To this day, the legal challenge to the NHS when it tried to regulate the packaging of tobacco products remains the best exploration of the issues arising when consultors have to evaluate expert responses. This was Rhion's analysis from August 2016

New insights for the interpretation of conflicting consultation responses

The recent Tobacco industry Judicial Review helps us to handle battles between the 'experts'

Many public consultations revolve around matters of strong professional disagreements, and one of the biggest challenges facing Governments, Regulators and public bodies of all kinds is how to take decisions without being unfair to one side or another. Nowhere is this more contentious than in the field of public health and some years ago Southampton Council and Hampshire County found themselves on opposite sides of a bitter dispute around fluoridation – which ended up in the High Court.

A few weeks ago, the Court has handed down an important judgment on the grand-daddy of them all – the attempt by the world's tobacco manufacturers to declare the Government's plain packaging regulations to be unlawful. ***R (ex parte BAT etc) v Sec of State for Health*** may indeed become the key legal case that covers the principles which govern the interpretation of consultation responses, and it has arisen, in part, because the tobacco firms claimed that the Government had not taken its 'expert' evidence sufficiently seriously. They were indignantly upset that the Government had only given 'limited weight' to their submissions both before and during two consultations in 2012 and 2014. They claimed this – and umpteen other failures made the *Standardised Packaging of Tobacco Products Regulations 2015* unlawful.

In fact, the Court rejected all their arguments, but in doing so, Mr. Justice Green made a comprehensive review of the issues surrounding the fair interpretation of consultation evidence. Aware of the intensity of the debate and the propensity of these particular claimants to dispute medical and other evidence, the Government had produced a ten-point statement of methodological *best-practice* against which to judge *consultee* responses. It includes some Tobacco-specific items such as consistency with their previous and internal documentation, but in the main covers excellent principles which will apply to a broad range of public consultations – especially when experts openly and publicly disagree. Just to cover a few, they include

Independence – with freedom from bias and conflicts of interest.

In legal cases, as in some consultations, specialist experts are paid to prepare or give evidence, but that, of itself does not make them wrong. Just because a Nobel Professor (as in this case) has had some research paid for by the Tobacco industry, it does not discount the integrity or value of his research. But it raises questions, and it is reasonable for consultation organisers to ask themselves about the extent to which his work might be affected e.g. by 'confirmation bias'

Peer Review

Again, lack of peer review does not of itself make research unviable – but it can damage its credibility. Most academics crave the legitimacy conferred when colleagues confirm that their methods and findings are intellectually or methodologically robust. If there are suspicions that an author has deliberately avoided peer review, it raises legitimate questions about the integrity of the evidence.

Transparency

Anyone who has read Ben Goldacre's works will know of his battles with Companies who have failed to disclose aspects of their methodology. Where contentious issues are at stake, a lack of transparency devalues it. Similarly if methods are unintelligible to laymen. The Judge commended the Competition Authority's Guidelines which stresses that evidence must be comprehensible. *"The fact that the recipient is an expert regulator does not mean that all of its officials are capable of interpreting complex econometric or statistical analyses. This is a recognition that complex evidence must be made digestible to non-specialists."*

Considering all the available relevant literature – not selective parts of it

A lower value may be placed on submissions that appear to take no account of the wider debate. For 'experts' to promote their own views without addressing or even acknowledging the existence of contrary evidence is a reasonable reason to give those submissions a lower 'weighting'

In the Tobacco case, however there was one overwhelmingly important factor, namely the claimants' track records. Back in 2006 in a crucial USA case, the entire industry had been found to have lied, manipulated and conspired against elected Governments across the globe who were doing their best to reduce the harm caused by cigarettes and other tobacco products. It found, for example that public statements made by the Companies were flatly contrary to their own, undisclosed research. Even in this latest case, the Companies stated that they had not undertaken any research on their likely impact of the changed packaging rules on the likelihood that young people would be lured into smoking. The Judge simply did not believe them, implying that they kept quiet about any such work in case it contradicted the submissions of heir 'expert *consultees*'.

Tobacco firms have been in the dock for years, and the World Health Organisation (WHO) has published Guidance that does not mince its words. It roundly accuses them of having had a 'deliberate policy of subverting public health policies' around the world. Puffing smoke may be truly an ill wind, but this case gives us legal authority for the truism that all consultee submissions are not, in fact, equal in weight, and that <u>it is perfectly lawful to take the credibility of the *consultee* into account</u>. For one industry, there was little left.

RHJ