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Dear Mr Dockrell

**Our client: Imperial Tobacco Limited
Breach of Tobacco and Related Products Regulations 2016 - Japan Tobacco
International ('JTI')**

We write in response to your email dated 17 September 2020.

We note that PHE has taken a decision to suspend all UK investigation into the JTI Products due to parallel procedures initiated by Sweden under Regulation (EU) 2016/779 (the **Regulations**).

Our client is aware of the complexity surrounding the Regulations and appreciates the particular challenges involved in applying them to decisions made by UK regulators as we near the end of the Brexit transition period.

However, the inherent complexity in this area only heightens the need for probity in the decision-making process. After considering your email our client is concerned that PHE has not taken into account a number of material factors, in particular the independent enforcement powers that UK regulators and courts have outside the remit of the Regulations.

Imperial is further concerned that PHE may have simply deferred to the Commission without a realistic appraisal of how the Commission's decision-making timetable sits alongside the Brexit process given that the Regulations are due to be repealed in just a few months' time.

Our client seeks urgent assurances in relation to these points (see Next Steps below).

Commission Implementing Regulation (EU) 2016/779

Our client does not dispute the fact that, during the transition period, the Regulations continue to have direct effect in the UK.

However, at the same time, the mere fact that the Regulations have legal force in the UK (for now) does not take all decision-making powers out of the hands of UK regulators.



In particular, as detailed in our client's previous correspondence, given the dual public policy imperative of ensuring that (i) menthol cigarettes are no longer available to UK consumers post the menthol ban and (ii) ensuring a level playing field for manufacturers who have chosen to comply with the law since 20 May 2020, there is a clear need for an interim order prohibiting the sale of JTI's menthol cigarette products. This is the case even if PHE has been advised that it is barred from making a final determination pending the resolution of the procedure initiated by Sweden under the Regulations.

We refer you to David Travers QC's written Opinion on this matter (per C23 – C27), which we have attached for reference:

C24 Moreover, there is an important distinction to be made between the prohibition by a Member State of the supply of a product, and an interim order of a court that the appropriate evidential threshold has been passed and, in the exercise of its discretion delivering a judgement, a fortiori making an interim order suspending the supply of the product pending the final trial of the action. Indeed, it is entirely possible that the final resolution of the issues could include consideration of the determination made in accordance with the procedure in 2016/779.

C25 My view is that the local authority is entitled to seek an interim order under Part 8 of the Enterprise Act. Indeed, even if the procedure on 2016/779 did bind the local authority and I am not presently persuaded that it does, I am of the view that would not preclude a court granting an interim enforcement order.

C26 I conclude with a practical observation. The procedure contemplated in 2016/779 is a lengthy one and hardly consistent with the precautionary and public health imperatives of taking action speedily in relation to a class of product which was outlawed after a considerable period of notice.

C27 Stepping back to look at this in a wider context. If it were the case that no decision could be made either by the UK government or by the domestic courts without going through the 2016/779 process that would be capable of eviscerating Article 7(1). Indeed, while I have no reason to believe it would happen in this case, an unscrupulous tobacco manufacturer could launch product after product with characterising flavours supplying each only for so long as the procedures in 2016/779 took to play out."

The Regulations (see Article 9(3) and Recital 11) do not limit Members States' ability to adopt interim prohibition measures as soon as they are satisfied that the products in question have a characterising flavour, provided that the Member State in question immediately aligns with the Commission's final decision when it is adopted¹.

It follows that if PHE's decision to suspend its investigation into the JTI Products rests solely on its deference to the Commission's interpretation of the Regulations, PHE would – on the face of it – have erred in law by closing its eyes to the need for urgent interim measures under national law in the UK. This would be all the more concerning given the overwhelming evidence (which PHE has in its possession) that menthol additives in the JTI Products are clearly noticeable to UK consumers.

Moreover, as we understand PHE is currently discharging the investigative function on behalf of Buckinghamshire & Surrey Trading Standards, PHE's decision potentially has the unintended knock-on effect of fettering Trading Standards' ability to discharge their enforcement obligations under reg.53(1) of the Tobacco and Related Products Regulations 2016.

Brexit

¹ For completeness, while the Regulations refer to this in the context of the "initiating Member State" (it is silent as to non-initiating Member States) it would be wrong to interpret the Regulations as only giving initiating Member States the power to adopt interim prohibitive measures (which in any event are allowed as a matter of construction of the applicable legislation under UK national law).



A further matter of importance is the fact that the Regulations will not form part of the retained body of EU law after the expiry of the Brexit transition period. After this date, the UK will not be bound by any decision adopted by the Commission in respect of the JTI Products under the Regulations.

In the circumstances, it is our client's assumption that PHE would only suspend its own investigation into the JTI Products if it is confident that it will be bound, at least temporarily (i.e. before 31 December 2020) by any decision adopted by a Commission decision pursuant to the Regulations.

We therefore assume that PHE has been assured by the Commission that any such decision will be adopted before the end of the Brexit transition period. If PHE has not received such assurances, and there is a real possibility that the UK will not even be temporarily bound to give effect to the decision adopted by the Commission, it would call into serious question PHE's decision to suspend its own investigations.

Our client understands that due to pressure from Sweden and other Member States that share Imperial's concerns in relation to the JTI Products (in particular the Netherlands and Finland), the Commission is currently on track to reach a decision as to whether the products have a characterising flavour by November 2020. We would be grateful if PHE could confirm this is the case and that a binding decision will be adopted by the Commission in due course.

Nevertheless, even if PHE has been assured that the Commission will reach a final decision this year, we observe that UK regulators would still need to reach an independent decision with regards to enforcement from 1 January 2021 onwards. Ultimately UK regulators need to determine the way the JTI products are perceived by UK consumers and in such a way that reflects the UK's status as a country outside both the single market and EU.

In short, our client can see no practical or legal justification for delaying PHE's investigations any longer.

Next steps

For the reasons outlined above, we request that PHE reconsiders its decision to suspend its ongoing investigation into the JTI Products. In practice, PHE's decision is likely to cause unnecessary further delay and result in menthol cigarettes being available for UK consumers for even longer².

In order to satisfy our client that the decision by PHE to suspend its investigation is lawful as a matter of public law, Imperial requires the following information as a matter of urgency:

1. Please confirm whether it is PHE's understanding that the Commission is currently aiming to reach a decision (whether provisional, draft or final) during November 2020.
2. In any event, please confirm whether PHE has been assured by the Commission that the procedure initiated by Sweden under the Regulations in respect of the JTI Products will conclude with a binding decision adopted by the Commission **before** 31 December 2020.
3. If PHE has not received such an assurance, please provide the justification for suspending the relevant independent UK investigation.

² JTI's New Dual and New Green products have now already been on the UK market for more than four months.



4. Please confirm that PHE's decision to suspend its investigation will not cause unjustified delay in the event that the Commission adopts a decision that the JTI Products have a characterising flavour. Please also confirm that PHE will promptly notify UK-based tobacco manufacturers (including Imperial) upon receipt of any update or final decision from the Commission or Swedish authorities in relation to this matter.

5. Finally, for completeness, please confirm that PHE is satisfied that for the purposes of Article 2 of the Regulations, the Swedish JTI Products are the same as the UK JTI Products in terms of ingredients and proportions in the tobacco blend.

We will advise our clients on next steps upon receipt of your response to this letter.

Yours faithfully

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