

JTI's response to the Scottish Government's consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland

23 December 2014

Organisation name

Japan Tobacco International (JTI) is part of the Japan Tobacco group (JT Group) of companies, a leading international tobacco product manufacturer.

JTI has its UK headquarters in Weybridge, Surrey, and has a long-standing and significant presence in the UK. Its cigarette brand portfolio includes Benson & Hedges, Silk Cut, Mayfair, Sovereign and Sterling, as well as a number of other tobacco products including roll-your-own tobacco (RYO), also known as hand-rolling tobacco (such as Amber Leaf), cigars (such as Hamlet) and pipe tobacco (such as Condor). JTI manufactures product for the UK market in Northern Ireland and other EU Member States (Germany, Romania and Poland). In the UK alone, JTI employs over 1,800 people. JTI's excise contributions on its tobacco products amounted to around £3.96 billion in 2013.

Gallaher Limited is the registered trading company of JTI in the UK.

In 2014 JT Group acquired Zandera Ltd, one of the UK's largest electronic cigarette companies. E-Lites is the main brand of Zandera Ltd and will be part of JT Group's international tobacco division, JTI. With electronic cigarettes being an increasingly popular alternative to cigarettes among many smokers, E-Lites is a logical extension to JTI's portfolio and will be its first non-tobacco, nicotine-containing product. By being part of JTI, the E-Lites brand will have access to:

- JTI's extensive manufacturing expertise (enabling standards of product quality & safety to be further enhanced);
- The JT Group's wider technological, research and scientific resources (facilitating compliance with future regulatory requirements, expediting the comprehensive scientific assessment of the E-Lites product portfolio, driving the development of next generation products to meet evolving consumer expectations, and delivering ever better electronic cigarette products); and
- JTI's global distribution network in over 120 countries (enabling E-Lites to become much more widely available to smokers).

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Confidentiality

JTI is happy for this response to be made public.

Introduction

Minors should not smoke and should not have access to tobacco products. This belief is central to JTI's Code of Conduct, and to JTI's marketing practices, operational policies and the way JTI does business. JTI is committed to playing a meaningful role in youth smoking prevention.

JTI supports regulation that is proportionate, targeted, necessary and appropriate to achieve a clearly articulated and legitimate public policy objective. Regulation should be made in accordance with internationally-accepted Better Regulation principles, which are supported by both the UK government and the European Commission (which in essence require regulation to be transparent, accountable, proportionate, consistent and targeted at cases where action is needed).

JTI actively seeks dialogue with government authorities around the world regarding the regulation of tobacco products and of the tobacco industry generally. JTI has a right – and an obligation – to express its point of view regarding regulation that affects its products and the industry. It is our belief that we have the responsibility, when engaging in a consultation process, to be open and transparent in our dialogue with government authorities, and to propose alternative, less restrictive and more targeted solutions that meet Better Regulation principles where we believe proposed regulations to be excessive.

JTI would like to outline our position on the various issues raised within this consultation, relating to both tobacco control and electronic cigarettes. JTI supports reasonable and proportionate regulation of electronic cigarettes. However it believes that:

- Adults should be free to choose whether they wish to use electronic cigarettes and no one should use them without understanding the risks associated with doing so;
- All marketed electronic cigarettes should comply with all relevant regulations, such as those concerning general consumer product safety, electrical safety and consumer protection from misleading marketing claims;
- Regulation of electronic cigarettes should aim to keep electronic cigarettes out of the hands of minors and to remind users of the risks associated with their use; and
- Governments and regulators should avoid excessive regulation that prevents adult consumers from choosing these products.

Age restriction for e-cigarettes

1. Should the minimum age of sale for e-cigarette devices, refills (e-liquids) be set at 18?

Regulation of electronic cigarettes should aim to keep electronic cigarettes out of the hands of minors. JTI does not market electronic cigarettes or electronic cigarette accessories to minors. We very much welcome and support the Scottish Government's proposal to introduce legislation that would make it an offence to sell electronic cigarettes to under 18s.

2. Should age of sale regulations apply to:

- a. only e-cigarette devices / refills (e-liquids) that contain nicotine or are capable of containing nicotine, or**
- b. all devices / refills (e-liquids) regardless of whether they contain or are capable of containing nicotine?**

We believe age of sale restrictions should apply to all devices and refills (e-liquids) regardless of whether they contain or are capable of containing nicotine.

3. Whom should the offence apply to:

- a. the retailer selling the e-cigarette;**
- b. the young person attempting to purchase the e-cigarette; or**
- c. both?**

In line with our Core Principle that children should not smoke, or have access to tobacco products, we also believe that children should not have access to electronic cigarettes. Regulation of electronic cigarettes should aim to keep electronic cigarettes out of the hands of minors. As such we support the proposal to introduce legislation that would make it an offence to sell electronic cigarettes to minors and for minors to attempt to purchase electronic cigarettes.

4. Should sales of e-cigarette devices and refills (e-liquids) from self-service vending machines be banned?

JTI believes that access to cigarette vending machines should be strictly controlled to prevent sales to children. We do not, however, support the prohibition of sales from vending machines, which would prevent legitimate access by adults. We would support mechanisms that restrict underage access by young people.

5. Should a restriction be in place for other e-cigarette accessories?

JTI does not market electronic cigarettes or electronic cigarette accessories to minors and all restrictions applied to the sale of electronic cigarettes should apply equally to electronic cigarette accessories.

6. If you answered 'yes', to question 5, which products should have restrictions applied to them?

All electronic cigarette products – the single unit electronic cigarette, electronic cigarette devices, electronic cigarette batteries and charging accessories.

Proxy purchase of electronic cigarettes

7. Should the Scottish Government introduce legislation to make it an offence to proxy purchase e-cigarettes?

The burden of preventing young people from getting access to these products should not rest on retailers alone. A “proxy purchase” offence would help deliver the message that the responsibility for restricting youth access to electronic cigarettes also lies with those adults who buy these products for young people. Provided that it is readily enforceable, JTI recognises that a ban on “proxy-purchasing” could be an effective tool to prevent youth access to electronic cigarettes in the same way as all other age-restricted products.

Domestic advertising and promotion of e-cigarettes

8. Should young people and adult non-smokers be protected from any form of advertising and promotion of e-cigarettes?

JTI does not market electronic cigarettes, or any other nicotine-containing product, to minors or to non-users of tobacco or nicotine-containing products. Governments and regulators should avoid excessive regulation that prevents adult consumers from choosing these products. We strongly believe that all advertising and marketing should be responsible.

9. In addition to the regulations that will be introduced by the Tobacco Products Directive do you believe that the Scottish Government should take further steps to regulate domestic advertising and promotion of e-cigarettes?

We believe that all advertising and marketing should be responsible and targeted only at adult consumers. JTI supports reasonable and proportionate regulation of electronic cigarettes. We do not see a requirement for the Scottish Government to take further steps to regulate domestic advertising and promotion of electronic cigarettes.

10. If you believe that regulations are required, what types of domestic advertising and promotion should be regulated?

- a. Bill boards;**
- b. Leafleting;**
- c. Brand-stretching (the process of using an existing brand name for new products or services that may not seem related);**
- d. Free distribution (marketing a product by giving it away free);**
- e. Nominal pricing (marketing a product by selling at a low price);**
- f. Point of sale advertising (advertising for products and services at the places where they are bought); or**
- g. Events sponsorship within a domestic setting?**

We do not believe that additional regulations are required.

11. If you believe that domestic advertising and promotion should be regulated, what, if any, exemptions should apply?

We do not believe that additional regulations are required. Therefore, no exemptions should be necessary.

12. Are you aware of any information or evidence that you think the Scottish Government should consider in relation to regulating domestic advertising in relation to impacts on children

and adults (including smokers and non-smokers)?

JTI does not market electronic cigarettes, or any other nicotine-containing product, to minors or to non-users of tobacco or nicotine-containing products. Governments and regulators should avoid excessive regulation that prevents adult consumers from choosing these products.

13. Are you aware of any information or evidence that you think the Scottish Government should consider in relation to regulating domestic advertising in relation to impacts on business, including retailers, distributors and manufacturers?

We are not aware of any specific information or evidence, but we would encourage the Scottish Government to conduct a proper *Impact Assessment* to quantify the potential dampening effect of electronic cigarette advertising and marketing restrictions on Scottish businesses, retailers, distributors and manufacturers.

Inclusion of electronic cigarettes on the Scottish Tobacco Retailer Register

14. Do you agree that retailers selling e-cigarettes and refills should be required to register on the Scottish Tobacco Retailers Register?

Yes.

15. Do you agree that the offences and penalties should reflect those already in place for the Scottish Tobacco Retailers Register?

We agree that the same offences and penalties should apply.

16. If you answered 'no' to question 15, what offences and penalties should be applied?

N/A

E-cigarettes - use in enclosed public spaces

17. Do you believe that the Scottish Government should take action on the use of e-cigarettes in enclosed public spaces?

We believe there is no justification whatsoever for banning the public use of electronic cigarettes.

18. If you answered 'yes' to Question 17, what action do you think the Scottish Government should take and what are your reasons for this?

N/A

19. If you answered, 'no' to Question 17, please give reasons for your answer.

We would appeal to policy makers to base policy on evidence, while recognising the absolute importance of identifying sensible and workable measures to accommodate electronic cigarette users.

20. Are you aware of any evidence, relevant to the use of e-cigarettes in enclosed spaces, that you think the Scottish Government should consider?

N/A

Smoking in Cars carrying children aged under 18

21. Do you agree that it should be an offence for an adult to smoke in a vehicle carrying someone under the age of 18?

No.

22. Do you agree that the offence should only apply to adults aged 18 and over?

No.

23. If you answered 'no' to Question 22, to whom should the offence apply?

JTI strongly advises against smoking when children are present. However, it is our belief that the regulation of smoking in private spaces is disproportionate, unjustified and unnecessary. JTI supports targeted public information campaigns to raise smokers' awareness that they need to be considerate to the people around them, in particular children, when they smoke. Therefore, we believe that Option 1 as set out in the impact assessment (IA) is the most appropriate approach.

It is our view that it is inappropriate for a government to seek to dictate the consumption by adults of a legal, and already heavily regulated product, in private spaces. The implications of criminalising a legal activity on private property are significant, and legislative bans interfere with the right to respect for private life protected by national law (the Human Rights Act 1998) and international law (including Article 8 of the European Convention on Human Rights).

We believe that education and awareness programmes which aim to reduce smoking in the proximity of children¹ are likely to be more effective drivers of behavioural change than further legislation which is likely to be difficult, if not impossible, to enforce.

Many people have concerns about exposure to environmental tobacco smoke (ETS)² and JTI agrees that all smokers should be considerate of others around them. Individuals who smoke should consider changing their own smoking behaviour to avoid exposing children to ETS. However, the number of people who smoke in their car with children present is significantly smaller than the level of attention given to the subject by the media may suggest.

The Consultation suggests that as many as 60,000 children in Scotland may be exposed to second-hand smoke within a car each week. In the original document that is referenced in the Consultation, there is no information provided on how this number has been reached and the methodology for the gathering of the data is not provided. When this number is compared to other studies that do not rely on self-report which have found much lower percentages:

- (a) research in New Zealand (a roadside study of 149,886 vehicles) found that just 0.13% of the occupants smoked with children present;³

¹ For example, JTI would in principle support targeted educational campaigns similar to those seen in Wales: <http://freshstartwales.co.uk/why-a-fresh-start/smoking-in-cars>

² In poorly ventilated areas, ETS can cause irritation of the eyes, nose and throat. It may also worsen childhood respiratory tract infections, as well as some childhood respiratory conditions such as asthma. Furthermore, a number of studies have linked ETS with Sudden Infant Death Syndrome (SIDS). Based on the current science, JTI does not believe the claim has been proven that ETS is a cause of diseases such as lung cancer, coronary heart disease, emphysema and chronic bronchitis.

³ Patel V, Thomson G, Wilson N. Objective measurement of area differences in 'private' smoking behaviour: observing smoking in vehicles. Tob Control. 2011

- (b) in 2013 the University College Dublin School of Public Health conducted a survey where 2230 vehicles were observed in Dublin. Only eight adult passengers and just one child were seen to be in a vehicle with a smoking adult driver. The overall prevalence of smoking drivers was just 1.39%.⁴

There already exists a high level of public awareness regarding the health risks associated with smoking. Nevertheless, JTI supports public health authorities' efforts to continue to inform the public about those risks and to reinforce awareness among young people on issues such as exercising responsible decision-making and to encourage children to discuss smoking issues with their parents. We remain, however, opposed to any campaigns or legislation that seek to 'denormalise' a legal activity.

24. Do you agree that Police Scotland should enforce this measure?

Unlike smoking bans at work or in indoor public places, which are monitored by the owner of the premises, a smoking ban in cars would have to be enforced by Police Scotland, therefore increasing their workload at a time of resource constraint. We believe that this will incur extra financial costs and that extra resources would be needed to ensure compliance.

The RAC, the Association of British Drivers, and the Police in England have all raised concerns about a ban on smoking in cars. For example, Malcolm Campbell QPM, Former Commander of the Metropolitan Police, has said that:

"It is quite obvious that a ban on smoking in cars would be almost unenforceable and yet the responsibility to do so would rest with the police service. This will just add more pressure to an already overstretched resource."

The enforcement of this legislation is likely to place undue pressure on the Scottish police, who will be faced with an almost impossible task. The ability to identify whether an individual is smoking and simultaneously establishing whether a child under the age of 18 is in the car will be nearly impossible.

26. Do you agree that there should be an exemption for vehicles which are also people's homes?

It is JTI's belief that it is entirely inappropriate for a government to seek to dictate the consumption by adults of tobacco, which is a legal product, in a private vehicle of any kind. Any penalty imposed on an individual exercising their own choice to smoke would interfere with fundamental rights, as outlined in our response to question 23.

Smoke-free (tobacco) NHS Grounds

29. Should national legislation be introduced to make it an offence to smoke or allow smoking on NHS grounds?

JTI believes that it would be inappropriate for the Scottish Government to introduce smoke-free legislation that covers NHS grounds, and therefore believe that Option 1 as set out in the impact assessment (IA) is the most appropriate approach.

We recognise that cigarettes are a legal but controversial product; as such, we believe adults have a fundamental right to make an informed choice about whether they want to smoke. More generally, it is not legitimate to seek to discriminate against, stigmatise or ostracise existing adult smokers, or to treat the use of tobacco as abnormal, unacceptable, or tainted. Therefore we believe it is

⁴ The survey can be accessed here: <http://www.imj.ie/ViewArticleDetails.aspx?ArticleID=10612>.

inappropriate for the Scottish Government to dictate how adult smokers behave when going about their everyday lives.

It is JTI's strong belief that since tobacco smoke is easily dispersed in the atmosphere and highly diluted in outdoor environments, there is no basis on which to regulate smoking outdoors. JTI notes that there is limited scientific literature on outside tobacco smoke. Even well-known anti-tobacco advocates have questioned the scientific basis for restrictions on smoking outdoors⁵. Considering these factors JTI considers that a smoking ban in outdoor spaces is misguided, unnecessary and excessive.

There already exists a high level of public awareness regarding the health risks associated with smoking, particularly amongst those who work in the healthcare profession. Nevertheless, JTI supports public health authorities' efforts to continue to inform the public about those risks.

Smoke-free (tobacco) children and family areas

35. Do you think more action needs to be taken to make children's outdoor areas tobacco free?

Tobacco products carry risks to health. Appropriate and proportionate regulation is necessary and right. In the UK, those under 18 should not smoke and should not be able to obtain tobacco products. Everyone should be appropriately informed about the health risks of smoking. These core principles are central to our Code of Conduct, Global Marketing Standard, operational policies and the way JTI does business.

Many people have concerns about exposure to environmental tobacco smoke (ETS).⁶ All smokers should show consideration for those around them and JTI strongly advises against smoking when children are present. An individual's decision to smoke around children is already guided by an awareness of the risks of smoking.

JTI would support targeted public information campaigns, rather than smoking bans, to encourage smokers to be considerate of those around them, especially children. For these campaigns to be successful in effecting a change in smoking behaviour, they need to engage with and involve smokers, rather than stigmatise them through prohibitionist policies.

The Impact Assessment also refers to tobacco related litter in outdoor areas. JTI encourages individuals to dispose of their litter in an appropriate manner. As a company, our main focus has been directed at providing the means of responsible and safe cigarette litter disposal for those adults who choose to use our products⁷. We believe that rather than introducing bans, it would be more appropriate for Local Authorities to ensure that all parks and outdoor areas have proper facilities available for the safe disposal of tobacco litter. We also believe that Local Authorities can play a role in properly educating smokers about smoking-related litter.

⁵ Jordan Raphael, in his discussion of American municipal outdoor smoking bans, indicated that outdoor smoking bans go "*beyond what is justified by the scientific findings on ETS*" (Raphael, 2007). Researchers also caution that it is premature to draw policy conclusions from their findings: Cameron et al. (2010) "*do not advise that the present results are used to advocate for outdoor smoking restrictions at the expense of other tobacco control policies known to reduce smoking prevalence*".

⁶ In poorly ventilated areas, ETS can cause irritation of the eyes, nose and throat. It may also worsen childhood respiratory tract infections, as well as some childhood respiratory conditions such as asthma. Furthermore, a number of studies have linked ETS with Sudden Infant Death Syndrome (SIDS). Based on the current science, JTI does not believe the claim has been proven that ETS is a cause of diseases such as lung cancer, coronary heart disease, emphysema and chronic bronchitis.

⁷ JTI UK is proud to work with the Campaign to Protect Rural England (CPRE), in support of their "Stop the Drop" anti-littering campaign, across a number of locations and areas or work by providing infrastructure and by enabling employee volunteering.

Age verification policy 'Challenge 25' for the sale of tobacco and e-cigarettes

38. Do you agree that retailers selling e-cigarettes, refills and tobacco should be required by law to challenge the age of anyone they believe to be under the age of 25?

Minors should not smoke and should not have access to tobacco products or electronic cigarettes. This belief is central to JTI's Code of Conduct, and to JTI's marketing practices, operational policies and the way JTI does business. Since its inception in 2004, JTI has supported the "No ID, No Sale!" campaign which educates retailers and creates an expectation that customers will be asked for proof of age.

JTI is committed to preventing children's access to tobacco products or electronic cigarettes. As one example, it has developed a ground-breaking new scheme, which was piloted in the North West of England in 2014, to provide small and independent retailers with professional training on age restricted products. The support available to retailers as part of the scheme incorporates three core elements: a course of compliance testing by mystery shoppers, a free, professional on-site training package for retailers, and a strengthening of the nationally recognised 'No ID, No Sale!' campaign. JTI's objective is to support our retail partners in the long-term, and as a consequence we are planning to roll this scheme out nationally.

JTI's emphasis is on supporting retailers, which is why we believe that the Scottish Government should continue to encourage retailers to apply Challenge 25 voluntarily; we also note that many retailers recognise, and are familiar with, the scheme itself. However, we think it would be inappropriate to create legislation that made it an offence for a retailer to sell tobacco or electronic cigarettes to someone under 25 without asking for ID.

Unauthorised sales by under 18 year olds for tobacco and e-cigarettes

40. Do you agree that young people under the age of 18 should be prohibited from selling tobacco and e-cigarettes and refills unless authorised by an adult?

JTI supports this proposal, and believes that it would be appropriate to create consistency of message when it comes to the sale of age-restricted products by minors. We recognise that it may be intimidating for someone under 18 to challenge someone for ID, therefore these individuals should be able to call on the support of an adult to authorise the sale of tobacco products or electronic cigarettes.

41. Who should be able to authorise an under 18 year old to make the sale, for example, the person who has registered the premises, manager or other adult working in the store?

Regarding who should be able to authorise the sale of goods, we believe that it would most appropriate for it to be an adult who has managerial responsibility for the minor who is conducting the sale. We believe that this would ensure that the retail store are able to monitor these sales, and ensure that the process is being conducted correctly and that is necessary ID had been requested.

42. Do you agree with the anticipated offence, in particular:

- a) the penalty, and**
- b) the enforcement arrangements?**

JTI believes that both the penalty and enforcement arrangements are appropriate. However, we want to ensure that the appropriate training and support is provided to retailers, including the small independents, by Trading Standards before such an offence is introduced.

Procedure

In addition to our comments above, JTI would like to raise some concerns about the way in which the consultation was run.

The consultation asks all respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. Having done so, it says the Scottish Government: “...*will still carefully consider all consultation responses from the tobacco industry and from those with links to the tobacco industry*”.

JTI makes two points in response:

- (a) Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC) is not intended to prevent the views of manufacturers of lawful products or those linked to them from being heard and properly taken into account. On the contrary, Article 5.3 seeks to protect the legislative process from undue influence and provides an opportunity to improve transparency, inclusivity and integrity of the regulatory process by using principles of good governance (principles which JTI supports);
- (b) Transparency as to vested interests should be a principle applied equally. The Scottish Government has failed to require, but should have required, respondents also to identify if they have “*direct or indirect links to, or receive funding from*”:
 - (i) The Government (e.g. the Department of Health); or
 - (ii) one of the tobacco control groups who are effectively professional lobbyists employed to create support for tobacco control regulations; or
 - (ii) the pharmaceutical industry, in circumstances where prominent tobacco control advocates: are supported by⁸ and have lobbied jointly with that industry in respect of tobacco control regulation;⁹ and: “*Health experts who recommended that the Government tighten the regulation of electronic cigarettes failed to declare their financial interests in Big Pharma’s rival products.*”¹⁰

JTI actively seeks dialogue with government authorities around the world regarding the regulation of tobacco products, electronic cigarettes and of the tobacco industry generally. JTI has a right – and an obligation – to express its point of view regarding regulation that affects its products and the industry. It is our belief that we have the responsibility, when engaging in a consultation process, to be open and transparent in our dialogue with government authorities, and to propose alternative, less restrictive and more targeted solutions that meet Better Regulation principles where we believe proposed regulations to be excessive.

⁸ for example: <http://www.blf.org.uk/Page/GSK-Partnership> and the statement by the British Lung Foundation that GlaxoSmithKline’s support allows them to: “*influence the health agendas in England, Scotland, Wales and Northern Ireland to raise the profile of lung health and improve respiratory services.*”

⁹ See, for example, the letter dated 14 October 2011 from a group of NGOs, charities, researchers, industry representatives and MEPs to the European Commission President, José Manuel Barroso. Available via: http://smokefreepartnership.org/IMG/pdf/Tobacco_Products_Directive_letter_141011.pdf.

¹⁰ See “*Advisers on e-cigarettes ‘failed to declare their interests’ in Big Pharma’s products*”, The Times, 26 August 2013. Available via: <http://www.thetimes.co.uk/tto/business/industries/consumer/article3852342.ece>.