



FAO XXX

Tobacco Notifications Team
Health Improvement: Alcohol, Drugs, Tobacco & Justice Division
Public Health England
Wellington House, 133-155 Waterloo Road
London, SE1 8UG

By email to: tobacco.notification@phe.gov.uk

CONTAINS CONFIDENTIAL INFORMATION

29 July 2020

Dear XXX

Prohibition of characterising flavours in cigarettes

I refer to your letter sent under cover of email dated 14 July 2020, in which you requested information in respect of 18 different cigarette products from the Benson & Hedges, Berkeley, Mayfair, Sovereign and Sterling brand families (the **Products**).

Prohibition of characterising flavours

As noted in your letter, the sale in the UK of cigarettes with characterising flavours has been prohibited since 20 May 2020 under Regulation 15 of The Tobacco and Related Products Regulations 2016 (the **Regulations**).

However, JTI firmly believes that it has complied with Regulation 15 in both letter and spirit, because none of the Products has a prohibited characterising flavour.

I note the following:

- Regulation 15 does not prohibit outright the inclusion of menthol or any other additive in tobacco products. Rather, it prohibits the production or supply of cigarettes or hand rolling tobacco “with a characterising flavour”. A “characterising flavour” is defined in Regulation 2 as 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 combination of additives”.
- Consequently, the inclusion in a tobacco product of any flavouring at a level that does not result in a “clearly noticeable” smell or taste other than one of tobacco before or during consumption is permitted by law.
- The Regulations implemented Directive 2014/40/EU (the **Directive**) into UK law and must be interpreted consistently with it. Recital 17 to the Directive confirms that 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”.
- As confirmed in JTI’s notification through the European Union Common Entry Gate (**EU-CEG**), the Products contain menthol, but at very low levels which do not result in a characterising flavour. This is clearly permitted by law.

JTI UK

JTI’s UK trading company is Gallaher Limited
Registered in England and Wales, Registration Number 01501573
Registered office: Members Hill, Brooklands Road, Weybridge, Surrey, KT13 0QU, UK
Telephone: +44 (0)1932 372 000

www.jti.com/europe/united-kingdom

JTI is satisfied that the inclusion of menthol at very low levels in the Products does not give rise to a characterising flavour, as defined by law. We have robust internal quality assurance processes to ensure that the use of additives in our products comply with the Regulations.

I enclose separate correspondence with Trading Standards which confirms this position.

Coordination of enforcement

Any official assessment regarding the compliance of the Products with the characterising flavour ban must follow mandatory EU procedural rules for determining whether a tobacco product has a characterising flavour other than tobacco.

The European Commission has adopted Implementing Regulation (EU) 2016/779 (the **Implementing Regulation**), which sets out the procedure that EU Member States and, for the moment, the UK and its competent authorities must follow if they are concerned that a tobacco product has a prohibited characterising flavour.

Importantly, where one Member State has initiated an investigation under this procedure, then all other Member States (and, for now, the UK) must refrain from starting similar procedures in respect of the same products or suspend any open investigations (see Article 5(2) of the Implementing Regulation). This is to prevent different authorities reaching inconsistent findings in respect of the same products. "Same products" for these purposes means "*products with the same ingredients in the same proportions in the tobacco blend composition, irrespective of the brand name or design*" (Article 2 of the Implementing Regulation).

Regrettably, in recent months, certain of JTI's competitors have engaged in a concerted campaign across Europe to cast doubt on JTI's position. They have incited different authorities around Europe to take market enforcement action against JTI – we suspect, not out of any genuine concern for public health, but for their own commercial benefit.

I can confirm that the Swedish Public Health Authority (PHA) has already initiated an investigatory procedure under the Implementing Regulation in respect of SKUs that contain the same blend as the Products, and which are therefore to be treated as the same products for the purposes of the Implementing Regulation. I enclose confirmation of this and of the Swedish PHA's notification of its investigation to the European Commission. I also enclose confirmation from the European Commission that it considers the Swedish PHA's communication of 25 June 2020 as the required notification of an initiating Member State under the Implementing Regulation.

Accordingly, in light of the Swedish PHA's notification under the Implementing Regulation, which remains directly applicable in the UK throughout the transition period, Public Health England is obliged to suspend its own investigation in accordance with Article 5(2). I understand that other Member States have already suspended their investigations in line with the Implementing Regulation, enabling JTI to finalize its response to the Swedish PHA's request for information due on 17 August. I also understand that some Member States are in regular and direct contact with the following individuals at the Swedish PHA and the European Commission to keep informed of developments:

Swedish PHA

- General contact details to the Swedish PHA: info@folkhalsomyndigheten.se, 0046 10 205 20 00. Case number 02651-2020-9.2.1
- Case officer: XXX@folkhalsomyndigheten.se, 0046 10 205 XX XX.
- Head of unit: XXX, @folkhalsomyndigheten.se, 0046 10 205 XX XX.

European Commission

- European Commission SANTE-B2-TOBACCO-CONTROL@ec.europa.eu
 - . XXX, B2 – Cross-border healthcare and tobacco control, Health and Food Safety DG (SANTE)
- @ec.europa.eu -
 - @ec.europa.eu

Public Health England might consider making contact with them too.

Independent product testing

Given the above points concerning the mandatory procedure under the Implementing Regulation, Public Health England is compelled to suspend its investigation, and refrain from commissioning independent product testing in relation to the Products.

Trade advertising

In respect of your reference to JTI's trade communications, we note that JTI has never stated that the Products have a "menthol effect". JTI does not describe or position the Products as menthol products. Indeed, it expressly positions them – as shown in the trade publications to which you refer – as alternatives to menthol products, in light of the recent ban.

It is widely acknowledged, by JTI as well as other manufacturers, that the effect of the ban would be that some adult smokers of menthol brands would switch to alternative products, other than cigarettes, which may lawfully still have a characterising flavour of menthol, e.g. vape products and nicotine pouches, whilst others would remain brand loyal and choose to purchase the brand of cigarettes they previously consumed (albeit reformulated so as not to have a characterising flavour).

JTI firmly believes that the marketing of the Products is fully compliant with the law.

Ingredients reporting and documentation requested

I note your request to provide "*all the associated/relevant documentation for these products*". JTI has complied fully with its obligation to provide information on the ingredients and emissions of the Products to the competent authorities, including Public Health England. This information has been submitted, as required, through the EU-CEG and is already available to you in that context.

Finally, I note your comments concerning publication of the correspondence between us. JTI does not consider this appropriate, given that the Swedish investigation of the same products is ongoing in accordance with the EU mandated procedure. In particular, the information relating to the Products that has been submitted via the EU-CEG is commercially sensitive and must be appropriately protected.

Yours sincerely

XXX

Encl.