

FAO [REDACTED]
Protection Team
Buckinghamshire & Surrey Trading Standards
Consort House
5 – 7 Queensway
Redhill
Surrey
RH1 1YB

IMPERIAL BRANDS PLC

121 Winterstoke Road
Bristol BS3 2LL, UK

Tel: +44 (0)117 963 6636
www.imperialbrandsplc.com

By Post and Email: [REDACTED]@surreycc.gov.uk

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Dear [REDACTED]

Japan Tobacco International (JTI) - Breach of Menthol Ban

We write further to our previous letter in relation to the above matter dated 3 June 2020.

You will recall that in that letter we raised serious concerns regarding the fact that JTI's New Dual Range of cigarettes appeared to contain menthol flavouring, notwithstanding the fact that characterising flavours have been prohibited by the Tobacco and Related Products Regulations (**TRP Regulations**) since 20 May 2020.

We are writing to keep you updated in relation to developments on this matter and, in particular, admissions made to us by JTI via its lawyers.

In summary, the current situation can be summarised as follows:

- JTI has confirmed the New Dual products contain menthol additives;
- There is strong evidence that those menthol flavourings are clearly noticeable to consumers; and
- JTI has openly marketed the products as menthol products in order to appeal to existing menthol smokers.

Taken as a whole, we consider that JTI is in clear and deliberate breach of regulation 15 of the TRP Regulations (widely known as the **Menthol Ban**) by producing and selling the New Dual Range. Further, JTI's conduct fundamentally undermines the considerable efforts taken by both tobacco manufacturers and retailers to comply with the Menthol Ban, at great commercial cost. We believe that JTI's conduct represents a direct challenge to the integrity of the tobacco products regulatory regime itself, which if allowed to continue risks compromising the "level playing field" under which all manufacturers agree to abide by the same rules and standards.

In order to ensure that the Menthol Ban is upheld and trust in the wider regulatory regime is maintained, we believe that enforcement action has become both urgent and essential. Given the ongoing damage caused by JTI's menthol products remaining on the market and being openly promoted, we consider that the appropriate remedy now would be injunctive relief in the form an Enforcement Order banning all further sale of the offending New Dual Range products. We are concerned that criminal proceedings, which would

Registered in England
and Wales No: 3236483

Registered Office:
121 Winterstoke Road
Bristol BS3 2LL, UK



necessarily take some time, particularly in the light of the pressure on the criminal courts because of the Covid crisis, will give JTI the opportunity to continue producing and selling its unlawful products for a long period of time. Any eventual fine would be negligible when set alongside the significant profits generated during this period from its unlawful conduct.

We appreciate that you will need to investigate this matter for yourself, make your own assessment of the evidence, reach your own independent conclusion about JTI's conduct, and decide upon the most appropriate course of action. We are, however, keen to provide you with the benefit of our own investigation and evidence gathering. We set out the findings of our initial investigations below.

Confirmation that New Dual products contain menthol

In our previous letter we informed you that we had detected menthol flavouring in New Dual cigarettes. JTI has now confirmed that these products do indeed contain menthol but denied this produces a 'characterising flavour', defined as a clearly noticeable smell or taste other than of tobacco.

Specifically, in a letter from JTI's lawyers, Freshfields Bruckhaus Deringer LLP, dated 5 June 2020 (copy enclosed), it was stated: "*JTI is satisfied that the inclusion of menthol at very low levels in certain of its UK brands does not give rise to a characterising flavour, as defined by law*".

We consider this to be a very unconvincing explanation. This is not least because, as we explain below, JTI is clearly holding New Dual products out as having menthol characteristics. It is part of its new "Menthol Reimagined" range. We fail to see why JTI would deliberately add menthol to its products if not to give a clearly noticeable menthol flavour.

We note the Freshfields' letter selectively quotes from Recital 17 of Directive 2014/40/EU, which was implemented by the Regulations. The extract selected states "*the prohibition of tobacco products with characterising flavours does not preclude the use of individual additives outright, but it does oblige manufacturers to reduce the additive or the combination of additives to such an extent that the additives no longer result in a characterising flavour*".

However, the remainder of Recital 17 goes on to explain why there is no outright ban of such additives, by stating that (our emphasis) "[t]he use of additives **necessary for the manufacture of tobacco products, for example sugar to replace sugar that is lost during the curing process, should be allowed, as long as they do not result in a characterising flavour or increase the addictiveness, toxicity or CMR properties of the product.**"

In other words, according to the Directive, an additive can be used if it can be shown to be necessary for the manufacture of the tobacco blend, not (as appears to be the case with the New Dual Range) where it is used to introduce a flavour not inherent in tobacco such as menthol.

We do not consider that there is anything necessary in JTI's addition of menthol in its New Dual Range beyond the perceived commercial need to retain and build upon their menthol customer base following, and in spite of, the Menthol Ban.

Further, the consumer perception data we have gathered so far (see below) clearly indicates that the New Dual products *do* in fact clearly have a menthol taste.

Strong evidence that the menthol flavour is clearly noticeable

JTI's assertion that its addition of menthol (and any other ingredients) is not sufficient to amount to a characterising flavour is contradicted by its consumers.

We have carried out some initial scientific analysis of the products JTI has launched post the Menthol Ban across the UK and other EU markets which we were concerned contained menthol. As well as confirming that the UK New Dual Range does in fact contain menthol (as has now been expressly admitted by JTI), a panel of 15 sensory analysts operating in accordance with ISO standards 13299 (which sets out the

methodology for sensory testing) all clearly identified the taste of menthol when smoking Sovereign New Dual. To avoid any bias, products were tested “blind” i.e. the panel did not know what tobacco products they were smoking, who they had been manufactured by, or the purpose of the research. This evidence strongly suggests that the menthol in Sovereign New Dual is clearly noticeable during consumption, and as such, amounts to a characterising flavour.

In addition, we set out below a selection of consumer reactions to the New Dual Range which have been posted on social media in relation to the Sterling New Dual product (a more extensive selection of social media postings is attached at Schedule 3):

“Just to let y’all know who smoke menthol. Buy “sterling dual New” they’re just the same pretty much”.

“literally don’t understand this menthol ban as I’ve just bought a pack of sterling duals they just don’t click?? They’re packaged as 2 packs of 10 that’s like the only difference”

“yeah they’re basically just menthol cigs”

“new sterling dual taste the same as menthol, looks like I’m not quitting smoking then”

“Right what have they actually banned re menthol cigs bc yesterday I got “sterling dual new” and they’re just menthol?”

“also they’ve literally just bought out these ‘new sterling dual’s that aren’t as strong but are still menthol, & are apparently legal...”

“I went to the shop today, and they said they got in today “sterling dual new” they didn’t know if they are menthol or not. I bought them and they are fully menthol... idk if the new name is a loophole around the ban but they are fully menthol”

“PSA THEY STILL DO MENTHOL THEYRE JUST LESS STRONG! Ask for sterling dual new (ur welcome)”

“PSA- for anyone that thinks menthols are gone forever. They’re not. Sterling new dual and b&h new dual are a ‘special blend’ to get round the law but they’re menthol xx”

In light of these consumer reactions to the New Dual Range we consider that it is simply not tenable for JTI to deny that its New Dual Range has a clearly noticeable menthol flavour. The evidence all points to this being the sole purpose these products were launched. This appears to be a flagrant breach of the law.

JTI is marketing the New Dual products as menthol products

As you will be aware, under the Tobacco Advertising and Promotions Act 2002 and the Standardised Packaging of Tobacco Products Regulations 2015, tobacco companies are effectively prohibited from making direct representations to end consumers in relation to their products, with the sole exception of the product name.

As a result, manufacturers can only communicate information regarding product characteristics via their retail trade partners.

This means that in order to understand how JTI is presenting the New Dual Range to consumers, it is essential to examine the advertising and promotional material it has been distributing to retailers. We are of course not privy to all of these communications, however, we refer you to the publication named “*Making a Mint*”¹, which describes itself as “An SLR [Scottish Local Retailer] supplement produced for Scotland’s local

¹ https://issuu.com/antonybegley/docs/menthol_handbook

retailers in association with JTI. This represents a sample of the kind of marketing material that JTI deployed ahead of the New Dual Range launch.

We refer in particular to the prominent back page of this publication, a copy of which is attached at Schedule 1. We believe this marketing communication is clearly intended to inform retailers that the New Dual Range is part of JTI's wider menthol range and like the rest of the menthol range has a characterising menthol flavour. We note the following in relation to this document:

- The page is entitled "*MENTHOL REIMAGINED*";
- The entire page is in the distinctive shade of green directly associated with menthol and mint flavours;
- All 3 of the other products displayed on the page contain menthol or mint, and are promoted accordingly, for example "*Cigarillos... with a peppermint capsule filter*"; "*Logic Compact ... 9 menthol flavours*"; "*Logic EPIQ e-liquid available in 5 menthol flavours*"; and "*Nordic Spirit ... a fresh mint flavour.*"

It appears that JTI are replicating the "menthol reimagined" marketing communication across multiple trade channels. For example, we also attach a photo of a large standing display bearing the same content outside a wholesale cash and carry retailer at Schedule 2.

We consider it highly probable, if not inevitable, that any retail business viewing these advertisements would reach the conclusion that the New Dual Range has clearly noticeable menthol flavours. Other pages in the 'Making a Mint' publication referred to above already position the New Dual Range as direct alternatives to JTI's previous menthol cigarettes.

It follows that JTI's intention was that retailers would also hold New Dual out as a menthol option to consumers after the menthol ban on 20 May 2020. Indeed, we understand from our trade representatives that this is precisely what is happening.

Breach of consumer protection & advertising law

We consider that – leaving aside the issue of non-compliance with tobacco products legislation – the highly misleading way that JTI has marketed the New Dual Range raises serious issues under both the Consumer Protection from Unfair Trading Regulations 2008 (the **CPUT Regulations**) and the Business Protection from Misleading Marketing Regulations 2008 (the **BPMM Regulations**).

In relation to the CPUT Regulations:

- As you will be aware, the CPUT Regulations makes it an offence for a trader to engage in unfair commercial practices. Under paragraph 9 to Schedule 1 of the Regulations, "*stating or otherwise creating the impression that a product can legally be sold when it cannot*" is one of the specific commercial practices which are in all circumstances considered unfair. A breach of the CPUT Regulations therefore must follow a breach of the TRP Regulations.
- As a more general observation, whichever way you look at JTI's marketing of the New Dual products, consumers are being misled. Either (i) the products cannot lawfully be sold because they have a clear menthol flavour or (ii) if the menthol flavour is not detectable (as JTI incorrectly claims) then JTI has misled consumers by holding the products out as having genuine menthol characteristics.

In relation to the BPMM Regulations:

- Regulation 3(3)(a) of the BPMM Regulations makes it an offence for a trader to mislead another business in relation to the "characteristics of the product". As discussed above, we believe that JTI has misled its retailer partners in relation to the characteristics of the product. JTI claims that the menthol additives in the New Dual Range are sufficiently low as to avoid breaching the characterising flavour ban, whilst simultaneously claiming that they have sufficient menthol flavour to appeal to existing menthol smokers. This is clearly wrong and misleading.

- It is particularly concerning that JTI appears to have misled its retail trade partners in relation to the legality of the New Dual range. Retailers rely on the industry and technical knowledge of tobacco companies in order to ensure that they are complying with the various complex regulatory requirements that apply to tobacco and nicotine products. By making representations in trade marketing to the effect that the New Dual Range can be lawfully sold (while at the same time promoting the menthol flavour) JTI is exposing retailers to direct liability under the TRP Regulations. This is because the offence of selling tobacco products with a characterising flavour also applies to retailers (as suppliers) of tobacco products – who are now potentially (and perhaps inadvertently) complicit in contravening the Menthol Ban.

For completeness, the principles above are also enshrined in the Committee of Advertising Practice (**CAP**) Code – which states that both that “*marketing communications should comply with the law and should not incite anyone to break it*” and that “*marketers must not state or imply that a product can legally be sold if it cannot*”.

We understand that these points will be of particular interest to Buckinghamshire & Surrey Trading Standards as the designated prosecuting authority for the Advertising Standards Authority (**ASA**). Please note that we intend to refer this matter to the ASA separately in relation to the breaches of the CAP Code – although we observe that this cannot address the more fundamental issue of JTI’s continued sale of products that breach the TRP Regulations.

Enforcement Order

For all of the reasons above, we consider that there is sufficient evidence already for you to investigate and pursue injunctive relief in the form of an Enforcement Order banning the sale of the New Dual range. Given the continuous and ongoing breaches by JTI we believe this case merits an application for an **Interim Order**. Seeking an Enforcement Order other than on an interim basis would allow JTI to benefit from the marketing of the New Dual Range until the final order is made. That may be some time in the future. Whilst we appreciate and understand you have the power to prosecute, this is a time consuming process during which JTI will continue to trade and reap considerable benefit from what we believe is illegal activity.

We have reviewed the Buckinghamshire & Surrey Trading Standards Enforcement Policy (the **Policy**) and, in our view, the Policy suggests this is the most appropriate course action here.

In particular we note that paragraph 1.5 of the Policy states: (our emphasis)

*“The main purpose of the Trading Standards Service enforcement activities is to protect the public and **legitimate businesses**. To achieve this aim we will undertake to regulate businesses and others in a fair, practical and consistent manner helping to support or enable local and national economic growth **for compliant businesses and other regulated entities**.”*

As discussed above, this is particularly pertinent here as JTI’s actions have fundamentally damaged the level playing field consensus created by shared compliance with the TRP Regulations, not to mention other core tobacco products legislation such as the Tobacco Advertising and Promotions Act 2002 and Standardised Packaging of Tobacco Products 2015.

We would also point out that we believe JTI is making substantial financial gains as a result of its non-compliance with the TRP Regulations. Our contacts in the retail trade inform us that JTI’s campaign of promoting the New Dual Range products as having menthol characteristics has been very successful in terms of encouraging retailers to recommend and sell them to existing menthol smokers. It is anticipated that unless JTI is ordered to stop selling the New Dual Range as a matter of urgency it stands to profit significantly from its unlawful conduct against which any fine levied will likely be trivial by comparison.

This is particularly relevant in the context of paragraph 2.6 of the Policy, which states that the aim of any intervention is to (amongst other things) “*eliminate any financial gain or benefit from non-compliance.*”



Further, the “*amount of gain for the offender*” is deemed an aggravating factor in terms of determining whether enforcement action should be taken under paragraph 3.

Clearly it is for you to take further steps to satisfy yourselves of the breach and determine the most appropriate course of enforcement action to take in this instance.

We of course fully appreciate that you have competing and more local priorities – more so than ever during the current coronavirus crisis – however given the national dimension of this issue we would invite you to consider working with National Trading Standards in order to ensure that the law is adequately enforced in this instance.

Indeed, we note from an article in The Irish Times dated 9 June 2020 that the Health Service Executive in Ireland has already launched an investigation into cigarette brands JTI is selling in Ireland which it has also admitted contain menthol².

Next steps

We are currently in the process of carrying out further evidence gathering in relation to this matter and will share that with you as soon as we have it, but we believe we have provided you with sufficient information for you to take action now.

Yours sincerely,

Imperial Tobacco Limited

² <https://www.irishtimes.com/business/health-pharma/hse-launches-investigation-into-tobacco-companies-over-menthol-blends-1.4273949>