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Tobacco industry tactics to circumvent and undermine the menthol cigarette ban in the UK

Rosemary Hiscock , Karin Silver, Mateusz Zatoński , Anna B Gilmore

Tobacco Control Research Group, Department for Health, University of Bath, Bath, UK

Correspondence to

Dr Rosemary Hiscock, Tobacco Control Research Group, Department for Health, University of Bath, Bath BA2 7AY, UK; R.Hiscock@bath.ac.uk

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INTRODUCTION

Menthol, a type of alcohol (molecular formula $C_{10}H_{20}O$), can be obtained from mint plants or manufactured.^{1 2} In addition to flavouring, it has local anaesthetic properties that can conceal the negative sensations of smoking, due to desensitising receptors.^{1 3} Menthol cigarettes increase overall smoke intake, but mask early respiratory disease symptoms, reducing the chance of quitting.⁴⁻⁶ Smoking menthol cigarettes also may raise nicotine intake, promoting nicotine dependence and the establishment of smoking in youth.^{4 5 7-9} Thus, banning menthol should reduce smoking prevalence.⁴ Furthermore, menthol cigarettes are likely to contribute to health inequalities as sociodemographic groups more likely to be of low income (low education, women, African-Americans and young people) are more likely to smoke menthol.¹⁰⁻¹³

A process for flavouring tobacco with menthol was first patented in the USA in the 1920s,¹⁴ but mass distribution and marketing started in the 1960s when a version with a filter was developed.^{15 16} A more recent innovation for adding flavour is by the addition of a capsule, or 'crushball', a small plastic capsule in the filter activated by crushing¹⁷ (figure 1). These first appeared on the market in Japan in 2007 and are popular among young people due to the flavour and interactivity.^{17 18} In the UK the only cigarettes available with capsules are menthol-flavoured.¹⁹

THE EU MENTHOL BAN

A ban on the sale of cigarettes with a characterising flavour, including menthol, was part of the revised European Tobacco Products Directive (EUTPD) (2014), which has been written into UK law and came into force in May 2016.²⁰ To allow manufacturers and retailers a transitional period to prepare for the ban, implementation of the ban on flavours was delayed until May 2020, for flavours representing at least 3% of a product category European Union (EU)-wide, such as menthol.^{20 21}

The legislation applies to cigarettes and roll-your-own (RYO) tobacco, with cigars, cigarillos and pipe tobacco exempt. Menthol accessories, which are not sold within the same packaging as tobacco or cigarettes, are also excluded.^{22 23} Unlike the EU, Canada has now banned menthol as an ingredient²⁴; elsewhere, cigarettes not labelled as menthol can contain menthol at subliminal levels to reduce the negative sensations of smoking.²⁵⁻²⁷

Leaked Philip Morris International (PMI) documents reveal that it opposes flavour bans,²⁸ and our monitoring of industry activity indicates that

tobacco companies have been exploiting loopholes in the menthol ban and related legislation in the UK, particularly in the months leading up to the ban. The purpose of the paper is, therefore, to expose these gaps and loopholes that other jurisdictions may need to close when developing similar legislation.

Tobacco industry use of the delay to menthol ban implementation

Data on market share of menthol and capsule cigarettes show that menthol/capsule median market share across EU countries (excluding UK) declined from 2015, the year after the TPD was announced (figure 2). In the UK, however, market share increased, via growth in capsule cigarettes, from 14% in 2014 to 21% in 2018, approximately twice and four times the EU median, respectively. Growth was steeper in the UK than in other European countries without the ban (figure 2). Therefore, it does not appear that the UK tobacco industry has been using the grace period to prepare for the menthol ban, but has instead used it to prolong and increase menthol sales.^{29 30}

Sixteen per cent of menthol smokers say they intend to quit after the menthol ban is implemented.³¹ With sales of six billion menthol cigarette sticks in 2018, this could reduce tobacco industry sales by around one billion sticks (3% of the total cigarette market) in the UK,³² so it is not surprising tobacco companies have looked to circumvent the ban.

The derogation delayed implementation until the COVID-19 pandemic. A trade journal reported industry representatives taking advantage of retail closures to request a further deferment³³ despite cigarette sales, and thus old stock turnover, spiking rather than declining.³⁴

Product innovation to circumvent and undermine regulation

As tobacco accessories sold separately are excluded from the legislation, companies have been introducing various menthol-flavoured accessories. Imperial launched menthol³⁵ and capsule³⁶ RYO filter tips in mid-2017 and January 2019, respectively. Independent RYO and make your own accessories specialist, the Republic Group,³⁷ also introduced a new menthol filter via its Swan brand.³⁸ These products could encourage menthol cigarette smokers to switch to RYO rather than quit. Imperial also announced the launch of 'menthol chill' and 'fresh mint' 'Flavour Infusion Cards' in January 2020, designed to provide a menthol



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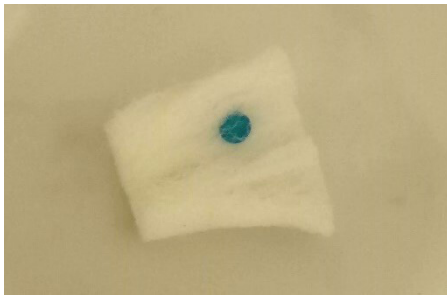


Figure 1 Menthol capsule located inside a filter.

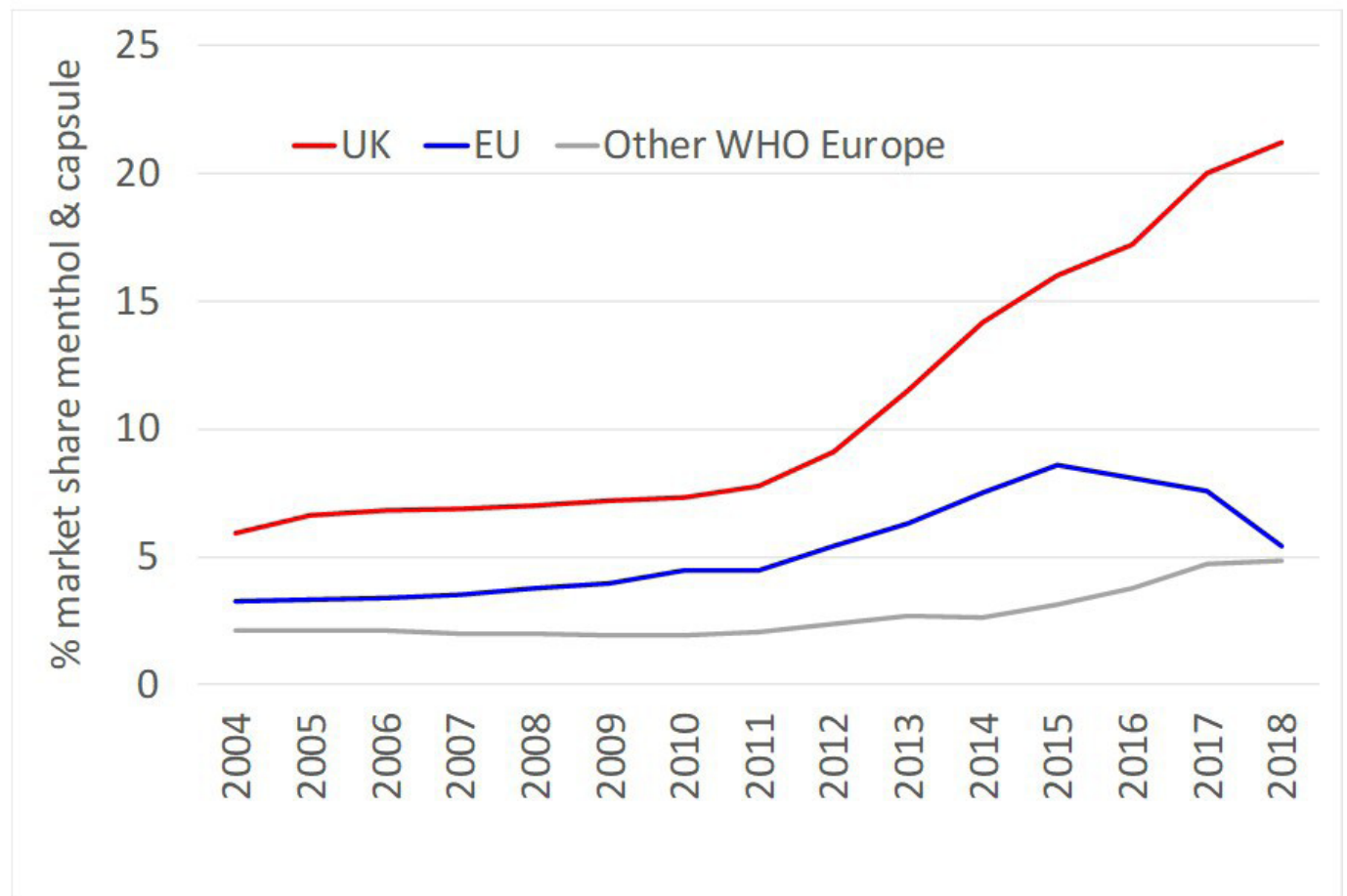
flavour if inserted into factory-made cigarettes or packs of RYO tobacco.^{39 40}

Unlike tobacco products, in England and Wales accessories such as these can be displayed at point of sale (including branding), whereas in Scotland they also need to be hidden

from view.^{41 42} Imperial Tobacco has recommended that retailers use point-of-sale displays to promote the flavour infusion cards.³⁹

About 5 months before the ban, Japan Tobacco International (JTI) launched 10-pack cigarillos with menthol capsules. These closely resemble cigarettes and are placed under its *Sterling* cigarette brand, and have been promoted to retailers as a way to circumvent the menthol ban.⁴³ The Scandinavian Tobacco Group, a specialist producer of cigars, is also launching a cigarillo with a capsule in the filter called *Signature Dual*.^{38 40} Euromonitor data suggest a growth in sales of cigarillos since the EUTPD and associated UK legislation⁴⁴ were enacted in 2016, reversing a downward trend, unlike the cigar market which continues to fall (figure 3).

PMI, which has only a small market share in the UK, is exploiting the opportunity to promote IQOS as an alternative to menthol cigarettes, as its tobacco HEETS sticks are not covered by the ban.^{38 40}



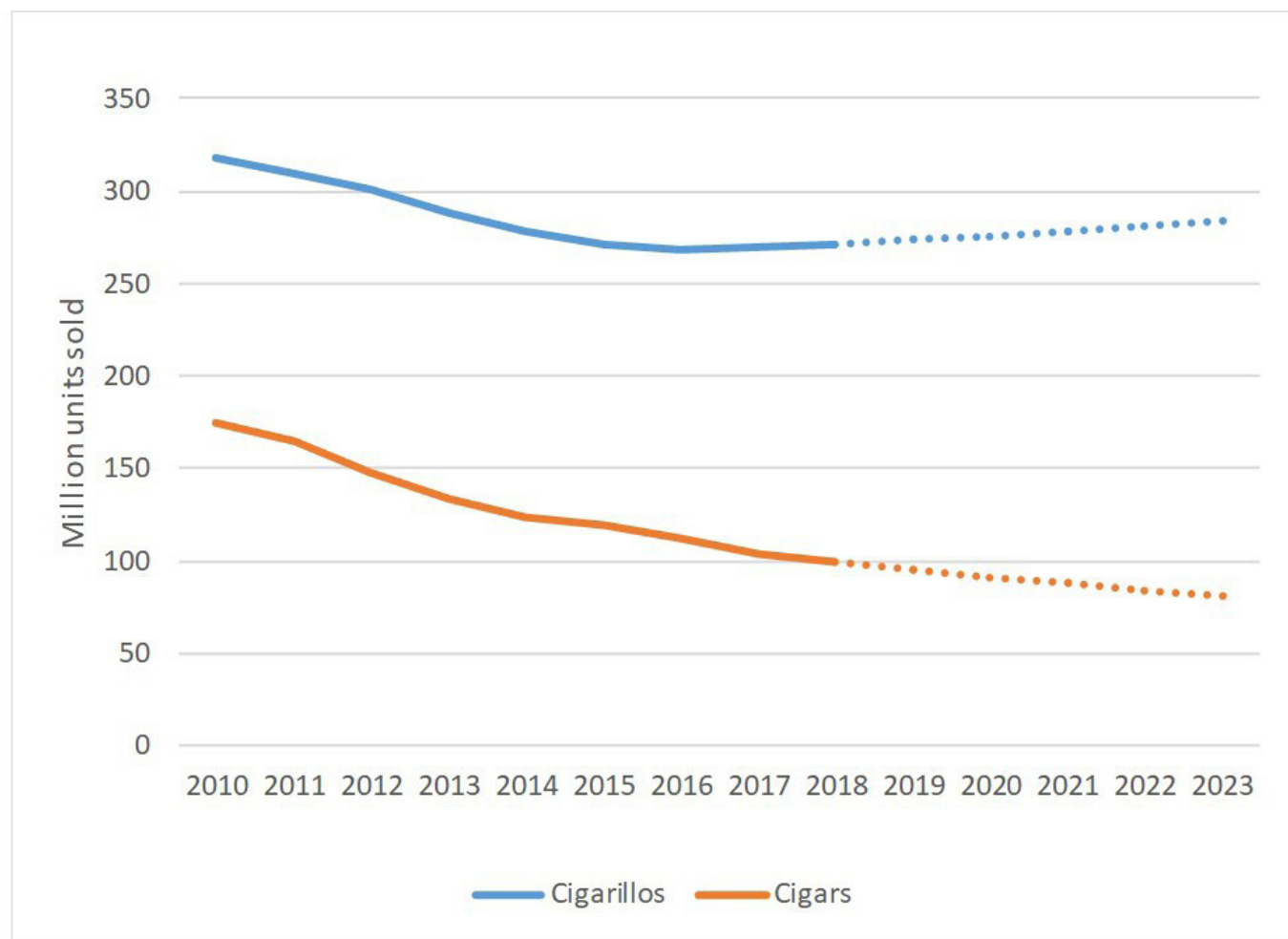
Source: Euromonitor February 2020 (Note that Euromonitor receives project funding from Philip Morris International (Gallagher, A. W., & Gilmore, A. (2019). Euromonitor International now accepts tobacco industry funding: a win for PMI at the expense of research on the tobacco industry [Blog]. *Tobacco Control* (April 8th).)

UK: United Kingdom of Great Britain and Northern Ireland

EU: median of the following European Union countries: Italy, Greece, Spain, Estonia, Sweden, Slovenia, Lithuania, Romania, Croatia, Austria, Denmark, Portugal, Slovakia, Latvia, Ireland, Poland, Bulgaria, Netherlands, Hungary, Czech Republic, France, Finland, Belgium, Germany

Other WHO Europe: median of the following countries: Switzerland, Norway, Serbia, Bosnia and Herzegovina, North Macedonia; Azerbaijan, Uzbekistan, Georgia, Belarus, Russia, Ukraine, Kazakhstan, Israel and Turkey

Figure 2 Market share of menthol and capsule cigarettes, WHO Europe region.



Source: Euromonitor International downloaded January 2020, dotted lines represent forecast data

Figure 3 Expected UK growth in cigarillos and cigars.

Given that the UK does not allow promotion⁴⁵ or display⁴² of tobacco products, the tobacco industry has widely promoted these new and diverse products to retailers via the retail press.^{22 36 38 39 46} They have also created dedicated websites for retailers and smokers.^{40 47–50} Although ostensibly set up to provide information, these websites in effect promote next-generation products (NGPs). One encourages retailers to calculate their potential losses from reduced cigarette sales while reassuring them that other menthol products are available.⁴⁹ Another presents three boxes with options to smokers—quit, heat and vape—and devotes more space and words to NGP options than quitting.⁴⁸

CONCLUSIONS

The tobacco industry has introduced diverse new products to the UK that can get around the ban: menthol accessories sold separately from cigarette packs, and RYO pouches and cigarillos with a capsule. It has also used the ban to promote more profitable⁵¹ heated tobacco products, which unlike quitting are not risk-free.^{52–55} Despite claims of a commitment to reducing harm, this provides yet further evidence that the tobacco industry will circumvent and undermine measures with genuine potential to reduce harm.

Cigarillos are likely to be particularly attractive to the tobacco industry because they are exempt from EU and UK standardised

pack legislation (with the exception of large pictorial warnings), are subject to lower taxes, and their definition is such that they can be sold looking similar to conventional cigarettes except for a brown leaf rather than white stick covering.⁴³ Thus, the tobacco industry may use cigarillos to reintroduce cigarette branding and cheap products which had been removed by standardised packaging.^{22 56}

The EU/UK menthol ban was associated with preceding falls in menthol sales in the EU, but in the UK sales grew up to implementation. This suggests not only that a long implementation period was not needed but that it was misused: menthol sales, which may be particularly harmful,⁴ were driven up in the UK. The yearlong standardised packaging implementation period in the UK was similarly exploited by the tobacco industry.^{22 56}

As other jurisdictions seek to implement flavour bans, standardised packaging and display bans, we suggest they aim to eliminate the weaknesses the industry exploited in the UK legislation. This could be achieved by including all tobacco products and accessories, encompassing all pack types and flavours. Presenting legislation this way, rather than specifying each product included, also helps future-proof it. Further, as in Canada, banning menthol as an ingredient has the benefit of ensuing the industry cannot continue to include menthol at below observable levels. There should be no derogations or phase-ins, in order to maximise impact and curtail sales quickly.

Twitter Mateusz Zatoński @ZatonskiMateusz and Anna B Gilmore @BathTR

Contributors All authors contributed to drafting the paper and approved the final version. RH collated and analysed the Euromonitor data and took the photo (figure 1). RH and KS collated and analysed the industry documents. KS wrote the initial notes for drafting the manuscript, and RH was responsible for much of the redrafting of the manuscript. MZ contributed particularly to the academic literature review. ABG is the head of the research group, spotted the cigarillos on sale, conceived the idea for the paper and provided thoughts for policy responses.

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ORCID iDs

Rosemary Hiscock <http://orcid.org/0000-0001-9741-9083>

Mateusz Zatoński <http://orcid.org/0000-0001-7254-569X>

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