

Michael Brodie
Interim Chief Executive
Wellington House
133 – 155 Waterloo Road
London SE1 8UG

Chiswick Business Park
Building 7
566 Chiswick High Road
London, W4 5YG

www.bat.com

30 September 2020

Dear Mr Brodie,

**Continuation of sale of illegal menthol tobacco products
by Japan Tobacco International (JTI) UK.**

Thank you for your letter dated 18 September.

I note your comments that the UK must comply with Commission Implementing Regulations (EU) 2016/779 – which I will refer to as “Reg 779” – during the transition period. I am, however, surprised and disappointed to hear of your interpretation of the Reg 779 procedure, and that your investigation into this matter is on hold as a result.

As you will know, the Tobacco Products Directive (TPD), as implemented in the UK through the Tobacco & Related Products Regulations 2016 (“TRPR”), takes precedence over a Reg 779 procedure and states clearly that the UK must ban such products without delay, on their own accord, without deferring to or waiting for a Reg 779 procedure to complete, should the tobacco products in question breach the relevant regulations, in this case section 15(1) of the TRPR¹.

I have set out below the rationale, based on the legal interpretation of the Commission Implementing Regulations (EU) 2016/779 and the TRPR, which shows that Public Health England (PHE) can, and indeed has a legal duty to, act now on this issue, even while in this transition period and in full compliance with the EU Withdrawal Agreement.

TPD and Reg 779 and the requirement to ban menthol products without delay

There is no doubt that TPD takes precedence over Reg 779, which is only designed to ascertain whether “borderline” products have a characterising flavour (i.e. where there are significant doubts whether there is a characterising flavour, which is clearly not the case with the products in question) or a characterising flavour for one product sold in multiple Member States (since Recital 3 indicates that a Member State should initiate an investigation for products marketed in only one or a small number of Member States).

As shown by the independent chemical analysis provided by SGS and sent to PHE previously, JTI is launching products with menthol and other characterising flavours, but

¹ The Tobacco and Related Products Regulations 2016
https://www.legislation.gov.uk/uksi/2016/507/pdfs/ukxi_20160507_en.pdf

with different compositions, across the EU, clearly as a tactic to prevent an EU-wide ban of its products, to confuse regulators and to head-off national level remedial action. The products in question are different in each market, therefore enabling both Member States, and in this case the UK government, to act now to ban these products. Indeed, it is for these reasons that investigations are ongoing in Austria, Denmark, France, Ireland, Poland and Romania, without engaging Regulation 779. By the same token, referring the matter to the Commission is unnecessary.

Notwithstanding this, even if Member States launch a Reg 779 procedure, they are still authorised by the TPD to suspend the sale of the products while the investigation takes place. If at the end of the assessment a conclusion is reached that the product does not have a characterising flavour, Member States can lift the suspension without any liability. As such, PHE is still able and legally obliged to act now even during the transition period. In fact, Recital 11 is crystal clear in stating that: *“In view of the public health considerations underpinning the prohibition on products having a characterising flavour, and with due regard to the precautionary principle, it is appropriate for the initiating Member State to be able to adopt prohibition measures as soon as it is satisfied, in accordance with the procedure provided for in this Regulation, that a product has a characterising flavour”*².

In other words, Member States (and as a result the UK government also) are legally authorised by Reg 779 to suspend the sale of the products at any point during the proceedings, based on public health considerations and on the precautionary principle. This provision shields Member States from any liability flowing from the suspension of sales whilst the 779 proceedings run its course, so long as the decision is motivated by sufficient reasons. In the case of JTI UK’s products there is ample, prima facie evidence that its products run afoul of Article 15(1) of the TRPR.

It is important to note that this view is not impacted by the wording in Recital 11 that a prohibition is *“in accordance with the procedure provided for in this Regulation”*. In Article 9(3) second paragraph, Reg 779 states that: *“The initiation of the procedure by the Commission in accordance with the first subparagraph shall not affect the entitlement of the initiating Member State to proceed to adopt a decision prohibiting the product on the basis of Article 7(1)”*. In other words, even if a Reg 779 investigation is initiated by the Commission, this does not prevent Member States, or in this instance the UK government, from banning the sales of the product being investigated whilst the investigation is ongoing, let alone investigations initiated by other Member States.

JTI Products are not a “borderline” product but have a clear characterising flavour

There is no reasonable doubt that the JTI UK products violate Article 7(1) TPD, or Article 15 of the TRPR, and should be banned outright for the following reasons:

- **The JTI UK products have a clear citrus and mint flavour.** Consumers, as described in several media articles and social media posts, have overwhelmingly found that there is a clear citrus smell upon opening a pack of the JTI UK products.

² Commission Implementing Regulation (EU) 2016/779, 18 May 2016 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.131.01.0048.01.ENG&toc=OJ%3AL%3A2016%3A131%3ATOC

Consumers further describe these products as having a clearly noticeable citrus and mint taste when being smoked. In the words of the consumers, the products were “the same as menthol” or “fully menthol”.

- **JTI UK has acknowledged that their products contain a mix of additives, including menthol.** The reason why JTI uses these additives is to give the products a distinct non-tobacco taste and thereby assimilating menthol cigarettes and differentiating them from regular cigarettes.
- **The JTI UK products are openly marketed as a replacement for traditional menthol cigarettes.** JTI's UK advertising in retail trade publications confirms that the products are intended to replace traditional menthol cigarettes. These materials openly state that the products are “fresh” and “substitutes” for menthol cigarettes. JTI also uses established menthol cigarette brands for these new products.
- **Without any advertising the JTI UK products have already captured over 8.5% of the market in the UK since 20th May, generating sales of over £124 million.** Given that any form of advertising is banned, in a fairly homogenised market like the UK, on any analysis it would be very difficult, if not impossible, for a type of “normal” cigarette (i.e. without a characterising flavour) to gain that level of market share so quickly.

Given the above and the clear powers that both PHE and the UK government in general have to conduct not only an investigation, but to ban these products and remove them from the market while an investigation is ongoing, I strongly request that PHE re-start and complete a full investigation and, as is required by the TRPR, remove these products from sale immediately.

The UK government is fully empowered and within its rights to do this, as outlined above, even during the transition period and in full compliance with the EU Withdrawal Agreement. Failure to act not only distorts competition, but more importantly is disincentivising smokers from switching to potentially less harmful alternatives to combustible tobacco, such as vapour products.

I would welcome the opportunity to discuss this matter with you further.

Yours sincerely,

[Redacted signature]

[Redacted name]

[Redacted title]

Cc: Jo Churchill MP, Parliamentary Under-Secretary of State for Health

Cc: [Redacted] (Special Advisers to the Secretary of State)

