economics' report which similarly established that there had been no change in smoking prevalence following the introduction of plain packaging in Australia, at least in regard to the number of people reporting smoking cigarettes:

"Over the timeframe of the analysis, the data does not demonstrate that there has been a change in smoking prevalence following the introduction of plain packaging and larger health warnings despite an increase in the noticeability of new health warnings."

It is interesting to note that, notwithstanding any alleged and anecdotal suggestions of an initial increase in consumer complaints about the taste of tobacco products after the introduction of plain packaging in Australia, there has been no recorded corresponding decrease in tobacco consumption.

One of the most recent reports from the New South Wales Cancer Institute15 analysed calls to the Quitline support service to find an initial temporary increase in calls associated with the phasing in of plain packaging from 1 October 2012. However, this increase was not sustained and the number of calls had returned to the level prior to the introduction of plain packaging within six months. It is also worth noting that this study does not establish any change in actual smoking behaviours and suffers from a number of crucial weaknesses. As the research itself notes:

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15Cancer Epidemiology and Services Research (CESR), Sydney School of Public Health, University of Sydney, Sydney, NSW. Association between tobacco plain packaging and Quitline calls: a population based, interrupted time-series analysis
"A weakness of our study is its inability to differentiate the impact of the increased size of graphic health warnings that happened simultaneously with tobacco plain packaging from the impact of plain packaging itself. Quitline calls are one measure of changes in people's behaviour in response to legislative change. The rate of calls to Quitline may have been confounded by the Quitline telephone number appearing to be more prominent in the absence of proprietary branding. Also, our study has shown an association but cannot prove causation."

Given this evidence, we cannot see how it could be concluded that there is a likely public health benefit to the very expensive and illegal move of introducing plain packaging of tobacco in Ireland. In addition, it is important to recognize that introduction of plain packaging would be accompanied by a range of unintended consequences, most importantly in the area of the black market for cigarettes.
6. UNINTENDED CONSEQUENCES – ILLICIT TRADE

- Ireland has a huge black market in tobacco products, taking money out of the pocket of retailers and costing the state up to €569 million per annum. 28% of the market is non-Irish duty paid product.

- PJ Carroll only has an approximately 17% share of the legitimate tobacco market – smugglers sell twice as many cigarettes in Ireland as we do.

- Evidence from Australia suggests that plain packaging would only make the problem of illicit trade worse.

- Criminals do not abide by tobacco control laws. The black market is therefore unregulated, and is the easiest point of access to tobacco for youth.

    Ireland is already home to the most lucrative black market in tobacco in Western Europe, and we believe that, rather than stopping youth from smoking, plain packaging would make cheap, unregulated illicit cigarettes more widely available.

6.1. The plainer the pack, the easier it is to copy

With Ireland recognised as having a particularly serious illicit trade problem, a problem that has increased in recent years, it would be very unwise to pursue a policy that could exacerbate this problem. Put simply, the plainer the pack, the easier it is for criminals to copy, the cheaper it is for counterfeit packs to be produced, and the easier it is for counterfeit packs to go unnoticed.

The introduction of plain packaging would provide counterfeiters with a single blueprint for tobacco packaging, which they would be able to use ad infinitum. This would drive down the cost of illicit production and create massive economies of scale for smugglers – rather than having to copy a variety of different packs, there would be only one. Packaging experts believe that pack complexity and the use of specialist manufacturing processes present a technical barrier to counterfeiting. Head 5 of the General Scheme of the Public Health (Standardised Packaging of Tobacco) Bill 2013 outlines the different features of tobacco packaging which are to be outlawed. These include:

- Decorative ridges
- Embossing
- Any other irregularities of shape or texture or other embellishments
- Any glues or other adhesives used in manufacturing that are coloured and non-transparent.

Each of these packaging elements creates an additional costly barrier for counterfeiters to overcome, which will be removed if the Proposal is introduced.
6.2. Plain packaging would drive down cigarette prices

It is generally accepted that one of the biggest risks with plain packaging of tobacco is that it would increase price sensitivity and consumers’ focus on price.\(^{16}\) Removing the incentive to pay premiums for products that no longer look or feel premium would drive prices down across all cigarette market segments.

This would provide a huge competitive advantage to those who can supply the lowest cost product: i.e. the illicit trader.\(^{17}\) This would undermine the whole rationale for the proposal: it would make cigarettes more affordable for everyone and, in particular for youth who are particularly price sensitive, and therefore is unlikely to achieve the aim of decreasing the prevalence of smoking (and may even lead to an increase in smoking prevalence).\(^ {18}\)

6.3. The Australian experience

The experience in Australia over the past twelve months supports our contention that plain packaging will provide a major boost to the illicit industry. An expert report by accountants KPMG suggests that the introduction of plain packaging in Australia has coincided with an increase in the illicit market, indicating the devastating impact that the Proposal could have on retailers, small business and the Government’s excise due to an increase in illicit trade. This data refers only to the first six months of 2013, and is the only report to look at the illicit trade in Australia after the introduction of plain packaging. The KPMG report and a separate piece of research carried out by Roy Morgan\(^ {19}\) have found that:

- **Cigarette smuggling has increased by 154%**. In the past the Australian illicit tobacco market has been dominated by loose tobacco, known locally as ‘chop-chop’. Since 2012 the market has shifted entirely, with a 40% fall in smuggled loose tobacco and a 154% increase in illicit cigarettes.\(^ {20}\)

- **Overall level of illicit tobacco products is up 13%**. A 13% increase in the net level of illicit tobacco products bought and smoked in Australia has seen the illicit trade reach its highest ever point. The illicit trade now costs the Australian state an estimated A$ 1 billion (€700m) in lost tax revenue.\(^ {21}\)

- **Branded cigarettes and ‘illicit white’ brands are appearing in the market**. ‘Illicit white’ cigarettes are not sold legally anywhere in the world, but since 2012 their market share in Australia has grown rapidly.\(^ {22}\)

\(^ {16}\) Transcrime, Plain Packaging and Illicit Trade in the UK: Study on the risks of illicit trade in tobacco products as unintended consequences of the introduction of plain packaging in the UK, 2012, page 23

\(^ {17}\) Roland Berger Strategy Consultants, The Potential Economic Impact of Plain Packaging for Cigarettes and Fine-Cut Tobacco in Ireland, 2013


\(^ {19}\) Roy Morgan associates, The Impact of Plain Packaging on Australia Small Retailers October 2013

\(^ {20}\) KPMG “illicit trade in Australia” October 2013

\(^ {21}\) As above

\(^ {22}\) As above
The biggest tobacco seizure in Australian history was made last year. A major operation in Melbourne in October saw 80 million illegal cigarettes and 70 tonnes of loose tobacco, worth an estimated AU$ 67 million, seized.23

Customers are now asking for illicit tobacco. More and more customers are asking retailers to sell them illicit cigarettes. 33% of retailers have been asked by customers for illicit tobacco since plain packaging was introduced.

6.4. Growth of illicit brands in Australia

One of the most frightening aspects of the changes in the Australian tobacco market in the last twelve months to the end of June 2013 is the rise of new brands of cigarettes that are paying no excise. Commonly termed 'Illicit Whites', these brands are produced for smuggling by rogue companies operating a business model based on illegal sales.

One example of this issue is the "Spoonbill" brand which has been discovered in Australia. The brand is not produced legally in Australia and yet has turned up on the shelf of some retailers.

Another such brand, 'Manchester', has quadrupled its market share since the introduction of plain packs, and now holds a 1.3% share of the entire Australian cigarette market, more than many legitimate brands.

Manchester is not sold legally in any retail outlets in Australia. It is smuggled into Australia where it is sold without paying any tax for less than half the retail price.

In 2012, Manchester accounted for 0.3% of the cigarette market, based on an Empty Pack Survey carried out by KPMG, with packs being found in just two of the locations sampled, Melbourne and Sydney.

In Q2 of 2013, Manchester had increased its market share to 1.3%, and the product was found in 13 of the 16 main cities sampled in the survey. In Sydney, Manchester was found to have a market share of 3.8%.

Illicit Whites such as Manchester already make up the bulk of cigarettes seized in Ireland. They are produced quasi-legally, often in free trade zones, and are often not sold legally anywhere in the world. They are smuggled un-taxed into countries like Ireland and Australia, where criminals can make massive profits. The introduction of plain packaging would only exacerbate consumers' willingness to purchase cheaper illicit branded packs by removing the incentive to pay premiums for legal products that no longer look or feel premium.

If this 13 per cent increase seen over six months of data was replicated in Ireland (a conservative estimate) we estimate we would see:

- An extra 186 million illegal cigarettes being bought and smoked in Ireland every year.
- A further €74 million in tax revenue being lost to the State.

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23 As above
• A significant increase in the funding available to professional criminals and organised crime.

• The loss of an additional 9.3 million retail transactions. This would undoubtedly have a significant impact on relatively fragile retail jobs market.

Additionally it would be expected that these figures would double if the trend remains the same for a full 12 months. While this is only for demonstrative purposes, and we would recommend that the department undertakes its own analysis, this is an example of the potential impact of illicit trade in Ireland

6.5. Smugglers do not care about tobacco control laws

Criminal gangs do not pay any tax nor do they comply with any laws and regulations regarding tobacco control. Most importantly, they provide the cheapest available cigarettes, often at less than half the legal price, and have no qualms about selling to youth.

In a recent survey by Red C24, one in four of those surveyed believed that tackling the illicit trade in tobacco products was the best way to reduce youth smoking rates, two and half times as many as believed plain packaging is the way to go. While no research has been carried out into how youth access cigarettes (PJ Carroll does not and will not carry out research on youth smoking) the survey demonstrates broad public awareness that young people are getting their cigarettes from illicit sources. Age restrictions are not obeyed by those in the illicit trade, and smuggled cigarettes are available at far more affordable prices for youth.

An increase in illicit trade would also expose consumers to more unregulated products with no controls on hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels. Concerns about the content of illicit cigarettes have been raised by the European Commission. Speaking in 2010, EU Taxation and Customs Union Commissioner Algirdas Šemeta offered this warning:

“To any citizen who is tempted to make a purchase from the illegal traders, I would say 'think about what you are buying'. You may pay very dearly for an apparently cheap cigarette. You do not know where it is coming from. You do not know what is in it. You are substantially increasing the threat to your health.”25

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24 Poll conducted by RED C on behalf of Forrest Eireann November 2013
25 Algirdas Šemeta, EU Commissioner for Taxation and Customs Union, Opening speech to conference on EU-US cooperation to tackle cigarette smuggling, 20 September 2010
7. **UNINTENDED CONSEQUENCES – PLAIN PACKAGING IMPOSES SIGNIFICANT COSTS ON THE IRISH STATE**

7.1. **The biggest black market in Western Europe**

Ireland is home to the biggest and most lucrative black market in tobacco in Western Europe. The KPMG Project Star report, endorsed by European anti-fraud agency OLAF, estimated that 19% of the cigarettes in Ireland are contraband or counterfeit and a further 9% are from non-Irish duty paid sources. A study commissioned by Revenue and the National Tobacco Control Office, using a different methodology, puts the level of illegal tobacco at 13%, with a further 6% non-Irish Duty paid. One billion illicit cigarettes were smoked in Ireland in 2012.

With more than 80% of the price of every pack going to the Government in taxes, Retail Ireland estimates that this costs the state up to approximately €569 million per annum in lost tax revenue every year.

Furthermore, the illicit trade is taking 70 million transactions out of legitimate stores every year, funding criminals instead.

**To put this into context, while PJ Carroll has an approximately 17% share of the legitimate tobacco market, smugglers sell twice as many cigarettes in Ireland as we do.**

Ireland has become a target for criminal gangs due to the high price of tobacco products, and the massive profits that can be made as a result. It is estimated that a container full of illicit cigarettes will net a profit of €2 million for the smugglers.

Finance Minister Michael Noonan recognises that excise policy has been an important driver of the illicit trade. Speaking in the Dáil in November 2013, Minister Noonan said:

> “As we continue to use price to discourage people from smoking, I think we will divert more and more of the trade to the illicit trade.”

At a European level, Ireland is also recognised as having a problem with the illicit trade. In December 2013, European Commissioner for Home Affairs, Cecilia Malmstrom, singled out Ireland and the UK in particular as destination countries for contraband cigarettes.

Gardaí and the PSNI believe that those involved in the black market in tobacco are organised criminals, many with paramilitary links. The Joint Garda / PSNI Cross Border Organised Crime Assessment, 2012, stated that:

> “Organised crime gangs continue to take advantage of rising cigarette and hand rolling tobacco prices in the UK and Ireland by smuggling tobacco products in from countries with lower duty rates and by importing counterfeit brands and ‘illicit whites’ from overseas.”

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26 Project Star, KPMG Report, July 2013  
27 Revenue Commissioners Report  
28 Illicit trade in Ireland report- Retail Ireland/Grant Thornton 2012. The estimate of approximately €569 million is dependent on the extent to which duty paid imports are being resold.
Late last year, Assistant Chief Constable Drew Harris of the PSNI said:

“Every time you buy dodgy cigarettes, cheap fuel or counterfeit goods, you are providing funds for organised crime. You are helping line the pockets of those involved in drugs, human trafficking and terrorism. By saying no, you can help us keep everyone safe.”

7.2. **The potential costs of illicit trade to the Irish State**

In Australia, the illicit market was 10.5 per cent prior to the introduction of plain packaging. In comparison Ireland’s illicit market is 19 per cent. Ireland is more vulnerable to illicit trade than Australia, due to its location, easy access and established smuggling network. If illicit trade has increased in Australia following the introduction of plain packaging, plain packaging has the potential to increase Ireland’s rates of illicit trade to drastically high rates.

The costs to the State of the impact of the Proposal in increasing illicit trade would be significant. If the changes seen in the Australian tobacco market were replicated in Ireland, we believe that Ireland could see an increase in non-Irish duty paid product to up to 35% of the tobacco market. In fact, we believe that the increase in illicit product could be even higher.

This would have an enormous financial impact on retailers, small businesses, and, ultimately, the State. At a rough estimate, an increase of non-Irish duty paid product to 35% of the tobacco market could result in a loss to the State of approximately €90 million in excise, approximately 22 million lost individual retail transactions and €300 million in the value of lost retail transactions.

This is merely an illustrative example of the potential costs to businesses and the State. We strongly recommend that the Department conducts a rigorous analysis as part of the Regulatory Impact Assessment process, so that the Government has a full view of the potential costs to the State of the Proposal.

This is merely an illustrative example of the potential enormous financial impact on retailers, small businesses, and, ultimately, the State. We strongly recommend that the Department conducts a rigorous analysis as part of the Regulatory Impact Assessment process, so that the Government has a full view of the potential costs to the State of the Proposal.

7.3. **The Government will need to compensate trademark owners for the removal of their assets**

The Government is not entitled to arbitrarily deprive private citizens and corporations of their property without compensation, and we believe the Proposal does exactly that. As outlined above, the Proposal would deprive the owners of validly registered trademarks of their valuable intellectual property. This destruction of trademarks and the associated goodwill must be compensated, even if it can be justified (which it cannot), and in these circumstances the compensation required would be considerable.
8. THERE ARE BETTER WAYS

- The industry is working with retailers to combat youth smoking.
- One of the key recommendations for the Department is to criminalise proxy purchases.
- Germany has demonstrated that focusing on education has a real and demonstrable impact on youth smoking levels.
- Increasing measures to prevent the trade of illicit tobacco is vital to reducing youth smoking.

We agree with Government and policymakers that every effort should be made to ensure youth cannot access tobacco. PJ Carroll supports regulations that are the product of evidence-based and consultative policy-making, and that are in the public interest.

There are highly effective programs we support both here and around the globe that we recommend to discourage youth smoking and initiation:

8.1. Supporting retailers in tackling youth smoking

One of the most effective programmes supporting retailers in combatting youth smoking is the ShowmeID campaign, an initiative started by retailers and the industry and launched by Minister for Youth Frances Fitzgerald. ShowmeID has been developed by the industry to provide Irish retailers with advice, support and leading practice on how to avoid the underage sale of tobacco products.

8.2. Criminalising proxy purchasing

We do not believe that anyone should be able to purchase tobacco for the underage.

Furthermore, we believe that anyone over the age of 18 who does so is knowingly breaking the law and we believe that there should be criminal penalties for proxy purchasing. A proxy purchasing offence has been introduced in Scotland and is being considered by the UK Government as part of the Children and Families Bill, and we strongly support its introduction in Ireland. A recent survey carried out in the UK for the NHS Information Centre reported that:

"Proxy purchase', that is getting someone else to buy cigarettes on their behalf, is common among 11 to 15 year olds who smoke. 10% of all pupils asked someone to buy them cigarettes from a shop in the last year, including 72% of smokers. Most pupils who ask someone else to buy cigarettes from a shop are successful, at least some of the time; 90% of those who had tried in the last year had been bought cigarettes at least once. The people most likely to buy cigarettes on behalf of 11 to 15 year olds were older friends (69%) or strangers (58%)." 29

8.3. Increasing focus on education in schools

Schools are currently recommended to have Social Personal Health Education (SPHE) once per week for junior cycle pupils, with classes for senior cycle pupils left at the schools' discretion. Smoking

education is one module currently taught as part of the SPHE course for junior cycle pupils, but there is no current data on the number of classes given over to this topic. Increasing teacher resources to support the tobacco-related curriculum in schools would help ensure that these classes are offered to pupils across the board. It is vital to ensure that when considering youth initiation in smoking we recognize the huge impact of peers and family on young people.

It is important that we ensure that when discussing education for young people, we consider not just awareness, but more importantly building the life skills capacity of young people to resist peer pressure and make their own decisions. Mandatory programs, such as those used to educate youth in Germany since 1997 have shown a marked and lasting improvement in their youth smoking prevention. Among young people, the proportion of smokers has fallen from 27.5% in 2001 to 11.7% in 2011, this trend is set to continue and the proportion of smokers among young people will continue to fall in the next few years. This has been confirmed by the Federal Health Ministry as well as the Federal Centre for Health Education.³⁰ EU states that rely on very restrictive tobacco regulation actually achieve lower success rates for reduced tobacco consumption than Germany.

In Ireland, where there is a ban on advertising and on retail display of tobacco products, the general proportion of smokers is higher than in Germany, where none of these instruments are used: 29% in Ireland compared to 25% in Germany.³¹. This was partly a result of a program that originated in 1998 by the German Cancer Research Centre, whereby they developed a curriculum to educate school-age youth on tobacco issues. In 2002, they started work with the WHO and became a WHO Collaborating Center for Tobacco Control. Their curriculum teaches that smoking is addictive and causes serious, life threatening illnesses, and helps German teenagers develop the independent thinking that helps them resist peer pressure and make their own choices

8.4. Increasing measures to prevent the trade of illicit tobacco.

As discussed above illicit tobacco is a major problem in Ireland. Accordingly, we see it as vitally important that the Government does not implement policies that create conditions that encourage illicit trade and that they establish strong border controls and effective enforcement of laws to combat illicit trade. As noted above, in a recent survey, one in four of those surveyed believed that tackling the illicit trade in tobacco products was the best way to reduce youth smoking rates.

³⁰Drugs and Addiction Report 2012, carried out on behalf of the Federal drug authorities (May 2012) and an investigation by the Federal Centre for Health Education into tobacco consumption by youths and young adults (February 2011)
³¹Eurobarometer report 2012, conducted at the request of the European Commission
9. IRELAND’S REPUTATION

- The Taoiseach’s ambition was to make Ireland the best country in the world for business and we are pleased that this has been acknowledged by Forbes Magazine.

- A key component of this is the protection of intellectual property rights. Ireland has made this a pillar of its international business offering, and any proposal that impacts on property rights may also impact on the Forbes ranking.

- In addition to breaching fundamental and constitutional rights as well as EU, international trade and intellectual property laws, the removal of legitimately held trademarks and other intellectual property rights would undermine and damage Ireland’s hard won position as the best country in the world for business.

- If this legislation is introduced, businesses across all sectors would be on notice that their trademarks are not safe in Ireland.

In December 2013, Ireland was named the Best Country in the World for Business by Forbes magazine. This status has long been an ambition of the Government, and recognises an industrial policy that has seen more than 1,000 overseas companies invest in Ireland and create more than 150,000 jobs.

The Forbes ranking ranks countries on a variety of categories, including investor protections and property rights. The property rights category, in which Ireland ranks 18th, gives a heavy weighting to the protection of intellectual property rights. Any attack on intellectual property rights in Ireland, such as that posed by plain packaging, could see the country lose its top spot and plummet down the rankings, damaging the prospect of further investment and economic recovery.

Intellectual property rights are considered a cornerstone of economic activity. This has been long recognised by the Government. At the launch of the Law Society Intellectual Property Law Committee on 26th September 2012, Sean Sherlock commented:

“The IP-related industry in Ireland has the potential to make a major contribution to economic growth and job creation in Ireland and the Government is committed to maximising this potential…. A high standard of intellectual property protection is essential to … maintain the necessary conditions for protecting and promoting innovative ideas.”

The Programme for National Government also contains a similar commitment:

"We will support the development of an International Content Services Centre to make Ireland a world leader in managing intellectual property."  

The new medium term economic strategy announced in December 2013 reiterated the commitment to intellectual property and to “strengthening our Intellectual Property (IP) framework”.

Yet in the same breath, the Government has introduced a proposal that would violate our right to use our trademarks on lawfully available products and prohibit the use of our globally recognised logos,
colours and designs. Among other things, our trademarks give our customers an assurance of the origin and quality of our products, a reputation that PJ Carroll has built up since 1824. Removing our trademarks would make it nearly impossible for PJ Carroll to distinguish its products from those produced and imported illegally which do not meet the same quality standards. The ability to differentiate a product from those of the competition is fundamental to ensuring undistorted competition. Plain packaging would undermine the most fundamental principle of the market economy: i.e. businesses compete to offer the best product for the best price.

The Irish Business and Economic Confederation (IBEC) has warned of the precedent plain packaging of tobacco products would set:

"IBEC believes that such proposals, if adopted, would set a dangerous precedent for all businesses in terms of loss of intellectual property and would also lead to a general weakening of the protection of property rights in Ireland".\(^{35}\)

If plain packaging for tobacco products is introduced, then other sectors would be on notice that their trademarks and other intellectual property are no longer safe in Ireland. Already there has been concern in other sectors that this may be the thin end of the wedge. Indeed, at the Joint Oireachtas Committee’s hearing on December 5\(^{th}\), 2013, Deputy Mitchell O’Connor advocated the introduction of plain packaging for foods with high sugar and salt content.\(^{36}\)

\(^{35}\)www.ibec.ie

\(^{36}\)Oireachtas Committee on Health and Youth regarding the General Scheme of the Public Health (Standardised Packaging of Tobacco) Bill December 2013
10. Conclusion

PJ Carroll strongly opposes the introduction of plain packaging.

Plain packaging is unlawful and would not achieve the objectives of the Government. PJ Carroll believes that there is simply no credible or reliable evidence that underpins or supports the introduction of the Proposal. The evidence relied on by the Government is not methodologically sound and does not justify the introduction of plain packaging because it fails to make the key link between packaging and actual smoking behaviour.

The Proposal would lead to unintended consequences that have the potential to damage the Government, consumers, retailers, legitimate businesses and Ireland’s business reputation. The initial evidence from Australia suggests that the introduction of plain packaging has coincided with an increase in the illicit market and a deceleration of the longstanding decline in tobacco consumption.

For the reasons outlined in this submission, PJ Carroll urges the Government to reconsider the Proposal.
# Appendix A

## Head by Head Analysis

For completeness we have set out below our views on each head. However our arguments in respect of each head should be taken as applying to the Proposal generally as we have fundamental concerns as to the legality of the Proposal as a whole. Although we have raised particular issues with specific heads we object to the Proposal in its entirety and the general criticisms above apply to each and every head.

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<td>Head 1: Interpretation</td>
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<td>Head 2: Regulations</td>
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| Head 3: Purpose of Legislation | The stated purpose of the Proposal is insufficient to justify plain packaging, which, as set out above and below, would amount to an unlawful, unreasonable, unnecessary and disproportionate interference with rights under the Irish Constitution, the laws of the European Union, the European Convention on Human Rights, the EU Charter of Fundamental Rights, and the protections afforded to international trade under WTO agreements. Tobacco is a lawful product, produced, manufactured and marketed by our company in accordance with all applicable Irish legal requirements. Attempting to reduce the "appeal" of tobacco products – a lawfully available product – is not a legitimate objective if it does not lead to the reduction of smoking. The ability to differentiate a product from those of the competition is fundamental to ensuring undistorted competition. To introduce plain packaging only to attempt to reduce the appeal of tobacco products would undermine the most fundamental principle of the market economy: i.e. businesses compete to offer the best product for the best price.

There is no evidence that plain packaging would have any effect on the appeal of cigarette smoking itself. The studies promoting plain packaging only evaluate the comparative appeal between branded and plain packs, not tobacco products or smoking itself. Asking people to compare branded packs to plain packs is the wrong question. The studies do not address the appeal of cigarette smoking itself if all cigarettes are sold in plain packaging. Furthermore, the studies do not relate comparative evaluations between branded and plain packs to smoking behaviours or establish how people would behave if all cigarettes are sold in plain packs and such packaging is not unusual. Health warnings have appeared on Irish cigarette packs since 1978. The content of the health warnings are now prescribed by EU law, as is their size. They already occupy a substantial proportion of the pack.
space, and there are proposals that this should be increased. The warnings are stark and unambiguous. There is no evidence that branding, trademarks, and packaging neutralise consumers’ existing awareness of the risks of smoking or prevent consumers from seeing and assimilating the existing health warnings. In the circumstances there is no rational basis for the suggestion that, in order for the health warnings to be effective, it is either necessary or proportionate that standardised packaging requirements should be imposed in respect of the remainder of the pack which is not already occupied by the health warnings.

As set out in section 5 there is no credible evidence that demonstrates that plain packaging would work. Any evidence in support of the Proposal rests on attitudes, perceptions and intentions, rather than actual behaviour. Extensive evidence shows that the influence of peers and family, access to cigarettes and price are the main factors in the decision to smoke, not packaging. There has been no change to the long term smoking trends in Australia since the introduction of plain packaging just over a year ago.

**Head 4: Application of the Provisions of this Act**

As set out in section 6 of our submission, we believe that the Proposal would only further increase the scale of the illicit trade problem in Ireland. Ireland has a huge black market in tobacco products, taking money out of the pocket of retailers and costing the state up to €569 million per annum (Retail Ireland report).

The evidence from Australia suggests that plain packaging would only make this problem worse. Criminals do not abide by tobacco control laws. The black market is unregulated, and is the easiest point of access to tobacco for youth. Given the acknowledged risks of smoking, the Government should be particularly concerned about illicit tobacco products. The illicit trade represents serious regulatory concerns.

It is only lawful to manufacture, produce and sell tobacco products under strictly controlled conditions. We comply with these rules, and respect these statutory and regulatory requirements, but there is no reason to suppose that those engaged in the illicit trade will do so. Accordingly, other laws designed to control the constituents of tobacco products are likely to be ignored by those engaged in illicit trade. Furthermore, laws designed to ensure that tobacco products are not sold to youth are much more likely to be ignored by those engaged in illicit trade. As outlined in section 6, Ireland is already home to the most lucrative black market in tobacco in Western Europe, and we believe that, rather than stopping youth from smoking, plain packaging would make cheap, unregulated illicit cigarettes more widely available. Put simply, the plainer the pack, the easier it is for criminals to copy, the cheaper it is for counterfeit packs to be
produced, and the easier it is for counterfeit packs to go unnoticed. Furthermore, removing the incentive to pay premiums for products that no longer look or feel premium would drive prices down across all cigarette market segments, conferring a competitive advantage to those able to supply the lowest cost product – *i.e.* the illicit trader.

**Head 5: Physical Features for Retail Packaging of Cigarettes**

As set out in section 4 the proposed provisions encroach and undermine fundamental rights protected by the Irish Constitution and by EU law, including the right to freedom of expression, the right to communicate, and the right to property (which includes trademarks and other intellectual property). The provisions would limit those freedoms for purported public health aims, but do so without any evident regard for fundamental constitutional requirements of proportionality, and without any evident concern for the extinguishment of the rights that they entail.

As outlined in section 6, packaging experts believe that pack complexity and variety and the use of specialist manufacturing processes present a technical barrier to counterfeiting.

**Head 6: Labelling Requirement for Retail Packaging of Cigarettes**

The evidence provided by Government in support of plain packaging fails to examine the relationship between packaging and people's actual behaviour. Research cited by Minister Reilly in support of his proposals, for example Moodie et al 2012 and the 2013 Update, only evaluates the comparative appeal between branded and plain packs, not the appeal of tobacco products or smoking itself. Furthermore, the studies do not relate comparative evaluations between branded and plain packs to smoking behaviours or establish how people would behave if all cigarettes are sold in plain packs and such packaging is not unusual. In a recent US Court decision, which prohibited the FDA from implementing a proposed set of graphic health warnings, this sort of evidence was dismissed as ‘questionable social science’ that constitutes ‘mere speculation and conjecture’.

**Head 7: Requirements for Appearance of Cigarettes**

The general criticisms above apply to each and every head.

**Head 8: Physical Features for the Retail Packaging of Roll-your-own tobacco**

Please see comments from previous sections

**Head 9: Labelling Requirements for the Retail Packaging of Roll-**

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<th>Head 10: Requirements for the Retail Packaging for Tobacco products other than Cigarettes and Roll-your-own Tobacco.</th>
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<th>Head 12: Authorised Officers</th>
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<th>Head 14: Fines and Penalties</th>
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<th>Head 15: Trade mark acts 1996</th>
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<td>As set out in section 4, PJ Carroll believes that plain packaging would contravene Irish and European law, and would be in contravention of WTO agreements. The measures contained in the Proposal would effectively deprive PJ Carroll of its right to use its legitimately held trademarks and other intellectual property.</td>
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<th>Head 16: Short title and commencement</th>
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<td>As outlined in section 3, while we welcome the opportunity to engage with the Department in relation to tobacco regulation, we do not believe that the way in which the Regulatory Impact Assessment process has been undertaken is in accordance with the principles of proper regulation espoused by the State. The Department has, belatedly and hastily, commenced what it characterises as a Regulatory Impact Assessment in respect of the Proposal. It is difficult to see how the process announced by the Department can be reconciled with the robust, independent and transparent process envisaged by the Programme for Government, the Cabinet Handbook and the Taoiseach's Departmental Guidelines. Given the complexity and the impact of the Proposal, sufficient time should have been granted to allow a comprehensive Regulatory Impact Assessment to be undertaken before the introduction of the Proposal, and before rather than after, the Joint Oireachtas Committee hearings. This is a surprising departure from good practice given the clear commitments in the Programme for Government, the Cabinet Handbook and the Taoiseach's Departmental Guidelines which all state that a Regulatory Impact Assessment should be conducted at an early stage before a decision to regulate has been taken. The WTO TBT Agreement also effectively requires countries to conduct a proper impact assessment before introducing packaging...</td>
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and labelling requirements that limit competitive opportunities, as the Proposal would.

The timing of this process is also difficult to reconcile with the Minister for Health's commitment to the Dáil (on six separate occasions since June 2013, and as recently as 19 December 2013), that the Department intended to adhere to these guidelines in respect of standardised packaging of tobacco products.
Appendix B- Overview of Recent Plain Packaging Research

Please see below review of the more prominent studies reviewed in the 2013 Update cited by Minister Reilly in support of the Proposal.

References in the report to the research by Moodie et al (2012) and the 2013 Update are to the systematic review undertaken as part of the Public Health Research Consortium in 2012 (the PHRC Review), and the subsequent research update dated September 2013.\textsuperscript{37}

The 2013 Update considered seventeen studies which had been published after the PHRC Review.

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<thead>
<tr>
<th>No.</th>
<th>Study</th>
<th>Factors Assessed</th>
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<tr>
<td>1.</td>
<td>Al-Hamdani (2013)\textsuperscript{36}</td>
<td>Warning Salience and Effectiveness (&quot;Warnings&quot;)</td>
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<td>2.</td>
<td>Borland &amp; Savvas (2013)\textsuperscript{39}</td>
<td>Appeal, Harm Perception</td>
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<td>3.</td>
<td>Borland et al (2013)\textsuperscript{40}</td>
<td>Appeal, Warnings</td>
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<td>4.</td>
<td>Edwards et al (2013)\textsuperscript{41}</td>
<td>Facilitators/Barriers to Introduction of plain packaging (&quot;Facilitators/Barriers&quot;)</td>
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<td>5.</td>
<td>Ford et al (2013a)\textsuperscript{42}</td>
<td>Appeal, Harm Perception</td>
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<tr>
<td>6.</td>
<td>Ford et al (2013b)\textsuperscript{43}</td>
<td>Appeal, Harm Perception, Intentions, Beliefs, Attitudes and Behaviour towards Smoking (&quot;Attitudes&quot;)</td>
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<th>Reference</th>
<th>Key Findings</th>
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These studies suffer from many of the same flaws as those reviewed in the PHRC Review, as summarised below.

10.1.1. The fundamental shortcoming of most of these studies is that they fail to observe plain packs in a natural setting. They lack real world evidence and do not evaluate the impact of plain packaging policy in practice.

10.1.2. These studies generally do not demonstrate any impact on actual smoking behaviours.

10.1.3. These studies do not establish any information deficit or any misperceptions about the health risks associated with cigarettes.

10.1.4. Even the 2013 Update states that these studies merely “suggest that plain packaging would: reduce the appeal of cigarettes and smoking; enhance the salience of health warnings on packs; and address the use of packaging elements that mislead smokers about product harm” (emphasis supplied). Notwithstanding the methodological flaws in the studies, these effects that plain packaging may allegedly have are not predictive of a change in actual smoking behaviour. Therefore, the additional studies reviewed in the 2013 Update do not justify introduction of plain packaging because they fail to demonstrate a link between packaging and smoking behaviour.

10.1.5. Many of these studies look at aspects like intentions, attitudes and impressions. They measure perceptions which are not predictive of actual behaviour. They examine the subjects’ stated views of plain packaging but observe no actual smoking practices.

10.1.6. The studies do not consider well established evidence (as discussed above) on the real factors driving smoking initiation, cessation and relapse. These reports establish that packaging has never been considered a relevant factor in driving these behaviours.

Some of the more prominent studies reviewed in the 2013 Update are discussed in more detail below.

**Maynard et al (2013):** This study examined eye movements with a convenience sample of 87 students (14-19 years) in three secondary schools in Bristol, UK. They were divided into four groups: never-smokers, experimenters, weekly smokers and daily smokers. The findings revealed that most participants made more eye movements towards the health warnings than to the brand name on plain packs but, overall, the participants made essentially the same number of eye movements to the health warnings irrespective of whether the packs were branded or plain. Moreover, the study found that adolescent never-smokers looked at the health warnings more than any branding element irrespective of whether the pack was branded or plain and, actually, looked at the health warnings more when the pack was branded. The key shortcomings of the study include:

(A) as admitted by the authors, the sample used in the study is not representative of the relevant policy population and the extent to which the results of this study generalise to the wider population would be limited. For example:

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only students from three schools were considered and the sample size was very small;

- the majority of the students were attending a school which was academically scoring above the national average;

- the majority of the students were studying psychology which could affect their opinions; and

- the never-smokers and experimenters were predominantly female, with more males in the smoking group.

(B) eye movement as a test is not indicative of actual smoking behaviour. There is no validated link between the amount of attention people pay towards health warnings and their decision to smoke.

(C) while this study finds more eye movements towards health warnings than to the brand name on plain packs, the total eye movement towards warnings as between plain packs and branded packs were essentially the same. If the premise for evaluating eye movements is that paying more attention to warnings leads people to quit smoking, this study suggests that plain packs do not focus more total attention to warnings as the difference between the actual time that adolescents pay attention to warnings on plain packs relative to branded packs is marginal.

(D) the study provides no credible support to the claim that plain packaging is more effective in achieving actual reduction in smoking.

Moodie and MacKintosh (2013): For this study, 187 young adult women (18 to 35 years) were recruited and instructed to use plain packs for one week and their own fully branded packs for one week. Following this, they completed questionnaires designed to assess their perceptions and feelings towards packaging and smoking, response to the warnings and avoidant and cessation behaviour. Plain packs were found to be less attractive than branded packs. The participants reported looking more closely at warnings on plain packs and thinking more about cessation. The key shortcomings of the study include:

(A) the duration of the study was only two weeks. It is an extremely short time frame and is not reflective of long term behaviour, particularly where the smokers would get accustomed to plain packs over time in a plain packaging environment. Moreover, the disparate emotions and intentions reported in this study in relation to branded and plain packs will be expected to dissipate if plain packs are the only packs available. Indeed, as the authors note, "participants may respond differently if only plan packs were available on the legitimate market." Therefore, the value of the findings of this study is limited.

(B) the impact on attitudes, beliefs and intentions of the participants is not predictive of actual behaviour. A respondent indicating that they find the packaging of a tobacco product less (or more) attractive alone is not an indication that the respondent's tobacco consumption will be affected by a change in the packaging.

(C) it is self-reported and respondents to the study may not have been honest in their responses.

(D) as the authors themselves admit, the results of this "study cannot be generalised to all young women smokers". Further, the findings cannot be generalised to male smokers, older female smokers, adolescent smokers and non-smokers.

(E) as is the case with most of the studies reviewed in the 2013 Update more generally, the setting is artificial as the plain packs carried fictitious names. Subjects trust existing brand names and may be suspicious of fake brand names. They may even consider the cigarettes provided under a fictitious brand name to be fake. This
may have generated responses that one would not see if people were to smoke cigarettes from plain packs bearing actual brand names. Therefore, this study does not inform on the impact of the policy in practice.

**Wakefield et al (2013):** This study involved a cross-sectional study conducted in November 2012 when plain packs were being rolled out in Australia but were not yet mandatory. It found that plain packs were associated with lower appeal relative to branded packs. People smoking from plain packs were more likely to think about quitting and support plain packaging measures. The key shortcomings of this study are:

(A) its conclusions focus only on intentions, attitudes and impressions (and ignore objective smoking measures). It does not examine actual behavioural changes.

(B) it found no differences between plain and branded pack smokers in relation to quit intentions within 30 days or the next six months. The study further found that there were no significant differences in the proportion of plain and branded pack smokers who thought frequently about the harms of smoking. As noted in the NHS's critique of this study, "There was no significant difference between groups for intentions to quit smoking, frequency of thoughts about harms or perceived exaggeration of harms."

(C) given that the study was conducted in November 2012, when plain packs had not yet been introduced in Australia, the findings of the survey may reflect an initial short term effect that would dissipate once people are accustomed to the plain packs after such packaging was made mandatory and plain packs were the only available cigarette packaging on the legal market.

(D) as further noted by the NHS, this study has many other flaws, including: "that the study could not assess whether a change in packaging achieves the desired outcomes – of an increase in quit rates . . . whether the change in packaging prevented people from starting smoking in the first place . . . It also only looked at adults’ beliefs, so the findings cannot be generalised to younger people . . . the amount people smoked was based on their own reporting, and there is a possibility that participants did not report their level of smoking consumption accurately. This could potentially bias the results as could the fact that some of the smokers of branded packs, may have previously smoked from plain packs."

**Hammond et al (2013):** While this study was not reviewed in the main body, it is considered in Appendix 2 of the 2013 Update as a part of the research within the UK. As a part of this study, 16 to 19 year old female subjects in the United Kingdom participated in an online survey. They were offered a cigarette pack that would be sent to them on conclusion of the study. Branded or plain packs were offered randomly. The study found that those who were offered branded packs were more likely to accept a pack than those offered plain packs (51.8% vs. 44.6%). The shortcomings of this report are:

(A) as in the case of Moodie and MacKintosh (2013), the preference may be an initial short term effect that would go away once people are accustomed to the packs or where plain packs become the norm extinguishing the legal availability of branded packs altogether.

(B) it is possible that people may have deduced the purpose of the study. This would bias their responses, which are consequently unreliable.

(C) the study cannot be generalised to a wider population as it exclusively looks at young female subjects. The findings cannot be generalised to males and older females (whether smokers or non-smokers).

In addition to the studies considered in the 2013 Update, there are some other recent studies that have purported to look at the impact of plain packaging. These suffer from similar methodological flaws as the studies discussed above.
White et al. (2012): This study involved 640 Brazilian women (16 to 26 years) who participated in an online survey involving comparison of branded and plain packs on perceived appeal, taste, health risk, smoothness, etc. At the conclusion of the survey, they were shown a range of branded and plain packs from which they could select one as a free gift if they wanted, which constituted a behavioural measure of appeal. This paper found a large difference with 40% people choosing a branded pack and only 13% choosing a plain pack. This study suffers from the following shortcomings:

(A) the survey suffers from a methodological flaw in that it offered people a choice between branded and plain packs. This is an artificial setting. In a real life situation, people would not get such a choice. Therefore, the mere fact that they would prefer branded packs over plain packs does not suggest that there would be any change in smoking prevalence if only plain packs were available. As a later study indicates, the difference between people accepting a branded pack and people accepting a plain pack is significantly reduced once the element of choice is removed.

(B) the shortcomings of Hammond et al. (2013), as above are also applicable here.

(C) the relevance of the findings in the context of Ireland is limited given that the sample consists exclusively of Brazilian women.

Rousu and Thrasher (2013): This study reports the results of experimental auctions with US smokers, assessing the percentage of smokers whose demand for cigarettes decreases when bidding on packs with graphic health warnings ("GHWs") and plain packs relative to packs with only text warnings. The study finds that GHWs are more effective in reducing demand than text-only warnings. Further, GHWs are more effective at encouraging younger smokers to reduce their demand. Plain packaging was found to be most effective in reducing demand among less educated smokers. They key shortcomings of this study are:

- the auction experiment that took place at tables in several grocery stores was contrived and very far from any naturalistic setting.

- the sample is not representative. It includes only smokers and does not consider what the impact of larger GHWs and plain packs would be on young non-smokers – the key focus of the Proposal. Further, the authors admit that the study was conducted with a convenience sample of smokers recruited from grocery stores. Therefore, the results may not be generalizable to all US smokers. The relevance of the findings in the context of Ireland may be limited given that the sample is not representative of US smokers.

- the reduction in demand for packs with larger GHWs and plain packs could be reflective of merely a short term demand change. The influence of the warnings may wear out and dissipate over time as they lose their novelty and smokers become more accustomed to them. Therefore, this study is not relevant when considering the long term impact of plain packaging on smoking.

- as in the case of Hammond et al. (2013) and White et al. (2013), as discussed above, the reduction in demand could also be explained on the basis that, as packs become more and more different from what is available, subjects may become more suspicious that the pack of cigarettes is genuine. The study does not control for this possibility and therefore, its findings have limited, if any, value.