

IN RELATION TO POSSIBLE REGULATORY ENFORCEMENT ACTION

BETWEEN:

BUCKINGHAM & SURREY TRADING STANDARDS

Prospective Applicant

and

JTI UK LIMITED

Prospective Respondent

OPINION

1 I am instructed by TLT LLP who act for Imperial Tobacco Limited (“Imperial”) in relation to the launch of a new range of cigarettes by one of its competitors, JTI UK Limited (“JTI”), a division of Japan Tobacco International.

2 In addition to my instructions, I am in receipt of a bundle of documents including correspondence, test reports, press and social media coverage, and feedback from Imperial’s trade representatives. The bundle has since been added to.

3 I am asked to provide an Opinion as to whether the new range of products launched by JTI are in breach of The Tobacco and Related Products Regulations 2016 (“TRPR”) on the basis that they have a characterising flavour other than tobacco clearly noticeable and arising from the addition of an additive and, if so, the appropriate action that the regulator should take in relation to such breach.

4 I divide the issues (and this Opinion) into three questions which paraphrase my instructions:

- A Is there sufficient evidence to commence enforcement proceedings against JTI?
- B Is an enforcement order the most appropriate form of action and what are its prospects of success?
- C Is the UK required to engage with the Independent Advisory Panel?

The Statutory Background

5 The Tobacco and Related Products Regulations 2016/507 (“TRPR”) were enacted to transpose into domestic law the provisions of Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products. (“2014/40/EU”). As currently enacted the TRPR provide by Regulation 15 within Part 3:

15.— No flavoured cigarettes or hand rolling tobacco etc.

(1) No person may produce or supply cigarettes or hand rolling tobacco with a characterising flavour.

(2) No person may produce or supply cigarettes or hand rolling tobacco with—
(a) a filter, paper, package, capsule or other component containing flavourings;
(b) a filter, paper or capsule containing tobacco or nicotine; or
(c) a technical feature allowing the consumer to modify the smell, taste, or smoke intensity of the product.

6 It is intended that on 31 December 2020 (the completion day of the implementation period) TRPR will be amended by the Tobacco Products and Nicotine Inhaling Products (Amendment etc.) (EU Exit) Regulations 2019/41 which will add a new paragraph providing:

(3) Regulations may -

(a) specify whether a tobacco product has a characterising flavour;
(b) set maximum content levels for additives or a combination of additives that result in a characterising flavour.

7 It is also intended that a new regulation will be added after regulation 16 (which prohibits various additives including vitamins and colourings). Regulation 16A will provide:

- (1) *Regulations may establish procedures for determining whether a tobacco product—*
- (a) *has a characterising flavour; or*
 - (b) *contains additives in quantities that increase the toxic or addictive effect, or the CMR properties, of that tobacco product at the stage of consumption to a significant or measureable degree.*
- (2) *Regulations made under paragraph (1) may—*
- (a) *provide for any determination to be made by—*
 - (i) *the Secretary of State; or*
 - (ii) *a person authorised by the Secretary of State for that purpose;*
 - (b) *establish, and provide for the operating procedures of, an independent advisory panel;*
 - (c) *be varied from time to time, including to take account of scientific and market developments in relation to tobacco products;*
 - (d) *make different provision for different cases or descriptions of case, different circumstances, different purposes or different areas;*
 - (e) *be revoked.*
- (3) *Before making regulations under this regulation the Secretary of State must consult such persons (or representatives of such persons) as appear to the Secretary of State to be likely to be substantially affected by them.*

8 Both of the proposed amendments reflect provisions in 2014/40/EU. The new provisions are permissive, rather than mandatory, in nature.

9 Regulation 2 of the TRPR deals with definitions:

“characterising flavour” means a smell or taste other than one of tobacco which—

- (a) *is clearly noticeable before or during consumption of the product; and*
- (b) *results from an additive or a combination of additives, including, but not limited to, fruit, spice, herbs, alcohol, candy, menthol or vanilla;*

...

“additive” means a substance, other than tobacco, that is added to a tobacco product, unit pack or container pack;

10 TRPR came into force on 20 May 2015. However, reflecting Article 7 (14) of 2014/40/EU, regulation 56 (3) delayed the application of the provisions of regulation 15 to tobacco products with a characterising flavour whose Union-wide sales volumes represent 3% or more in a particular product category until 20th May 2020. Menthol cigarettes are in that category. Since that date it has been unlawful to produce or supply cigarettes with a characterising flavour¹.

11 Regulation 53 (1) provides (with some exceptions): *“It is the duty of each weights and measures authority in Great Britain ... to enforce these Regulations within their area.”*²

12 The provisions of TRPR are clear and, post the end of the implementation period, pose no particular problems for enforcers.

13 The other relevant set of regulations for present purposes is the Consumer Protection from Unfair Trading Regulations 2008 (“CPUTR”). These implement the Unfair Commercial Practices Directive (2005/29/EC).

14 Regulation 3 provides;

Prohibition of unfair commercial practices

(1) Unfair commercial practices are prohibited.

(2) Paragraphs (3) and (4) set out the circumstances when a commercial practice is unfair.

(3) A commercial practice is unfair if—

(a) it contravenes the requirements of professional diligence; and

(b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

(4) A commercial practice is unfair if—

(a) it is a misleading action under the provisions of regulation 5;

(b) it is a misleading omission under the provisions of regulation 6;

¹ Regulation 48 provides that if a person breaches a provision of, inter alia, Part 3 which includes regulation 15, that person shall be guilty of an offence.

² Other parts of the regulation provide that for some purposes various parts of the Consumer Protection Act 1987 apply as if the TRPR were safety regulations and the persons on whom functions are conferred under TPR were enforcement authorities under the Consumer Protection Act.

- (c) *it is aggressive under the provisions of regulation 7; or*
- (d) *it is listed in Schedule 1.*

15 Schedule 1 is headed: *Commercial practices which are in all circumstances considered unfair - Regulation 3(4)(d)* and contains paragraph 9 which identifies:

Stating or otherwise creating the impression that a product can legally be sold when it cannot.

16 Regulation 19, so far as material provides “(1) *It shall be the duty of every local weights and measures authority ... to enforce these Regulations ...*” and “(3) *...within the authority’s area*”

The facts

17 JTI is selling cigarettes in respect of which it appears to be common ground that menthol is added to the tobacco in their production. However, JTI assert that although menthol is added, the quantity which is added is such that it does not produce a ‘*characterising flavour*’.

18 In my instructions are three expert reports enclosed with letters sent by Imperial to Buckinghamshire & Surrey Trading standards which evidence a characterising flavour in the cigarettes. The first of the letters to trading standards was sent on 3 June 2020, and at the time of writing there has not been a written reply.

19 The reports are from tobacco product sensory experts and carried out in line with an established methodology, *prima facie* they evidence a clearly noticeable taste or smell other than that of tobacco in JTI’s cigarettes. I should say that - beyond sight of some correspondence - I obviously do not have any evidence from JTI and my opinion is based only on the material before me.

20 In an overall declining EU cigarette market, the market share occupied by menthol cigarettes grew from 3.4% in 2000 to 5% in 2012³. The concern of Imperial, and perhaps others in the industry, is that in circumstances where menthol cigarettes

³ Source: Euromonitor Passport

have been outlawed after a lengthy transition period a level playing field requires effective and prompt action to enforce the ban. A failure of enforcement would reward an offending producer with exclusive access to a significant and lucrative part of the market. It would further delay the effective implementation of 2014/40/EU in respect of a tobacco product which is widely regarded as encouraging individuals to take up smoking. It could also encourage other producers to return to the supply of menthol cigarettes.

A Is there sufficient evidence to commence enforcement proceedings against JTI?

A1 In discharging the duty imposed upon it by regulation 53 (1) of TRPR (and regulation 19(1) of CPUTR) Buckinghamshire and Surrey Trading Standards is bound to consider whether there is evidence that menthol cigarettes are being produced and sold notwithstanding the end of the transition period. If so, it is bound to consider what to do.

A2 The material I have seen strongly supports the claim that the cigarettes in question are not lawful. It appears to be admitted that they contain a menthol flavour by way of an additive and there is evidence, including expert evidence, that flavour is clearly noticeable to smokers.

A3 I deal briefly with the general point that weighing the evidence, whether the flavour is a smell or taste other than one of tobacco which is clearly noticeable before or during consumption, is perhaps a slightly unusual question for a court to have to determine. That is not a problem. Courts have to make decisions daily which are novel or otherwise outside the normal experience of the decision maker. This is not a bar to taking action and is resolved in the adversarial process. In this case there is evidence from experts in tobacco products sensory issues. The experts have used an established methodology and come to a clear conclusion. The methodology used reflects the conclusions of the HETOC report, *“Mapping of best practices and development of testing methods and procedures for identification of*

characterising flavours in tobacco products” [RfS Chafea/2014/health/19] which was produced under the EU Health Programme (2008-2013) in the frame of a service contract with the Consumers, Health, Agriculture and Food Executive Agency (Chafea) acting on behalf of the Commission. That report concluded that the use of a sensory expert panel was a good approach to assessing characterising flavours. I turn below to the question of how far the mechanism for determining how a characterising flavour should be assessed issue is prescribed but, in my view, there is prima facie evidence that the cigarettes are unlawful.

B Is an enforcement order the most appropriate form of action and what are its prospects of success?

B1 JTI appear adamant that the cigarettes in question are lawful and absent a change of position it would appear that unless the matter is determined through the courts JTI will continue to sell the product.

B2 One way the matter could be resolved is by way of a prosecution for the supply of the cigarettes, either contrary to TRPR themselves, or contrary to CPUTR.

B3 An alternative, and in my view more appropriate, approach would be to commence proceedings under Part 8 of the Enterprise Act 2002 seeking an order preventing the continued supply of the cigarettes.

B4 Section 213 (5) of the Enterprise Act 2002 makes provision for the Competition and Markets Authority and every weights and measures authority to be an ‘enforcer’ for the purposes of the Act.

B5 Enforcers can seek an Enforcement Order from a court pursuant to Part 8 of the Act of 2002 if a trader engages in conduct which constitutes either a domestic or a community infringement and there is, or is likely to be, harm to the collective interests of consumers.

B6 Breaches of both the TRPR and CPUR are breaches of relevant directives which transpose EU law into domestic law and, on their face, community infringements. Under the Act a local authority must consult before seeking although the minimum periods identified range from as little as 7 days (where an interim order is sought) to 28 days where the respondent is, or is represented by, a 'representative body' which operates an approved consumer code.

B7 On the face of it, seeking an Enforcement Order would appear better to serve the consumer protection obligations of the local authority. It would permit speedy action if an interim order were sought and granted preventing the supply of the cigarettes pending the final trial of the action. (On the subject of speed, the civil courts are moving significantly faster than the criminal courts during the covid emergency.) Rather than fact specific criminal proceedings for what would amount to a sample offence an order would also address the issue head on in a principled way. Proceedings under Part 8 would also enjoin JTI to cease supply of the products rather than hoping for on an anticipated change of policy following a conviction. A further advantage would be that it would resolve the situation in relation to the many others (from wholesalers to corner shops) who sell these cigarettes in the course of their business, and who at present are also subject to the risk of prosecution.

B8 It is a requirement that there is, or might be, 'harm to the collective interests of consumers'. My opinion is that a court would conclude that test is passed here. Indeed, the provision of an unlawful product, is in my view precisely the sort of situation which the Enterprise Act contemplates.

B9 On the evidence I have seen, and subject to the debate in Part C I regard the prospects of success for the local authority as high.

C Is the UK required to engage with the Independent Advisory Panel?

C1 I turn to the question arising as to whether the local authority is compelled to participate in the EU regime for determining whether a product has a characterising

flavour including triggering the Independent Advisory Panel (IAP) procedure having regard to the provisions of 2014/40/EU and the implementing measures.

C2 The starting point is 2014/40/EU itself which was transposed into UK law by the TRPR. For our purposes, the core provision is Article 7, which so far as material provides:

1. Member States shall prohibit the placing on the market of tobacco products with a characterising flavour.

Member States shall not prohibit the use of additives which are essential for the manufacture of tobacco products, for example sugar to replace sugar that is lost during the curing process, provided those additives do not result in a product with a characterising flavour and do not increase to a significant or measurable degree the addictiveness, toxicity or the CMR properties of the tobacco product.

...

2. The Commission shall, at the request of a Member State, or may, on its own initiative, determine by means of implementing acts whether a tobacco product falls within the scope of paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

3. The Commission shall adopt implementing acts laying down uniform rules for the procedures for determining whether a tobacco product falls within the scope of paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

4. An independent advisory panel shall be established at Union level. Member States and the Commission may consult this panel before adopting a measure pursuant to paragraphs 1 and 2 of this Article. The Commission shall adopt implementing acts laying down the procedures for the establishment and operation of this panel.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

...

C3 The first and central point is that Member States are obliged by Article 7 (1) to prohibit the placing on the market of tobacco products with a characterising flavour. As to the other material provisions, in summary:

C4 Article 7 (2) obliges the Commission at the request of a member state to determine by means of implementing acts whether a tobacco product falls within the scope of (1) and permits the Commission to do so of its own motion.

C5 Article 7 (3) says the Commission 'shall' adopt implementing acts laying down uniform rules for determining whether a tobacco product falls within 7 (1). The question as to what constitutes uniform rules in terms of both methodology and process is not addressed and is not self-evident within the paragraph.

C6 Article 7 (4) provides for the establishment of an Independent Advisory Panel. The article is permissive not mandatory. The sentence "*Member States and the Commission may consult this panel before adopting a measure pursuant to paragraphs 1 and 2 of this Article*" creates a power to refer not a duty to do so. (my emphasis). This is not altered by the reference to Article 25 (2).

C7 In relation to Article 7 paragraphs (2), (3) and (4) implementing acts shall be adopted in accordance with the procedure in Article 25 (2) which applies Article 5 of Regulation EU 182/2011.

C8 While some provisions within Article 7 are mandatory, such as 7 (1), others are permissive, for example 7 (4) reflecting the preamble which includes in recital (17) "*An independent European advisory panel should assist in such decision making*". (Emphasis added)

C9 In my opinion while the Implementing Decision 2016/786 ("2016/786") is mandatory as to how the IAP should be established and operate it is clearly only permissive as to whether and how the IAP should be involved in any decision. I regard this as consistent with both the wording of 2016/786 itself taken as a whole and the scheme of 2014/40/EU. In my opinion therefore there is not an obligation on the UK to engage the IAP.

C10 That is not the end of the matter because a distinct but closely related question arises in respect of Implementing Regulation 2016/779 (“2016/779”)

C11 Going back to 2014/40/EU recital (50) provides: *“In order to ensure uniform conditions for the implementation of this Directive implementing powers should be conferred on the Commission concerning [numerous matters, not altogether happily expressed in the English text but including] ...the methodology for determining whether a tobacco product has a characterising flavour, ... Those implementing powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council.”*

C12 The text does not make clear what ‘*methodology*’ means in the context of the recital as to whether it means process or method of expert assessment. It lies in contrast to the choice of the word ‘*procedures*’ in Article 7 (3) and in the title of 2016/779.

C13 For completeness, paragraph (51) of the recital says: *“In order to ensure that this Directive is fully operational and to adapt it to technical, scientific and international developments in tobacco manufacture, consumption and regulation, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of ... setting maximum levels for additives that result in a characterising flavour or that increase toxicity or addictiveness, ...”*

C14 This relates to setting objective levels for additives which give rise to a characterising flavour rather than how to address what amounts to a characterising flavour. I do not read it, nor any other part of the material before me, as indicating that particular prohibited levels of additive are the only way to determine characterising flavour. (I am to some extent reinforced in this view by the fact the recital contemplates exercise of the power in Art 290 of TFEU which, classically at least, relates to supplementing or non-essential measures.)

C15 The recitals to 2016/779 refer to common procedures for determination as to whether a tobacco product has a characterising flavour and go on to rehearse a

series of steps which include avoiding parallel procedures, having a single procedure across the EU and an in depth assessment (which may involve the IAP) if the producer disputes that there is a characterising flavour, together with significant consultation and attempts to reach a consensus before a conclusion is reached.

C16 Recital (11) provides:

“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. Nevertheless, where the Commission subsequently adopts a decision in respect of that product, the initiating Member State should then take immediate measures to ensure its law and practice is aligned with that decision in order that the prohibition laid down in Article 7(1) of Directive 2014/40/EU is applied uniformly throughout the Union.”

C17 On the face of it that recital contemplates a Member State having to be satisfied after the entire process in 2016/779 has been gone through before it can make a decision within the meaning of the Regulation. However, looking at the operative Articles of the Implementing Directive, Article 3 (1) is expressed in permissive terms and provides that a Member State or the Commission “may initiate the procedure”. Article 3 (2) says the Commission may initiate the procedure even where one or more procedures were initiated or concluded by one or more Member States “*in particular, when it is necessary to ensure the uniform application of Article 7 of Directive 2014/40/EU*”.

C18 A Member State which initiates the process is required by Article 4 to allow the manufacturer 4 weeks to reply and by Article 5 to notify the Commission and the other Member States. By Articles 6 and 7, where the presence of a characterising flavour is disputed (as is the case here) a further gathering of evidence is permitted which may include seeking the advice of the IAP. By Article 8 the manufacturer is given a further opportunity to make observations and, after additional information, yet further observations.

C19 Article 9 sets out a series of measures in relation to ‘*coordination*’ which require the initiating Member State to submit a draft of its reasoned decision (and the report of the IAP if consulted) to the other Member States and the Commission at least 4 weeks before it is adopted, and then only after consideration of representations and attempts to reach consensus. Art 9 (3) provides that *“In the absence of consensus, where it is considered necessary to ensure the uniform application of Article 7(1) of Directive 2014/40/EU, the Commission shall initiate the procedure in accordance with Article 3(1).”* Reflecting recital (11) the next sub paragraph begins: *“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).”* However, following the outcome of the procedure initiated by the Commission when it adopts its decision the initiating Member State must come into line with the decision reached in the Commission initiated procedure.

C20 Trying to draw that web of provisions together, I think it is arguable that an attempt by the UK to prohibit the supply of the relevant cigarettes would be bound to subject the question of characterising flavour to the procedure in 2016/779.

C21 However, the scheme of the domestic regulations, placing the duty to enforce on local authorities does not fit happily with that. This is not least in the light of the fact the TRPR do reserve some enforcement actions exclusively to the Secretary of State by regulation 53 (6). It is equally arguable, and in my view more persuasive, that the author of the domestic regulations - which were made on the same day as 2016/779 (and no doubt with cognisance of them) did not regard the function in respect of Regulation 15, which implements Article 7 (1) of 2014/40/EU as constrained by the procedure in 2016/779.

C22 The basic law in 2014/40/EU clearly mandates a prohibition on the supply of tobacco products which have characterising flavour from additives.

Mindful of the imperative in Article 7 (1) it is easy to see why, taken as a whole - including in the context of the precautionary and public health aims of 2014/40/EU, a distinction can properly be drawn between the enforcement obligations on local authorities and the wider decision making of member states.

C23 Put another way, a proper distinction can be made between a Member State making a decision to prohibit a product for the purpose of 2016/779 and the judgement of a court of competent jurisdiction as to whether an evidential test is made out. This construction is consistent with the plain words of the domestic regulation. Moreover it is reinforced by the fact that the offence creating measures in TRPR are common informer provisions, meaning that prosecution is not limited to a public body or an emanation of the state but could be commenced by anyone, including a private individual.

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.

C28 Thank you for my instructions in this interesting matter.

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