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Our ref
6461/17503/30993177
Your ref
FH CR 3/3231/15
Date
24 February 2017

By email and by hand

Dear Sirs

Government's proposal to change the graphic health warnings ("GHWs") on tobacco products packets and retail containers ("Proposal")

We act for British American Tobacco Company (Hong Kong) Limited ("**BAT HK**") and refer to all our previous correspondence ("**Previous Correspondence**") with the Legislative Council's Panel on Health Services ("**Panel**") and/or the Food and Health Bureau ("**FHB**") in relation to the Proposal.

We note that the FHB has issued a further legislative council paper (LC Paper No. CB(2)859/16-17(12)) ("**Paper**") in relation to the Proposal for discussion in the meeting of the Panel to be held on 28 February 2017 ("**Meeting**"). The FHB states in the Paper that it would provide an "*overall response to the issues*" raised by the tobacco trade and trade representatives. However, BAT HK notes that the Paper does not fully address nor analyse the issues raised in detail in BAT HK's submissions made in our Previous Correspondence. We highlight some of the examples below for the Panel and the FHB's consideration ahead of the Meeting.

1. DEPRIVATION UNDER ARTICLE 105 OF THE BASIC LAW

1.1 The Government states in the Paper that a tobacco trader could still display his trademark, "*though with adaptation or re-sizing in some cases*", on the remaining 15% of the two largest surfaces as well as the lateral surface of the packet or retail container. However, this statement fails to take into account the fact that various 3D or pack shot trademarks

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owned by BAT HK cannot be displayed **at all** in the remaining 15% space of the pack. Contrary to the Government's unfounded assertion, it is technically impossible to "adapt" or "re-size" those trademarks to fit in the remaining space, without losing the distinctive character of the trademarks. In any event, the 15% remaining space available would not be sufficient to effectively designate the product and would leave the trademark (whether for 3D, pack shot trademarks or otherwise) without its function as an identification of the commercial origin and the quality of the underlying product. An even smaller 80% GHW on cigarette packages was held by the Court of Appeal of Sri Lanka to have not allowed sufficient space to display trademarks, and the Court directed that the size of the GHWs should only occupy a space of 50% to 60% of the pack. The Court stated:

"Having considered the size of the packs and other relevant facts, I am of the view that 20% of the space is not reasonably sufficient to present and exhibit a trademark. 20% of the space is not exclusively left for the trademark. It may carry other information as well. In such a space, the presentation of the trademark necessarily becomes comparatively very small. The owner of a trademark cannot reach the consumers with his mark which is hidden in the health warning. The consumers will also not be able to see and identify the trademark properly and consequently the source of the respective goods. They have to make extra efforts to see or identify the trademark, when they buy the goods. Such a situation will unreasonably interfere with the statutory right of the owner of the trademark to use it frustrating the whole purpose of a trademark and of the trademark law" (please refer to section 3 of our letter to the Panel dated 23 June 2015 ("BAT HK's 2015 Submissions")).

1.2 Please find below an illustration of how the registered trademark would be impacted by an 85% GHW:

[111] 商標編號:	303517984
Trade Mark No.:	
狀況:	Registered
Status:	
[540] 商標:	KENT
Mark:	
[550] 商標種類:	Ordinary
Mark Type:	





1.3 Further, in its opinion dated 25 June 2013 the European Parliament Committee on Legal Affairs stated that the introduction of 75% GHWs would not be in accordance with national constitutional law as well as international treaties such as the TRIPS Agreement and recommended 50% GHWs (please refer our letter dated 10 January 2017 to the Panel, copying the FHB and the Secretary for Justice ("**BAT HK's 2017 Submissions**")). After considering other factors, 65% GHWs was adopted.

1.4 The Proposal would thus deprive BAT HK of "*all meaningful use*" or "*all economically viable use*" of its trademarks, which would satisfy the test for deprivation under Article 105 of the Basic Law laid down by the decision of the Court of Appeal in *Fine Tower Associates Limited v Town Planning Board* [2008] 1 HKLRD 553. The Government has either ignored or failed to consider this important test for deprivation, hence wrongly concluded that there would be no deprivation.

2. **PROPORTIONALITY**

2.1 The Government recognises in the Paper that the proportionality test is relevant in cases engaging Articles 6 and 105 of the Basic Law. However, the Paper glosses over the "four-step process" laid down in the Court of Final Appeal decision in *Hysan Development Co. Ltd v. Town Planning Board* (2016) 19 HKCFAR 372 and was only referred to in the footnote, and superficially concludes that the Proposal is proportionate. It has either ignored or avoided addressing various important elements of the proportionality test, including whether the restriction would be no more than necessary for advancing a legitimate aim and whether the social benefit gained (if any) is outweighed by its detrimental impact. This is so notwithstanding that the Government has the burden of proof to establish all four steps in the proportionality test following the decision of the Court of Final Appeal in *Mok Charles Peter v Tam Wai Ho* (2010) 13 HKCFAR 762. BAT HK is of the view that the Government would not be able to discharge its burden of proof in any judicial challenge, including because:

2.1.1 the margin of discretion to be afforded to the FHB in this case is narrower than that for other public health regulation because there would be significant interference with fundamental property rights as protected by the common law and the Basic Law in this case;

2.1.2 public awareness in Hong Kong about the risks of smoking cigarettes is effectively universal. According to an independent tobacco survey, 95.4% of the youth in Hong Kong are well aware of the risks of smoking;¹

2.1.3 a proper evidence-based analysis demonstrates that larger graphic warnings do not reduce smoking prevalence. This is confirmed for example by analyses undertaken by the U.S. Food and Drug Administration ("**FDA**") on the effectiveness of GHWs, which the Government has not referred to. In all of the FDA's statistical analyses to estimate the effect of the Canadian graphic warnings on smoking prevalence rates, the effects of graphic warnings on smoking prevalence were statistically equivalent to a zero effect. There is also a demonstrated lack of effectiveness of larger warnings in other jurisdictions such as Australia, and Thailand,² and expert evidence submitted by BAT HK has

¹ As demonstrated by the independent 2009 Global Youth Tobacco Survey (GYTS) data for Hong Kong which found that 95.4% of respondents answered 'Definitely Yes' (89.8%) or 'Probably Yes' (5.6%) to the question 'Do you think cigarette smoking is harmful to your health?'

² As explained in our letter to the Panel dated 20 July 2015, copying the FHB.



clearly indicated that increasing the size of warnings in Hong Kong has not had any beneficial effect above smaller warnings.³ The Government has not addressed this evidence in the Paper or otherwise;

- 2.1.4 the Government has offered no evidence, in the Paper or otherwise, demonstrating that larger graphic warnings have directly caused a material decrease in smoking rates in any of the countries that now require them. Instead, the Government relies on evidence on downstream psychosocial variables that are an insufficient basis to evaluate the effectiveness of tobacco control policies. None of these studies examine actual behavioural outcomes, but instead merely ask about people's intentions, thoughts and perceptions. This type of evidence was rejected by the U.S. Court of Appeals decision in *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*⁴ Commenting on the U.S. FDA's reliance on this type of evidence to support the claim that graphic warnings will advance its interest in reducing the number of Americans who smoke, the Court stated:

"FDA makes much of the "international consensus" surrounding the effectiveness of large graphic warnings, but offers no evidence showing that such warnings have directly caused a material decrease in smoking rates in any of the countries that now require them. While studies of Canadian and Australian youth smokers showed that the warnings on cigarette packs caused a substantial number of survey participants to think - or think more - about quitting smoking, Proposed Rule at 69,532, and FDA might be correct that intentions are a "necessary precursor" to behaviour change, Final Rule at 36,642, it is mere speculation to suggest that respondents who report increased thoughts about quitting smoking will actually follow through on their intentions. And at no point did these studies attempt to evaluate whether the increased thoughts about smoking cessation led participants to actually quit."
(emphasis added); and

- 2.1.5 the existing 50% GHWs are sufficient for the purpose of informing consumers about the hazards of tobacco use. Such warnings comply with the obligations under the FCTC, while minimising the violation of the rights of manufacturers and obligations under other international agreements. In addition, existing laws that prevent false or misleading trade descriptions of goods are sufficient to meet any demonstrable concerns regarding packaging while also respecting the choices and rights of adults who choose to use tobacco products and allowing manufacturers, as a part of a legal industry, to communicate product information to consumers; and any concerns regarding the current warnings being worn out and lower levels of awareness of specific illnesses, can be met by changing the current warning content without enlarging the size of the GHWs. Increasing the size of the warnings is not needed and will not have any improved benefit in terms of reducing smoking rates.

³ As explained in the expert report of Professor Viscusi, Appendix 3 of BAT HK's 2015 Submissions, at para 30. See also the study carried out by Professor Kevin Tsui in the John E Walker Department of Economics at Clemson University.

⁴ *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012).



2.2 Please refer to our Previous Correspondence, including paragraphs 1.3 to 1.6 of BAT HK's 2017 Submissions, for a detailed explanation of why the Proposal would fail the four-step proportionality test.

2.3 As noted by Hon Paul Tse Wai-Chun, JP in the meeting of the Panel on 17 January 2017 (the "**January Meeting**"), any Government policy should balance the interests of various stakeholders and that the Government needs to have sufficient evidence before it can restrict the freedom of the people of Hong Kong. As illustrated above, there is no evidence which supports the necessity or effectiveness of the Proposal. Hence, the Government is not justified to restrict and/or deprive of property rights by implementing the Proposal.

3. REGULATORY IMPACT ASSESSMENT ("RIA")

3.1 Whilst the Government noted the trade's query on whether the Government has conducted an RIA on the Proposal, the Government did not answer the question but only stated in the Paper that there was a need to strengthen tobacco control measures and claimed that it had considered statistics, experience and development of Hong Kong. A one-paragraph discussion on the Proposal in the Paper is manifestly short of what an RIA requires. BAT HK maintains that the Government should conduct a proper RIA before introducing the Proposal. It should undertake a thorough analysis on all issues relevant to the Proposal, including but not limited to whether there are less burdensome means of achieving the regulatory objective, assessment of the positive and negative impacts of each option via public consultation, evidence based study and appropriate cost/benefit analyses.

3.2 The failure to undertake any impact analysis of the Proposal goes against the recommendation made in the Regulatory Impact Analysis undertaken in 2001 in respect of proposed amendments to the then existing smoking legislation, that: "*any future requirements for pictorial and graphic contents take into account the likely financial and economic costs of implementation and that these be weighed against the likely health and economic benefits likely to arise*";⁵ as well as established international principles of Better Regulation to which Hong Kong has subscribed; and its own previous consultation standards. The Paper also ignores the fact that BAT HK has a legitimate expectation that an RIA should be conducted before introducing the Proposal.

3.3 Further, it must be considered that if the Government had undertaken a proper evidence-based analysis it would have reached a similar outcome to the FDA, namely that increasing the size of the existing warnings would not be effective in reducing smoking prevalence. The FDA analysis is the *state of the art* and is most objective and logical when it comes to assessing the impact of GHWs, which nevertheless failed to find any impact of GHWs on smoking behaviours. This is particularly telling in the present case where GHWs in Hong Kong already cover 50% of the pack. In these circumstances further increasing the GHWs to 85%, when there is no information deficit to be addressed and no evidence that (i) consumers do not understand the current warnings covering 50% of the 2 largest surfaces of the pack and that (ii) the increased warnings would reduce smoking prevalence is clearly arbitrary and an improper use of power. Indeed, the only explanation that the Paper gives for adopting the 85% warnings instead of the 65% warnings adopted in Germany (which is also the warning size required in the whole of the European Union) is to say: "[i]n view of the progress of Hong Kong on the global tobacco control road map, we consider it

⁵ Regulatory Impact Assessment, *Proposed amendments to the existing smoking legislation*, Environmental Resources Management Limited, LC Paper No. CB(2)1/02-03(04), Dec 2001, page 107 <http://www.legco.gov.hk/yr02-03/english/panels/hs/papers/hs1025cb2-1-4e.pdf>.



appropriate to expand the health warning size to 85%." This indicates that the Government's intention on introducing the Proposal is simply to seek international favour rather than considering whether the proposal is actually necessary in Hong Kong.

- 3.4 Further, the Government's assertion that there is no reasonably available alternative to the Proposal is unfounded and incorrect. If the Government had conducted a proper RIA, it would have found that there are a number of alternative regulations that are more effectively targeted towards reducing youth smoking than larger GHWs. For example, public bill board advertisement, TV education program, online or mobile app targeted for youth, targeted channel leaflet distribution, quit-smoking hotline flyers to targeted housing estate, rigorous enforcement of existing laws forbidding retailers to sell to minors and/or the implementation of additional age verification measures, creating an offence of proxy purchase, creating an offence of youth purchase and implementing a consistent tax policy that discourages youth uptake of smoking.
- 3.5 Please refer to our Previous Correspondence, including section 2 of our letter to the FHB dated 29 July 2016, enclosed to our letter to the Panel dated 13 December 2016, for a detailed explanation of why the Government has failed to follow a fair and proper regulatory process and thus denied BAT HK's procedural legitimate expectations.

4. **LEGISLATIVE MEANS**

- 4.1 We note from the Paper that the Government purports to rely on section 18 of the Smoking (Public Health) Ordinance (Cap. 371) ("**SPHO**") as the basis for implementing the Proposal. We have explained in BAT HK's 2017 Submissions why the Government in fact has no legal authority to implement the Proposal under section 18 of the SPHO. In short, the Court of Final Appeal in *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362 has recognised and applied the principle of legality as a canon of statutory construction. When applying this principle, trademarks cannot be abrogated or curtailed except by express words or necessary implications in the legislation, both of which are clearly absent from section 18 of the SPHO. Hence, section 18 of the SPHO does not authorise the Government to prescribe any regulation or order that abrogates or curtails trademarks, such as the Proposal. In response, the Government simply referred to the background of the previous reform without addressing this issue and has not even mentioned the principle of legality in the Paper. We would strongly emphasise to the FHB and the Panel that this is an important issue as the implementation of the Proposal through section 18 of the SPHO would be an unlawful exercise of power and hence liable to be struck out by the Courts, even before considering the question of unconstitutionality.

5. **COLLECTION OF STAKEHOLDERS' VIEWS**

- 5.1 As conceded by the Government in the Paper, the Government only "*consulted members of the HS Panel in May 2015*", attended several Panel meetings and a technical briefing session. In other words, it has not conducted any **proper public** consultation. Whilst the FHB has purportedly cited overseas experience as the basis for introducing the Proposal, it has refused to follow the same consultation process adopted in overseas jurisdictions, including Australia, Canada, the United Kingdom and New Zealand (which are all Parties to the FCTC). As Hon Dennis Kwok Wing-hang indicated in the January Meeting, the Government should conduct a formal and proper consultation in relation to the Proposal, which includes issuing a formal consultation document, giving time for the public to make submissions on the Proposal and issuing a formal consultation report.



- 5.2 Finally, the Government's statement that "*Majority of the views* [in the January Meeting] *supported the proposal*" is misleading. According to the statistics conducted by the Coalition on Tobacco Affairs and summarised in its letter to the Panel dated 22 February 2017 (LC Paper No. CB(2)880/16-17(01)), there were 74 submissions (with substantive content) against the Proposal and equally 74 submissions (with substantive content) in support of the Proposal. The number of submissions supportive and against the Proposal was the same when discounting the 20 other submissions which have no substantive content or reasoning.

In short, the Paper is alarmingly lacking in many important respects, and the explanations provided by the Government in that Paper as highlighted above are insufficient and not substantiated. We would urge the Government to reconsider its position prior to the Meeting in respect of this unlawful Proposal and flawed regulatory process.

We should be grateful if you could kindly table a copy of this letter for consideration by the Panel in advance of the Meeting.

Please do not hesitate to contact us should you have any queries.

Yours faithfully,

Herbert Smith Freehills

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