



Assistant Secretary for Food and Health (Health) 5A  
Food and Health Bureau  
19/F, East Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong

23rd Floor Gloucester Tower  
15 Queen's Road Central  
Hong Kong  
T +852 2845 6639  
F +852 2845 9099

[www.herbertsmithfreehills.com](http://www.herbertsmithfreehills.com)

For the attention of Miss Carol Wong

Our ref  
6461/12474/31022546  
Your ref  
FH CR 1/3231/19  
Date  
11 April 2019

By fax (2840 0467), by email and by hand

Dear Miss Wong

**Smoking (Public Health) (Amendment) Bill 2019 (the "Bill")**

We act for British-American Tobacco Company (Hong Kong) Limited.

We refer to the letter from the Assistant Legal Adviser of the Legal Service Division of the Legislative Council Secretariat (the "**Legal Service Division**") to you dated 4 April 2019 (LC Paper No. CB(2)1175/18-19(01)).

We note that the Legal Service Division refers in the Schedule to its letter to paragraphs 12 to 20 of our letter dated 18 February 2019 (LC Paper No. CB(2)830/18-19(01)), which set out the basis for our views that the Bill is unconstitutional and contravenes local and international law. The Legal Service Division has asked whether the Administration would provide their response to these views for consideration by the Honourable Members of the Legislative Council.

We have recently issued a detailed submission to the Bills Committee on the Bill on 8 April 2019, copying the Secretary for Food and Health and the Secretary for Justice (LC Paper No. CB(2)1175/18-19(11)). Sections 6 to 10 of the submission contain a more detailed explanation of these constitutional and international law issues which we believe would be helpful for the Administration to better understand our views in preparing their response. We enclose herewith a copy of the submission for your reference.

We look forward to receiving your response.

**Regional Managing Partner** □ Asia  
J J G D'Agostino

A R W Aitken  
D J Byrne Hill +  
J S Caen

M C Emsley  
D A Geiser  
W R Hallatt  
R W M Hunt  
W W H Ku  
H H S Lau

K S H Sanger  
J Sung  
G H Thomas  
T C P Tong  
K A Wombolt

**Senior Registered Foreign  
Lawyers:**  
D Logofet \*

**Senior Consultants:**  
S M Loi  
M K Wallace

**Managing Partner - Greater China**  
M F Tai

H E Cassidy  
S J Chapman  
J M Copeman +

**Senior Registered  
Foreign Lawyers:**  
P D Kiesselbach \*

+ Not resident in Hong Kong

\*Admitted in England and Wales



HERBERT  
SMITH  
FREEHILLS

Date  
11 April 2019  
Letter to  
Assistant Secretary for Food and Health (Health)  
5A

If you have any questions on our submission, please feel free to contact our Mr Dominic Geiser or Mr Truman Mak.

Yours faithfully,

Herbert Smith Freehills

Encl

- cc: Ms Wendy Kan  
Assistant Legal Adviser  
Legal Service Division  
Legislative Council Secretariat  
Legislative Council Complex, 1 Legislative Council Road  
Central, Hong Kong  
Ref: LS/B/11/18-19  
(By fax (2877 5029), by email and by hand)
- cc: Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019  
Legislative Council Secretariat  
Legislative Council Complex, 1 Legislative Council Road  
Central, Hong Kong  
(By fax (2185 7845), by email and by hand)
- cc: Law Drafting Division  
Department of Justice  
3/F, East Wing, Justice Place  
18 Lower Albert Road, Central  
Hong Kong  
Attn: Mr Manuel Ng, Senior Government Counsel and Miss Celia Ho, Government Counsel  
(By fax (3918 4613), by email and by hand)



Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill  
2019  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

23rd Floor Gloucester Tower  
15 Queen's Road Central  
Hong Kong  
T +852 2845 6639  
F +852 2845 9099

[www.herbertsmithfreehills.com](http://www.herbertsmithfreehills.com)

Our ref  
6461/12474/31012325  
Your ref

Date  
08 April 2019

By email and by hand

Dear Sirs

### **Submission on the Smoking (Public Health) (Amendment) Bill 2019**

We act for British-American Tobacco Company (Hong Kong) Limited ("**BATHK**").

We write in connection with the deputation meeting of the Bills Committee (the "**Bills Committee**") in relation to the Smoking (Public Health) (Amendment) Bill 2019 (the "**Bill**") on 13 April 2019 (the "**Meeting**"). Amongst other things, the Bill seeks to ban the import, manufacture, sale, distribution and advertisement of Alternative Smoking Products (as defined in the Bill).

BATHK strongly opposes the Bill. The Bill is irrational and is not evidence-based – it bans products that are potentially less harmful than conventional cigarettes, including tobacco heating products ("**THPs**") and electronic cigarettes ("**e-cigarettes**"), and effectively ignores the potential harm reduction benefits associated with the use of such products. The Bill is also unconstitutional and contravenes the Basic Law in that it violates the fundamental human right of privacy and right of private property, disproportionately restricts the free movement of goods and impermissibly threatens Hong Kong's guaranteed status as a free port. The Bill is inconsistent with Hong Kong's international trade obligations. Furthermore, the Government has failed to follow a proper process with the Bill, in breach of BATHK's legitimate expectation and its duty to consult.

Please find below a detailed submission of BATHK on the Bill for consideration by members of the Bills Committee at the Meeting. We should be grateful if you could kindly table a copy of this submission for the Meeting.

**Regional Managing Partner** □ Asia  
J J G D'Agostino

**Managing Partner - Greater China**  
M F Tai

A R W Aitken  
D J Byrne Hill +  
J S Caen  
H E Cassidy  
S J Chapman  
J M Copeman +

M C Emsley  
D A Geiser  
W R Hallatt  
R W M Hunt  
W W H Ku  
H H S Lau

K S H Sanger  
J Sung  
G H Thomas  
T C P Tong  
K A Wombolt

**Senior Registered Foreign  
Lawyers:**  
D Logofet \*

**Senior Consultants:**  
S M Loi  
M K Wallace

**Senior Registered  
Foreign Lawyers:**  
P D Kiesselbach \*

+ Not resident in Hong Kong

\*Admitted in England and Wales

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### 1. EXECUTIVE SUMMARY

- 1.1 British American Tobacco ("**BAT**") has long been working to develop potentially reduced-risk products ("**PRRPs**") that could help reduce the public health impact of smoking. To that end, it has invested in a range of PRRPs, including THPs and e-cigarettes. They are different to conventional cigarettes – they do not combust, and therefore, they produce significantly fewer toxicants than conventional cigarettes. The reduced-risk potential of THPs and e-cigarettes as compared to conventional combustible cigarettes has been widely recognised by public authorities (see section 2 below).
- 1.2 Under the current legislative framework, it is legal to import and sell THPs and e-cigarettes in Hong Kong, subject to certain regulations, such as payment of duties and registration. The Government has also previously agreed that these products should continue to be available for sale and consumption in Hong Kong, and proposed in June 2018 that they should be regulated in a way similar to conventional cigarettes. The Chief Executive also explained to the members of the Legislative Council on 12 July 2018 that these products, "*which [are] less harmful medically*", should be regulated, and expressed her concerns over a blanket ban being imposed, including concerns relating to Hong Kong's trade obligations (see section 3 and paragraphs 4.1 to 4.2 below).
- 1.3 However, notwithstanding her concerns, and without providing any scientific justification or conducting any prior consultation with the industry or the general public, the Chief Executive drastically changed her position and unilaterally announced on 10 October 2018 in her 2018 Policy Address that the Government will introduce the Bill. The Bill is effectively a blanket ban of Alternative Smoking Products in Hong Kong, and extends even to their private use (see paragraphs 4.3 to 4.7 below).



- 1.4 BATHK submits that the Bill is irrational and disproportionate in banning products that emits substantially less toxicants than conventional cigarettes whilst at the same time allowing people to smoke conventional cigarettes. An approach that denies harm reduction benefits to consumers is not rational, ethical or appropriate for the protection of public health. There are alternative regulatory approaches that are available to support smokers in quitting conventional smoking, while minimising the potential risks presented by their use, as proposed by many experts and implemented in other countries (see section 5 below).
- 1.5 BATHK also submits that:
- 1.5.1 The Bill is **unconstitutional** in that:
- (A) It disproportionately restricts the fundamental human right of privacy protected under Article 14 of the Hong Kong Bill of Rights, Article 17 of the International Convention on Civil and Political Rights ("**ICCPR**") and Article 39 of the Basic Law, by imposing a blanket ban on Alternative Smoking Products, regardless of one's age, the place or the purpose for which they are to be consumed. The Bill would prevent a conventional smoker from exercising his or her freedom to consume these products (which are endorsed by leading health regulators and experts around the world as potentially less harmful alternatives to cigarettes) in private, in order to switch away from smoking conventional cigarettes (see section 6 below).
  - (B) It amounts to a complete deprivation of private property protected under Articles 6 and 105 of the Basic Law, including BATHK and BAT's goodwill, registered trademarks, patents, and investments in its Alternative Smoking Products. Such deprivation is not necessary to achieve any legitimate aim of the Bill. It also exposes the Government to significant risks of claims and liabilities for compensation (see section 7 below).
  - (C) It disproportionately restricts the free movement of goods and impermissibly threatens Hong Kong's constitutionally guaranteed status as a free port under Articles 114 and 115 of the Basic Law, without any legitimate necessity to achieve the objectives sought to be pursued in the Bill (see section 8 below).
- 1.5.2 The Bill is **in breach of due process**, by denying BATHK's legitimate expectation that the Government will regulate, rather than impose a blanket ban on, Alternative Smoking Products and that the Government would follow fair and proper regulatory processes, such as conducting a formal public consultation and Regulatory Impact Assessment to properly consider the impacts, costs and benefits of the Bill, before introducing significant tobacco control reform (see section 9 below).
- 1.5.3 The Bill is **inconsistent with Hong Kong's international obligations** by breaching the General Agreement on Tariffs and Trade ("**GATT**") of the World Trade Organisation ("**WTO**") and Hong Kong's bilateral treaties, including, *inter alia*, the Investment Promotion and Protection Agreement ("**IPPA**") signed between Hong Kong and the United Kingdom (see section 10 below).



- 1.6 BATHK therefore respectfully urges the Government to withdraw this Bill which is irrational, in breach of due process and inconsistent with Hong Kong's international obligations. It should then conduct a public consultation in relation to these matters and review the responses received before deciding to introduce any regulatory reform. In doing so, it should engage with manufacturers of such products, as well as other stakeholders. BATHK would be happy to share their insights on best practices from their dealings with different types of regulatory frameworks around the world.

## 2. INTRODUCTION

- 2.1 BATHK is a member of the BAT group of companies and is responsible for the importation, distribution and sale of tobacco products in Hong Kong.
- 2.2 BAT has long been working to develop PRRPs that can help potentially reduce the public health impact of smoking and has invested in a range of PRRPs, including THPs and e-cigarettes. BAT is one of the major suppliers of these products in a number of countries. BATHK has already commenced preparation to launch these products, in particular *glo*, one of BAT's THPs, in Hong Kong based on the proposed regulation of these new tobacco products by the Government which was submitted to the Panel on Health Services of Legislative Council (the "**Health Panel**") in June 2018.

### THPs

- 2.3 THPs are devices that heat rather than burn tobacco. Unlike conventional cigarettes (which combust tobacco at a temperature higher than 800°C), THPs heat tobacco (typically at a temperature between 240-350 °C) to produce a nicotine-containing aerosol that is inhaled. Unlike the smoke emitted from a lit cigarette, THPs' aerosol is composed mainly of water, humectant (e.g. glycerol), nicotine and flavourings.
- 2.4 *Glo* is composed of an electronic battery powered device which heats specially designed tobacco sticks, Neostiks, to approximately 240°C. The consumer inserts the Neostik into the *glo* device and turns it on by means of a button which initiates the heating of the tobacco. Once the initial heating phase is completed, the Neostik is ready to be consumed.
- 2.5 When used as directed and intended, Neostiks neither ignite nor burn. The electronically-controlled heating, in combination with the uniquely processed tobacco, prevents combustion from occurring. The Neostiks are not smoked; they do not combust and produce no ash. The reduction in temperature, and the fact there is no burning, results in the production of aerosol containing fewer as well as a lower level of toxicants, the majority of which are at significantly lower levels than in cigarette smoke. This offers the potential for significant harm reduction when compared to cigarettes. Indeed, the science BAT has done to date on *glo* shows that it emits approximately 90-95% less toxicants<sup>1</sup> than the smoke of a reference cigarette in terms of the nine harmful toxicants the World Health

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<sup>1</sup> 'British American Tobacco publishes a series of studies supporting the reduced-risk potential of *glo*' published by Dr Marina Murphy of British American Tobacco in November 2017; 'Tobacco heating products overview of the scientific assessment of *glo*' prepared by British American Tobacco (available in enclosure 5 in LC Paper No. CB(2)1402/17-18(01) (Revised)). Also see Forster et al., (2017) [Assessment of novel tobacco heating product THP 1.0. Part 3: Comprehensive chemical characterisation of harmful and potentially harmful aerosol emissions](#). This is an independently peer-reviewed study, published in the journal of Regulatory Toxicology and Pharmacology.



Organisation ("**WHO**") recommends to reduce in cigarette smoke.<sup>2</sup> There is also a substantial reduction in the number and level of second hand environmental toxicants emission for *glo* use compared to cigarette smoking.

2.6 The reduced-risk potential of THPs as compared to conventional combustible cigarettes has been recognised by public authorities and experts. For example:

2.6.1 In 2018, Public Health England ("**PHE**"), an executive body of the UK Department of Health, published an evidence review of e-cigarettes and THPs in which it concluded that "[c]ompared with cigarette smoke, heated tobacco products are likely to expose users and bystanders to lower levels of particulate matter and harmful and potentially harmful compounds."<sup>3</sup>

2.6.2 In 2017, the UK Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment ("**COT**") published a toxicological evaluation of two THPs on the market in the UK, in which it found that "[i]nvestigations on both products showed a decrease in the harmful and potentially harmful compounds (HPHCs) in the aerosol generated by the device to which the user would be exposed, compared to the HPHCs in the mainstream smoke from a conventional cigarette. For both products, there were some HPHCs where the reduction was approximately 50%, but the reduction in a number of other HPHCs was greater than 90%, with many of the compounds being below the limits of detection or quantification for the assays used."<sup>4</sup>

2.6.3 A study by Caponnetto et al.<sup>5</sup> which investigated carbon monoxide in the exhaled breath ("**eCo**") of participants after use of two THPs found "*no eCO elevations during inhalation testing with HTPs [Heated Tobacco Products] under investigation in any of the study participants. Our findings concur with findings from e-cigarette studies as well as from manufacturer and independent data on HTPs.*" The authors concluded that "*it is our opinion that non-combustible nicotine sources – that are significantly less harmful than conventional cigarettes – can be a viable solution for those who, for whatever reason, cannot or do not want to give up nicotine, or who want to cut back on smoking or quit altogether. Therefore, switching to combustion-free products has the potential to act as a gateway out of smoking. The personal preference for a particular product (e.g., e-cigarette vs HTP vs smokeless tobacco products) can play a critical role in increasing the likelihood of successfully abstaining from cigarette smoking...As for e-cigarettes, health professionals should consider all the options available to a smoking patient and opt for the ones that provide the greatest probability of quitting for good, including HTPs.*"

<sup>2</sup> This is a comparison between the smoke from combusted tobacco in a standard 3R4F reference cigarette (approximately 9 mg tar) and the vapour from heated tobacco in *glo*, in terms of the nine types of harmful components the WHO recommends to reduce. See also (1) Statement on the toxicological evaluation of novel heat-not-burn tobacco products by Committee on Toxicity – COT2017/04; December 2017; and (2) Toxicological evaluation of novel heat-not-burn tobacco products – non-technical summary.

<sup>3</sup> PHE (2018), [Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England](#).

<sup>4</sup> COT (2017), [Statement on the toxicological evaluation of novel heat-not-burn tobacco products](#).

<sup>5</sup> Caponnetto et al. (2018), [Carbon monoxide levels after inhalation from new generation heated tobacco products](#).



### E-cigarettes

- 2.7 E-cigarettes contain no tobacco at all, do not rely on combustion, and, as a consequence, no smoke or tobacco tar is formed when the e-liquid is "vaped". BAT launched its first vapour product, Vype e-cigarette, in 2013 and is one of the world's leading e-cigarette companies.
- 2.8 An increasing number of health experts agree that vaping e-cigarettes is less harmful than smoking conventional cigarettes. For example:
- 2.8.1 A recent systematic review of the scientific literature undertaken by the National Academies of Sciences, Engineering, and Medicine for the U.S. Food and Drug Administration concluded, *inter alia*, that: "[t]here is conclusive evidence that completely substituting e-cigarettes for combustible tobacco cigarettes reduces users' exposure to numerous toxicants and carcinogens present in combustible tobacco cigarettes."<sup>6</sup>
- 2.8.2 The PHE (2018) report recognised that "[v]aping poses only a small fraction of the risks of smoking and switching completely from smoking to vaping conveys substantial health benefits over continued smoking. Based on current knowledge, stating that vaping is at least 95% less harmful than smoking remains a good way to communicate the large difference in relative risk unambiguously so that more smokers are encouraged to make the switch from smoking to vaping" and that there have been "no identified health risks of passive vaping to bystanders" (emphasis added).<sup>7</sup>
- 2.8.3 The Scottish National Health Service in collaboration with several other public health bodies and NGOs, including Action on Smoking and Health Scotland, Cancer Research UK, and the UK Centre for Tobacco and Alcohol Studies, published a statement in 2017 in which it stated that "[t]here is now agreement based on the current evidence that vaping e-cigarettes is **definitely less harmful** than smoking tobacco. Although most e-cigarettes contain nicotine, which is addictive, vaping carries less risk than smoking tobacco. Thus, it would be a good thing if smokers used them **instead** of tobacco."<sup>8</sup> (emphases in original)
- 2.8.4 A study funded by Cancer Research UK (2017) found that people who swapped smoking regular cigarettes for e-cigarettes or nicotine replacement therapy for at least six months had much lower levels of toxic and cancer causing substances in their body than people who continued to use conventional cigarettes.<sup>9</sup>
- 2.8.5 A study by Levy et al., (2017)<sup>10</sup> modelled the population impact in the future if more smokers in the US switched to e-cigarettes. They estimated that taking into account several parameters such as cessation, initiation and relative harm, switching cigarette smokers to e-cigarette use over a 10-year period would lead to 1.6 to 6.6 million fewer premature deaths in the US under a pessimistic and

<sup>6</sup> The National Academies of Sciences, Engineering, and Medicine (2018), [Public Health Consequences of E-Cigarettes](#).

<sup>7</sup> PHE (2018), [Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England](#), at Chapter 4.

<sup>8</sup> <http://www.healthscotland.scot/publications/e-cigarettes-consensus-statement>.

<sup>9</sup> Shahab et al., (2017) *Nicotine, Carcinogen, and Toxin Exposure in Long-Term E-Cigarette and Nicotine Replacement Therapy Users*. *Ann Intern Med*, 390-400.

<sup>10</sup> Levy et al., (2017) *Potential deaths averted in USA by replacing cigarettes with e-cigarettes*. *Tobacco Control*. Aug 30.





optimistic scenario respectively. The authors concluded that "*a strategy of replacing cigarette by e-cigarette use can yield substantial gains, even with conservative assumptions about related risks. Most important, an e-cigarette substitution strategy provides the justification to redouble efforts to target cigarette use, as it is called for by the WHO Framework Convention for Tobacco Control.*" (emphasis added)

- 2.9 In view of the reduced harm from the use of e-cigarettes, an increasing number of governments and public health authorities support the use of e-cigarettes as an effective way for people to quit smoking. For example:
- 2.9.1 The PHE (2018) report found that "[i]n the first half of 2017, quit success rates in England were at their highest rates so far observed and for the first time, parity across different socioeconomic groups was observed. It is plausible that EC [e-cigarettes] have contributed to this" and that "[w]hile caution is needed with these figures, the evidence suggests that ECs have contributed tens of thousands of additional quitters in England."<sup>11</sup>
- 2.9.2 The UK National Health Service supports the use of e-cigarettes in quit-attempts, referring to e-cigarettes on its "Stop smoking treatments" website, and stating that "research has found that e-cigarettes can help you give up smoking, so you may want to try them rather than the medications listed above..."<sup>12</sup>.
- 2.9.3 A briefing note by Cancer Research UK (2016), "E-Cigarettes in Stop Smoking Services" recommends that "[S]top Smoking Services are currently seeing a reduction in the number of clients and one contributing factor is likely to be the increase in e-cigarette use. These services should be accepting of e-cigarette use and support those who wish to use them alongside behavioural support as an aid to stop smoking."<sup>13</sup> (emphasis added)
- 2.9.4 The Royal College of Physicians has stated that "smokers who use nicotine products as a means of cutting down on smoking are more likely to make quit attempts. Promoting wider use of consumer nicotine products, such as e-cigarettes, could therefore substantially increase the number of smokers who quit."<sup>14</sup>
- 2.9.5 Health Canada's current tobacco control strategy states "[t]raditional cessation approaches are not the only tools available to help Canadians transition away from smoking cigarettes, the most deadly nicotine delivery system. A harm reduction approach aims to reduce the negative consequences of cigarette smoking by recognizing the potential benefits of using less harmful alternatives". It adds "**Vaping is less harmful than smoking.** Completely replacing cigarettes with a vaping product will significantly reduce a smoker's exposure to toxic and

<sup>11</sup> PHE (2018), [Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England](#), at Chapter 4.

<sup>12</sup> [http://www.nhs.uk/conditions/smoking-\(quitting\)/Pages/Treatment.aspx](http://www.nhs.uk/conditions/smoking-(quitting)/Pages/Treatment.aspx).

<sup>13</sup> Cancer Research UK (2016), *E-Cigarettes in Stop Smoking Services*. Available at: [https://www.cancerresearchuk.org/sites/default/files/e-cig\\_in\\_sss\\_0.pdf](https://www.cancerresearchuk.org/sites/default/files/e-cig_in_sss_0.pdf).

<sup>14</sup> UK Royal College of Physicians (2016), [Nicotine without smoke: Tobacco harm reduction](#).



*cancer-causing chemicals. Adults can access vaping products containing nicotine as a less harmful alternative to smoking.*<sup>15</sup> (emphasis in the original)

- 2.9.6 The New Zealand Ministry of Health states that "[s]mokers switching to vaping products are highly likely to reduce their health risks and for those around them" and "[s]top smoking services should support smokers using vaping products to quit."<sup>16</sup>
- 2.10 For a detailed illustration of the reduced risk potential of PRRPs, please refer to BATHK's previous submission to the Health Panel dated 16 May 2018 (LC Paper No. CB(2)1402/17-18(01) (Revised)).

### 3. THE CURRENT REGULATORY FRAMEWORK

- 3.1 Tobacco products are currently regulated under the Smoking (Public Health) Ordinance (Cap. 371) ("**SPHO**"). Under Part 3 of the SPHO, it is permissible to sell cigarettes and tobacco products in Hong Kong, provided that certain packaging and tar yield requirements are complied with.
- 3.2 THPs are a type of tobacco product. Under the current regulatory regime, it is **legal** to import and sell THPs in Hong Kong, provided that appropriate duty is paid. BATHK has therefore already commenced preparation to launch one of its THPs, i.e. *g/o*, in Hong Kong.
- 3.3 As e-cigarettes do not contain tobacco, they are not regulated under the SPHO. However, e-cigarettes that contain nicotine may potentially be regulated under the Pharmacy and Poisons Ordinance (Cap. 138). Nevertheless, it is still **legal** to import and sell e-cigarettes containing nicotine in Hong Kong provided that the relevant regulations are complied with.

### 4. THE BILL

- 4.1 On 12 June 2018, the Food and Health Bureau issued a Legislative Paper to the Health Panel in relation to its proposal to regulate e-cigarettes and new tobacco products (including THPs) in a way similar to the current regulatory regime of cigarettes and tobacco products, i.e. the provisions in the SPHO.<sup>17</sup> In doing so, the Government agreed that the import and sale of e-cigarettes and THPs **should be legally permitted**, subject to similar regulations that apply to conventional cigarettes and tobacco products.
- 4.2 On 12 July 2018, the Chief Executive explained to the members of the Legislative Council of the Government's proposal to regulate new tobacco products. The Chief Executive stated that:

<sup>15</sup> Health Canada (2018), *Overview of Canada's Tobacco Strategy*, see: <https://www.canada.ca/en/health-canada/services/publications/healthy-living/canada-tobacco-strategy/overview-canada-tobacco-strategy.html>.

<sup>16</sup> New Zealand Ministry of Health (2018), *Ministry of Health position statement – Vaping products*, see: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco>.

<sup>17</sup> LC Paper No. CB(2)1578/17-18(05) (https://www.legco.gov.hk/yr17-18/english/panels/hs/papers/hs20180619cb2-1578-5-e.pdf).



*"... the Food and Health Bureau is proposing to strengthen regulation, such that these products are being regulated, at least on par with the conventional cigarettes for the protection of public health.*

*Right now, the Secretary for Food and Health is consulting the sector, listening to various views, and we hope to take into account these views and introduce amendments to the Smoking (Public Health) Ordinance in the coming legislative session.*

*But as far as a complete ban is concerned, Hong Kong does have to recognize her trade obligations in an international environment, because if conventional cigarettes are even more harmful, but they are allowed to be sold in Hong Kong under certain regulation, to go into a total ban of another form of tobacco product which is less harmful medically would raise many challenges. So, we have to really strike a balance.*<sup>18</sup> (emphasis added)

- 4.3 The proposal was tabled at the Health Panel, and deliberations were based on the said proposal.
- 4.4 Notwithstanding these remarks by the Chief Executive, on 10 October 2018, without any prior consultation with the members of the tobacco industry or the general public, the Chief Executive unilaterally announced in her 2018 Policy Address that the Government would submit proposed legislative amendments to ban the import, manufacture, sale, distribution and advertisement of e-cigarettes and other smoking products. This is a complete change of position from the Chief Executive's remarks that were made only three months earlier which confirmed the Government's intention to regulate, not ban, such products.
- 4.5 The Bill and related Legislative Brief were then introduced to the Legislative Council and the Bills Committee in February and March 2019 respectively without consulting the Health Panel again.
- 4.6 Although the Bill does not specifically restrict the possession, purchase and use of Alternative Smoking Products, once implemented, it would be practically impossible for any individual to legally possess, purchase or use any of these products in Hong Kong (and in the case of existing users, at least when they have consumed all of the existing products that they have legally purchased) given that they would no longer be able to legally purchase them in Hong Kong or import them into Hong Kong for private use. In other words, the Bill is effectively a blanket ban on the use of Alternative Smoking Products in Hong Kong. This not only represents a drastic change in the Government's position but it is also inconsistent with the approach taken by leading countries around the world, such as in most countries in Europe, the UK, the US, Japan, S. Korea, Canada and New Zealand.
- 4.7 For the reasons explained below, it is clear that the Bill is unconstitutional, irrational, in breach of due process and inconsistent with Hong Kong's international trade obligations.

## 5. THE BILL IS IRRATIONAL

- 5.1 BATHK submits that the Bill is irrational. Rather than being evidence-based, the Bill is being driven by an irrational and outdated concept of an '*abstinence-only*' approach to tobacco control that ignores both the potential public health benefits that tobacco harm reduction strategies can bring, and undermines individual freedoms. There are alternative

<sup>18</sup> <https://www.legco.gov.hk/yr17-18/english/counmtg/hansard/cm20180712a-translate-e.pdf>.



regulatory approaches that are available to support smokers in quitting conventional smoking, while minimising the potential risks presented by their use, as proposed by many experts and implemented in other countries.

- 5.2 Internationally, it is accepted that most of the harm associated with tobacco is caused by inhaling the smoke produced by the combustion of tobacco and not nicotine itself.<sup>19</sup> There is also recognition that different tobacco and nicotine products can have vastly different risk profiles, and that PRRPs have an important role in reducing the projected harms of smoking. For example, the findings of the 2007 report of the Royal College of Physicians (one of the oldest and most prestigious medical societies in the world) were unequivocal: "[i]n this report we make the case for harm reduction strategies to protect smokers. We demonstrate that smokers smoke predominantly for nicotine, that nicotine itself is not especially hazardous, and that **if nicotine could be provided in a form that is acceptable and effective as a cigarette substitute, millions of lives could be saved.**" (emphasis added)<sup>20</sup>
- 5.3 Sweanor<sup>21</sup> et al. summarised the global public health implications of tobacco harm reduction, stating: "*The relative safety of smokeless tobacco and other smokefree systems for delivering nicotine demolishes the claim that abstinence-only approaches to tobacco are rational public health campaigns*" and concluded that "**Applying harm reduction principles to public health policies on tobacco/nicotine is more than simply a rational and humane policy. It is more than a pragmatic response to a market that is, anyway, already in the process of undergoing significant changes. It has the potential to lead to one of the greatest public health breakthroughs in human history by fundamentally changing the forecast of a billion cigarette-caused deaths this century.**" (emphasis added)<sup>22</sup>
- 5.4 A recent letter from a group of 72 independent specialists in nicotine science, policy and practice, calling on the WHO to embrace innovations in technology in the fight against diseases caused by smoking, also states: "[i]n the field of tobacco control and public health, the world has changed significantly since the Framework Convention on Tobacco Control was signed in 2003. It is impossible to ignore or dismiss the rise of Alternative Nicotine Delivery Systems (ANDS). These are established and new technologies that deliver nicotine to the user without combustion of tobacco leaf and inhalation of tobacco smoke. These technologies offer the prospect of significant and rapid public health gains through 'tobacco harm reduction'. Users who cannot or choose not to quit using nicotine have the option to switch from the highest risk products (primarily cigarettes) to products that are, beyond reasonable doubt, much lower risk than smoking products (e.g. pure nicotine products, low-toxicity smokeless tobacco products, vaping or heated tobacco products). We believe this strategy could make a substantial contribution to the Sustainable

<sup>19</sup> For a detailed discussion of the reduced risk potential of THPs and e-cigarettes, please refer to BATHK's previous submission to the Health Panel of the Legislative Council dated 16 May 2018 (LC Paper No. CB(2)1402/17-18(01) (Revised)).

<sup>20</sup> Royal College of Physicians (2007). 'Harm reduction in nicotine addiction: helping people who can't quit. A report by the Tobacco Advisory Group of the Royal College of Physicians'.

<sup>21</sup> David Sweanor, J.D., is a renowned public health advocate and Advisory Committee Chair of the University of Ottawa Centre for Health Law, Policy and Ethics. He has over 30 years' experience in public health policy, including spearheading the development of efforts to reduce cigarette smoking in Canada and globally.

<sup>22</sup> Sweanor D, Alcabes P, Drucker E (2006), [Tobacco harm reduction: how rational public policy could transform a pandemic](#), International Journal of Drug Policy 18 (2007) 70-74.



*Development Goal to reduce premature deaths through non-communicable diseases (SDG Target 3.4)."*<sup>23</sup>

- 5.5 The concept of tobacco harm reduction is also firmly embedded in the WHO Framework Convention on Tobacco Control ("**FCTC**"). Specifically, in defining tobacco control, Article 1(d) of the FCTC recognises that "*tobacco control*" concerns not just "*a range of [tobacco] supply, demand*" measures, but also the adoption of "*harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke*". Accordingly, the Government, as a party to which the FCTC applies (through China), is obliged to consider harm reduction measures as part of an overall tobacco control strategy.
- 5.6 The Bill is also irrational in the following aspects:
- 5.6.1 As explained in paragraphs 2.5 and 2.8 above, the use of THPs (such as *glo* and Neostiks) and e-cigarettes result in the emission of substantially less toxicants than conventional cigarettes. It is unreasonable, and indeed illogical, for the Government to adopt a blanket ban on all Alternative Smoking Products, whilst at the same time allowing people to smoke conventional cigarettes;
- 5.6.2 The Bill implements a blanket ban on all Alternative Smoking Products, the definition of which is extremely wide under the current Bill and does not take into account the specific health impacts of each such product. For example, it is wide enough to cover a device which generates an aerosol that contains no tobacco whatsoever;
- 5.6.3 The Government has not considered or responded to the significant volume of scientific evidence of the harm reduction benefits offered by THPs and e-cigarettes. BATHK has previously made public submissions to the Health Panel on 16 May 2018 enclosing a large volume of evidence which has apparently not been considered.<sup>24</sup> The Government has not explained why a blanket ban is required and favoured over regulation, notwithstanding the evidence submitted; and
- 5.6.4 We note that the Government only chose to conduct testing on one of the THPs among the many different THPs manufactured by different manufacturers and available in the international market, and each product could be very different and carry different risk levels. For example, whilst the Government noted that iQOS (the only product tested) burns the tobacco stick at about 260°C, we are instructed that BAT's *glo* would heat Neostiks at a lower temperature of approximately 240°C and consequently would be likely to produce fewer toxicants and lower levels of those toxicants. The substance and composition of Neostiks may also be different with that of iQOS. BATHK in fact provided samples of its THPs (i.e. *glo* and Neostiks) to the Government for laboratory testing in April 2018. However, all samples were returned untested by the Government in November 2018. The Government's approach in relying on only one product to impose a blanket ban on other products from a range of different manufacturers (which they have ignored and refused to test) is plainly unfair to other market participants, and is irrational. This approach also illustrates that the Government

<sup>23</sup> Abrams et al. (2018), '[Letter from seventy-two specialists in nicotine science, policy and practice](#)'.

<sup>24</sup> LC Paper No. CB(2)1402/17-18(01); <https://www.legco.gov.hk/yr17-18/english/panels/hs/papers/hs20180521cb2-1402-1-e.pdf>.



has not properly considered the health effects of all types of Alternative Smoking Products before deciding to introduce the Bill.

## 6. BREACH OF THE FUNDAMENTAL HUMAN RIGHT OF PRIVACY

The Bill is a clear restriction on the right to privacy

- 6.1 The right to privacy is a fundamental human right protected by Article 14 of the Hong Kong Bill of Rights, Article 17 of the ICCPR and Article 39 of the Basic Law, which provide, *inter alia*, that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy".
- 6.2 Privacy is the "*secluded part of every person's life in which, without outside interference, he or she may act independently*".<sup>25</sup> The Hong Kong Court has recognised that the concept of "privacy" under the ICCPR is indistinguishable to the concept of "private life" under Article 8 of the European Convention of Human Rights.<sup>26</sup>
- 6.3 The European Court of Human Rights has considered the nature of the right to privacy / private life as follows:
  - 6.3.1 "[t]he concept of "private life" is a broad term... It covers the physical and psychological integrity of a person";
  - 6.3.2 "the notion of personal autonomy is an important principle underlying the interpretation of [the guarantees of right to private life]";
  - 6.3.3 "The very essence of the [European Convention of Human Rights] is respect for human dignity and human freedom... the Court considers that it is under Article 8 that notions of the quality of life take on significance"; and
  - 6.3.4 "The Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health, or arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the scope of Article 8(1) and requiring justification in terms of the second paragraph" (emphasis added).
- 6.4 In other words, a person's autonomy in respect of one's own private life is constitutionally guaranteed in Hong Kong. A person should be free to conduct one's own life in a manner of one's own choosing. This includes, for example, the food and drink that one consumes, as well as the activities that one chooses to do, even if the food/drink might negatively impact one's own health or if the activity might pose danger to one's own life.
- 6.5 The Government now intends to implement the Bill which is effectively a blanket ban on the use of Alternative Smoking Products. This has the practical effect of prohibiting an

<sup>25</sup> *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804.

<sup>26</sup> *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804.



individual (capable of understanding the risks involved in the same and exercising his or her own autonomy) from using Alternative Smoking Products, even privately in one's own home, and even when alone (and therefore not affecting any members of the public). Whilst the use of these products might affect one's own health, the same is also true for smoking conventional cigarettes and the consumption of food or drink, notably alcohol, neither of which are banned. Indeed in this case, the proposed ban cannot be justified in any way because the Hong Kong Government is denying smokers the opportunity to move away from conventional cigarettes to PRRPs. The intended ban clearly intrudes such person's autonomy and human dignity and is in clear violation of the fundamental human right to privacy.

- 6.6 Indeed, the UK Supreme Court (whose decisions are highly persuasive in Hong Kong) has recently held that a comprehensive ban on smoking in a hospital (in which convicts with mental disorder were detained) engaged the right to private life under Article 8 of the ECHR.<sup>27</sup> The present case is even stronger – the Bill seeks to impose a comprehensive ban on the use of products that are potentially less harmful than the use of conventional cigarettes.
- 6.7 We wish to note that the Bill gives rise to an issue that is of fundamental public importance and with far-reaching implications. The issue is not just relevant to the ban on Alternative Smoking Products. The Bill sets precedent and opens a gateway to any future proposal of the Government to ban other personal activities, including private consumption of unhealthy food/alcohol and the private participation of life-threatening activities, with the same purported rationale – to restrict Hong Kong residents from taking part in activities that the Government considers harmful, even in circumstances where the individual concerned understands and accepts the risk involved in the activities and where the activities do not affect any other people. Hence, the Government's purported restriction of the right to privacy under this Bill must be carefully considered.

The restriction on the fundamental right to privacy is disproportionate

- 6.8 Since the Bill imposes a restriction on the fundamental right to privacy, the Government must discharge the burden to demonstrate that the restriction is proportionate, i.e.:<sup>28</sup>
- 6.8.1 the restriction must pursue a legitimate aim;
  - 6.8.2 the restriction must also be rationally connected to that legitimate aim;
  - 6.8.3 the restriction must be no more than necessary to accomplish that legitimate aim; and
  - 6.8.4 the social benefit gained is not outweighed by the detrimental impact of the restriction.
- 6.9 In respect of the aim of the Bill, the Government noted the following in its Legislative Council Brief for the Bill:
- 6.9.1 "4. *The Food and Health Bureau submitted a proposal to the Legislative Council ("LegCo") Panel on Health Services ("HS Panel") on the regulation of alternative smoking products in June 2018. The proposal was heavily criticised by the*

<sup>27</sup> *McCann v State Hospitals Board for Scotland* [2017] 1 WLR 1455.

<sup>28</sup> *Hysan Development Company Limited and Others v Town Planning Board and Another* (FACV 21/2015, 26 September 2016).



- medical professions, education sector, parents and many members of the public. They were worried that allowing the sale of alternative smoking products with restrictions would not be adequate to protect public health, and would bring about very negative impact and pose health risks on children and adolescents in particular. A non-binding motion was passed at the HS Panel meeting on 19 June 2018, urging the Government to impose a full ban." (emphasis added);*
- 6.9.2 "5. Meanwhile, there is increasing evidence that both e-cigarettes and HNB products are definitely harmful to health and may bring about gateway effects..." (emphasis added);
- 6.9.3 "7. International studies have also concluded that the tar and nicotine yields in HNB products are comparable to conventional cigarettes. Even Philip Morris International's ("PMI") in vivo clinical data failed to show a statistically detectable difference between iQOS (short for "i Quit Ordinary Smoking", the HNB product developed by PMI) and conventional cigarette users for 23 of the 24 biomarkers of potential harm among American adults..." (emphasis added);
- 6.9.4 "8. While awaiting studies on the gateway effect of the newly introduced HNB products to accumulate, a US study examined consumers' perception about iQOS in Japan and Switzerland. Through expert interviews, product and marketing analysis and focus groups, the study concluded that iQOS was marketed as a "sophisticated, high tech and aspirational" product. Youth and young adults are more interested in such product positioning and this approach raises concern about youth appeal..." (emphasis added);
- 6.9.5 "9. On the other hand, WHO has tightened its guidelines on tobacco control. Further to the seventh session of the Conference of the Parties ("COP") to the WHO Framework Convention on Tobacco Control ("FCTC") which proposed, in November 2016, to its Contracting Parties to consider applying regulatory measures to, *inter alia*, prohibit the manufacture, importation, distribution, sale, presentation, etc., of e-cigarettes, the eighth session held in October 2018 proposed the same for HNB products."
- 6.10 It appears that the aim of the Bill is to:
- 6.10.1 Prevent children and adolescents from using Alternative Smoking Products (the "**Children Concern**");
- 6.10.2 Prevent the opening of a gateway to the consumption of conventional cigarettes (the "**Gateway Concern**");
- 6.10.3 prevent access to products with tar and nicotine yields that are comparable to conventional cigarettes (the "**Harm Concern**"); and/or
- 6.10.4 Respond to the alleged guideline of the WHO to prohibit Alternative Smoking Products (the "**FCTC Concern**").
- 6.11 However, in respect of:
- 6.11.1 The Children Concern – it is essential to have careful regard for the evidence and to properly assess to risks and benefits of any proposed intervention. Such an assessment would need to include, identifying the extent and patterns of any youth usage; assessing the extent to which any such usage is harmful, including whether the use is merely experimental or long term; and assessing the extent to





which any increased usage of PRRPs is displacing more harmful cigarette use by youth and adult smokers. In failing to undertake such an assessment, the Government cannot demonstrate that the Bill is adequate, necessary or proportionate. Indeed, contrary to the position asserted by the Chief Executive, the PHE (2018) report found that "[d]espite some experimentation with these devices among never smokers, EC are attracting very few young people who have never smoked into regular use" and that "EC use among never smokers in GB remains very rare at less than 1%, similar to the level of use of NRT. Among never smokers who have ever used EC, a minority have used nicotine-containing liquids and the vast majority have not progressed to regular use."<sup>29</sup> A US study published by Kozlowski et al., (2017)<sup>30</sup> also concluded that "risks for youth posed by e-cigarettes likely fall far short of those feared by the products' opponents" and that, currently "youth use of e-cigarettes is unlikely to increase the ranks of future cigarette smokers." Other studies also indicate that regular youth use is concentrated in young people who smoke<sup>31</sup> and there is evidence that young people use vaping products to reduce harm and to quit smoking<sup>32</sup>. In the 2018 United States Annual Review of Public Health, the authors also note: "[u]nder all but the most implausible scenarios, population simulation modeling estimates millions of life years saved by employing the principles of harm minimization and switching smokers to safer ANDS products."<sup>33</sup> In any event, it is clear that a blanket ban of these products is not necessary at all and is excessive. A prohibition of sale of these products based on the age, **similar to the restriction imposed on sale of conventional cigarettes, would be more than sufficient to achieve this purpose;**

- 6.11.2 The Gateway Concern – the Government only claimed that the use of THPs "*may bring about gateway effects*" (emphasis added) and stated in paragraph 28 of Annex B of the Legislative Council Brief that "[t]he presence of nicotine from the heating of real tobacco in HNB should bring about *possibly stronger gateway and renormalisation effect, despite the lack of scientific evidence at this stage*" (emphasis added). In other words, the Government has openly admitted that there is currently no scientific evidence on any alleged gateway effect from the use of THPs. To the contrary, evidence suggests that e-cigarettes and THPs have provided a gateway out of smoking for millions of smokers. As a number of public health experts recently noted in a letter calling on the WHO to reject prohibition and embrace 'tobacco harm reduction' and risk-proportionate regulation of tobacco and nicotine products: "[m]illions of smokers have moved from cigarettes to less harmful alternatives where the laws allow it. Where ANDS

<sup>29</sup> McNeill A, Brose LS, Calder R, Bauld L & Robson D., *Evidence review of e-cigarettes and heated tobacco products 2018. A report commissioned by Public Health England*. London: Public Health England, 2018

<sup>30</sup> Kozlowski et al. (2017), *Adolescents and e-cigarettes: Objects of concern may appear larger than they are*. *Drug & Alcohol Dependence*, 174:209-14.

<sup>31</sup> Villanti et al. (2016), *Frequency of Youth E-Cigarette and Tobacco Use Patterns in the United States: Measurement Precision is Critical to Inform Public Health*, Vol. 19, *Nicotine and Tobacco Research*. Oxford University Press.

<sup>32</sup> Shiffman S and Sembower MA (2017), *PATH Data: Harm Reduction is Teens' Top Reason for Using e-cigarettes*.

<sup>33</sup> Abrams et al (2018), *Harm Minimization and Tobacco Control: Reframing Societal Views of Nicotine Use to Rapidly Save Lives*, *Annu. Rev. Public Health* 2018. 39:193–213.



*have been popular, we have seen rapid declines in adult smoking, for example in the United Kingdom, Sweden, the United States, and in Japan where cigarette consumption fell by 27 percent in the two years between first quarter 2016 and the same period in 2018 following the introduction of heated tobacco products.*"<sup>34</sup>;

- 6.11.3 The Harm Concern – as stated in paragraphs 2.6 and 2.8 above, the reduced-risk potential of Alternative Smoking Products as compared to conventional combustible cigarettes has been widely recognised by international public authorities. Although the Government appears to disagree with this view, the Government admitted in paragraph 7 of the Legislative Council Brief that certain THPs are at least "*comparable to conventional cigarettes*", as opposed to being more harmful. The Government has not explained what "*comparable*" means (e.g. whether the Government considers a difference of, say 30%, to be "*comparable*"). In any event, even if, on the Government's view (which is disagreed by BATHK), they are "*comparable*", the Government has not provided any justification as to why THPs should be banned whilst "*comparable*" conventional cigarettes should be permitted; and
- 6.11.4 The FCTC Concern – other than prohibition, the FCTC Conference of the Parties in fact also proposed its Contracting Parties to consider other types of regulation as appropriate (such as restrictions or regulations) on new generation products such as THPs. It did not require Contracting Parties to only consider prohibition as the only means.
- 6.12 Further, in considering whether the restriction is proportionate, it is important to bear in mind that:
- 6.12.1 The right to privacy is a fundamental human right concerning a person's dignity and autonomy, a right which must be respected by the Government. The role of the Government is to protect the welfare of the general public, but not to interfere with an individual's autonomy; and
- 6.12.2 The Bill effectively imposes a blanket restriction on the use of Alternative Smoking Products. A person is prohibited from using these products at all regardless of one's age, the place or the purpose for which they are to be consumed. A person cannot even exercise one's freedom to consume these products alone, in private, for the purpose of switching away from smoking conventional cigarettes. The extent of the constitutional right which the Bill seeks to restrict is therefore very significant.
- 6.13 In view of the above, it is clear that the Bill disproportionately infringes the fundamental human right to privacy, and is therefore unconstitutional.

## 7. DEPRIVATION OF CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS

- 7.1 The Court of Final Appeal acknowledged that Articles 6 and 105 of the Basic Law expressly protect private property rights.<sup>35</sup> These rights are fundamental to a capitalist economy which is protected by Article 5 of the Basic Law.

<sup>34</sup> Abrams et al. (2018), '[Letter from seventy-two specialists in nicotine science, policy and practice](#)'.

<sup>35</sup> *Hysan Development Company Limited and Others v Town Planning Board and Another* (FACV 21/2015, 26 September 2016).



- 7.2 In *Michael Reid Scott v The Government of HKSAR*,<sup>36</sup> the Court found that property for the purposes of Article 105 of the Basic Law is a very wide concept and requires a "*wide and purposive interpretation*". Similar to property rights protected under Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the protection of property rights clearly extends to intangible properties, such as goodwill in a business.<sup>37</sup>
- 7.3 Although BATHK has not yet completed its launch of its THPs, *g/o*, as explained in paragraph 2.2 above, these products are currently widely available for purchase outside Hong Kong (including in countries such as Japan and Korea) and can be brought into Hong Kong legally by individuals as long as appropriate duties are paid. **It has been held that a manufacturer of goods sold abroad, but whose goods were brought into the local jurisdiction by private individuals, would be considered as having established sufficient market within the local jurisdiction to have its goodwill protected in the local market.**<sup>38</sup> The goodwill attached to *g/o* and Neostiks is therefore constitutionally protected in Hong Kong. The trademarks of *g/o* and Neostiks are also registered under Trade Mark Ordinance (Cap. 559), and hence, legally protected as personal property in Hong Kong together with the registered patents.
- 7.4 If the Bill is passed, BATHK would not be permitted to sell, nor could Hong Kong residents legally purchase or import, and thus use, *g/o* or Neostiks in Hong Kong. All of BAT and BATHK's goodwill, patents, and investments in *g/o* and Neostiks will become of no meaningful or economic use, and hence, worthless in Hong Kong. Hence, the Bill does not merely restrict BAT and BATHK's property rights – it goes as far as to completely deprive BAT and BATHK of their goodwill, trademarks and investments in *g/o* and Neostiks, which are property rights constitutionally protected under Articles 6 and 105 of the Basic Law. As such, similar to the infringement of the right to privacy, the Government must demonstrate that the Bill is proportionate to the extent of it imposing restrictions on those constitutional rights.
- 7.5 As demonstrated in paragraphs 6.8 to 6.13 above, it is clear that the Bill is disproportionate. In this connection, we wish to add that the restriction of property rights to be imposed by this Bill is even more disproportionate than the Government's previous reform relating to the increase in size of the graphic health warnings on cigarette packets – BATHK will be effectively denied the right to apply any of the *g/o* and Neostiks trademarks (which are specific to THPs) at all to its THPs. There would remain absolutely no commercial value or utility in these trademarks in BAT/BATHK's Hong Kong market if the blanket ban was implemented.
- 7.6 Apart from the protection mentioned above, Article 105 of the Basic Law also requires the Government to protect the "*right to compensation for lawful deprivation of their property*" (emphasis added). This means that, even if the Bill is proportionate, the Government will still be liable to pay compensation for the complete deprivation of BAT and BATHK's goodwill, trademarks and investments in *g/o* and Neostiks. The same also applies to other Alternative Smoking Products manufactured by other tobacco companies, exposing the Government to significant risks of claims and substantial liabilities.

<sup>36</sup> HCAL 188/2002, 7 November 2003.

<sup>37</sup> See for example, *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 at [73].

<sup>38</sup> *La SociÉTÉ Anonyme Des Anciens ÉTablissements Panhard Et Levassor v Panhard Levassor Motor Company, Limited* [1901] 2 Ch. 513.



8. **BREACH OF HONG KONG'S CONSTITUTIONALLY GUARANTEED STATUS AS A FREE PORT**

8.1 Articles 114 and 115 of the Basic Law expressly guarantee Hong Kong's status as a free port and protect free trade and free movement of goods:

Article 114

*The Hong Kong Special Administrative Region shall maintain the status of a free port and shall not impose any tariff unless otherwise prescribed by law.*

Article 115

*The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.*

8.2 The Bill imposes a blanket ban on all import of smoking products. It is indisputable that the Bill engages Articles 114 and 115.

8.3 Indeed, prohibitions on the sales/import of tobacco and alcohol products have been found to engage the European counterpart to Articles 114 and 115 of the Basic Law, i.e. Article 34 of the Treaty on the Functioning of the European Union ("TFEU"), which provides that "*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states.*"

8.4 For example, in *R (Sinclair Collis Ltd) v Secretary of State for Health*<sup>39</sup>, a prohibition on the sale of tobacco from automatic vending machines in the United Kingdom was found to engage Article 34 TFEU for impeding on the claimant's ability to import tobacco vending machines into the United Kingdom. The European Court of Justice (the "ECJ") similarly found in *Rosengren and Others v Rikssaklagaren*<sup>40</sup> that a ban imposed by the Swedish Government on the importation of alcoholic drink by private individuals into Sweden engaged Article 34 TFEU.

8.5 Where the free movement of goods is restricted, the ECJ held that "*it is for the national authorities to demonstrate that those rules are consistent with the principle of proportionality, that is to say, that they are necessary in order to achieve the declared objective, and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade*" (emphasis added).<sup>41</sup>

8.6 Applying this proportionality analysis, the ECJ in *Rosengren* found that the Swedish Government could not show that the complete ban on import of alcoholic drink by private individuals was necessary in order to achieve the declared objective of protecting public health, or that the public goal could not be achieved by a less extensive prohibition, such as a restriction based on age. Hence, the ban was held to be a disproportionate restriction on the free movement of goods, and therefore, unconstitutional.

8.7 Similar considerations apply to the Bill. As explained in paragraphs 6.8 to 6.13 above, it is plainly not necessary to impose a blanket ban on these products. Less extensive restrictive measures are available, including age restriction on sale and use (held in *Rosengren* to be an alternative means) and appropriate marketing restriction.

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<sup>39</sup> [2012] QB 394.

<sup>40</sup> (Case C-170/04) [2007] ECR I-4071.

<sup>41</sup> *Rosengren and Others v Rikssaklagaren* (Case C-170/04) [2007] ECR I-4071 at [50].



- 8.8 As such, the Bill disproportionately restricts the free movement of goods protected under the Basic Law, and impermissibly threatens Hong Kong's constitutionally guaranteed status as a free port.

## 9. BREACH OF DUE PROCESS

- 9.1 The Government's previous representation to regulate new tobacco products, rather than ban them outright, gave rise to a legitimate expectation that it will still be legal to import and sell Alternative Smoking Products in Hong Kong. In reliance of this legitimate expectation, BATHK has commenced preparation for the launch of its THPs, namely, *glo* and Neostiks, in Hong Kong and incurred considerable expenses as a result.
- 9.2 The Government's unilateral and complete change in position in October 2018 represents a clear departure from the legitimate expectation. The Government has not at any time sought to consult BATHK or other members of the tobacco industry. The introduction of the Bill is therefore in breach of due process.<sup>42</sup>
- 9.3 Further, the Bill represents a significant departure from the Government's existing policy on regulation of tobacco and nicotine products. BATHK, as well as other members of the tobacco industry, has a legitimate expectation that the Government would follow fair and proper regulatory processes, such as conducting a formal public consultation and Regulatory Impact Assessment (to properly consider the impacts, costs and benefits of the Bill) before any significant tobacco control reform such as the Bill. However, the Government had neither produced any consultation document for the public to consider the Bill nor invited the public to submit their views on the same before introducing the Bill, which deviates from the long-established standards and consultation practices adopted by the Food and Health Bureau. Moreover, notwithstanding that the Government first introduced its proposal to regulate Alternative Smoking Products in the Health Panel, it proceeded to introduce the Bill directly in the Legislative Council without any attempt to consult with members of the Health Panel.
- 9.4 The Bill is therefore introduced by the Government in breach of due process and the legitimate expectation of BATHK.

## 10. INCONSISTENCY WITH HONG KONG'S INTERNATIONAL OBLIGATIONS

- 10.1 As referred to in paragraph 4.2 above, the Chief Executive explained to the members of the Legislative Council on 12 July 2018 that:
- "But as far as a complete ban is concerned, Hong Kong does have to recognize her trade obligations in an international environment, because if conventional cigarettes are even more harmful, but they are allowed to be sold in Hong Kong under certain regulation, to go into a total ban of another form of tobacco product which is less harmful medically would raise many challenges. So, we have to really strike a balance."* (emphasis added)
- 10.2 In other words, the Chief Executive is aware that the Bill, constituting a blanket ban of Alternative Smoking Products, is inconsistent with Hong Kong's trade obligations.
- 10.3 Indeed, as will be illustrated below, the Bill is:

<sup>42</sup> *Ng Siu Tung & Others v Director of Immigration* (2002) 5 HKCFAR 1.



- 10.3.1 In breach of the GATT of the WTO;
- 10.3.2 In breach of Hong Kong's bilateral treaties, including the IPPA signed between Hong Kong and the United Kingdom; and
- 10.3.3 In any event not required by the WTO FCTC.

The Bill is in breach of the GATT

- 10.4 Article XI of the GATT of the WTO, of which Hong Kong is a member, provides that:  
*"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."*
- 10.5 Unlike the current legislative regime for conventional cigarettes which includes the imposition of duties (which is permissible under Article XI), the Bill constitutes a complete and absolute ban on the importation of Alternative Smoking Products. This is clearly captured by Article XI.
- 10.6 Further, in view of the following factors, the Bill cannot be saved by the general exceptions permitted under Article XX(b) of the GATT for measures that are necessary to protect human health:
  - 10.6.1 The threshold for the "necessity" test is high – the WTO Appellate Body has recognised that a "necessary" measure is *"located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"* (emphasis added).<sup>43</sup>
  - 10.6.2 The WTO Appellate Body has recognised that an import ban is *"by design as trade-restrictive as can be"* and that *"when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective"* (emphasis added).<sup>44</sup>
  - 10.6.3 To demonstrate that an import ban brings about a material contribution or is indispensable to the achievement of its objective, the Government has to support it by evidence, data, quantitative projections or qualitative reasoning based on a set of hypothesis that are tested and supported by sufficient evidence.<sup>45</sup> The Government has, however, adduced none of these. To the contrary, there is a significant volume of evidence showing that THPs and e-cigarettes emit significantly lower level of toxicants than conventional cigarettes and are potentially less harmful alternative to conventional smokers (see paragraphs 2.5

<sup>43</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000), para. 161; see also Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007), para. 141.

<sup>44</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007), para 150.

<sup>45</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007), para 151.



and 2.8 above). These all point against any suggestion that the Bill brings about any material contribution or is indispensable to the protection of public health.

- 10.6.4 Further, less restrictive alternative measures are available, such as setting appropriate product safety standards and ensuring that robust laws are put in place that prevent the sale of Alternative Smoking Products to minors. The availability of these far less restrictive alternative measures plainly illustrates that it is not necessary to implement a blanket ban on the import of Alternative Smoking Products.
- 10.7 In light of the above, the Government faces considerable difficulties to justify that an import ban of these potentially reduced risk products is necessary to protect public health. The Bill is therefore in breach of the GATT.

#### The Bill is in breach of international bilateral agreements

- 10.8 The Bill is also in breach of the bilateral agreements signed by Hong Kong. For example, the IPPA signed between Hong Kong and the United Kingdom provides that:
- 10.8.1 *"Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment... Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the... use, enjoyment... of investment in its area of the other Contracting Party"* (IPPA Article 2(2)).
- 10.8.2 *"Investors of either Contracting Party shall not be deprived of their investment... except lawfully, for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against compensation."* (IPPA Article 5).
- 10.9 For reasons explained in section 5 above, the Bill is not only unreasonable but also irrational. The unreasonable measure to be introduced by the Bill, which results in effectively a complete deprivation of the investments of foreign investors, such as BAT (which is based in the United Kingdom), is in clear breach of IPPA Article 2(2).
- 10.10 Further, IPPA Article 5 requires any lawful deprivation of foreign investment to be compensated. For reasons similar to paragraph 7.6 above relating to Article 105 of the Basic Law, the Bill would expose the Government to potentially significant liability for compensation to foreign investments in Alternative Smoking Products.

## 11. OTHER POLICY CONSIDERATIONS

- 11.1 Apart from the above legal issues, BATHK wishes to highlight the following policy considerations, all of which militate against the introduction of the Bill:
- 11.1.1 There is ample evidence from many developed government departments or authoritative bodies on the reduced risk potential of Alternative Smoking Products, indicating that these products can be a less harmful option for many conventional cigarette users;<sup>46</sup>
- 11.1.2 The WHO FCTC Conference of the Parties merely recommended in the eighth session that Contracting Parties should consider regulatory measures as

<sup>46</sup> For a detailed discussion of the reduced risk potential of THPs and e-cigarettes, please refer to our previous submission to the Health Panel dated 16 May 2018 (LC Paper No. CB(2)1402/17-18(01) (Revised)).



appropriate to local laws. Hong Kong has one of the lowest rates of smoking around the world.<sup>47</sup> Further, Hong Kong adult consumers are sensible and can and should not be unfairly prevented from making their own decision as to what products to consume. The current proposed extreme measure does not suit Hong Kong local circumstances;

- 11.1.3 There are around 40 countries around the world (mostly developed countries) that have allowed the sales of these Alternative Smoking Products;
- 11.1.4 As stated in paragraph 5.6.4 above, the Government's testing of THPs was tilted towards one company's product, and excluding BAT's THPs. In any event, the Government has not disclosed the testing methodology. It should be noted that the testing methodology for THPs should not be equivalent to those adopted for conventional cigarette;
- 11.1.5 As stated in paragraph 6.11.2 above, the Government has produced no evidence of the alleged gateway and renormalization effects from THPs. Further, many of the surveys or researches conducted by the Government on the Alternative Smoking Products are not published despite repeated requests by various parties. BATHK urges the Government to fully publish all relevant surveys, reports or studies quoted by the Government in the Bill with full transparency to the members of the Bills Committee and members of the public; and
- 11.1.6 BAT never targets its products, whether conventional cigarette or Alternative Smoking Products, to minors. The Children Concern does not justify a blanket ban of these products as it can be sufficiently addressed by restricting sales of the Alternative Smoking Products to minors in Hong Kong.

## 12. CONCLUSION

- 12.1 In view of the above, the Bill is clearly irrational and disproportionate, violates the fundamental human right of privacy and right of private property, disproportionately restricts the free movement of goods, impermissibly threatens Hong Kong's guaranteed status as a free port, is in breach of due process and inconsistent with Hong Kong's international obligations. Before deciding to introduce this Bill, the Government should first conduct a public consultation in relation to these matters.
- 12.2 Rather than banning these new technologies, the Government should develop regulatory solutions for bringing high quality PRRPs including Alternative Smoking Products to market and supporting smokers who want to switch from conventional smoking. Any legitimate concerns about safety and quality, access by young people etc., can be addressed by product regulations of which there is growing experience in other countries, including in Europe, the UK, the US, Canada and New Zealand. A real opportunity exists for the Government to drive change that could benefit the lives of millions of smokers, rather than creating a legacy of further failed tobacco policy and potential harm to consumers and the economy.

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<sup>47</sup> <https://www.info.gov.hk/gia/general/201803/22/P2018032200255.htm>.





- 12.3 BATHK therefore respectfully urges the Government to withdraw the Bill and to work with all stakeholders to establish an evidence-based, appropriate regulatory regime that properly reflects the risk profile of Alternative Smoking Products and respects the constitutionally protected rights and freedom of Hong Kong residents.

Yours faithfully,

*Herbert Smith Freehills*

cc: Professor Sophia CHAN, JP  
Secretary for Food and Health  
Food and Health Bureau,  
18/F, East Wing,  
Central Government Offices,  
2 Tim Mei Avenue, Tamar,  
Hong Kong  
(By email and by hand)

cc: Ms. CHENG Teresa, GBS, SC, JP  
Secretary for Justice  
Department of Justice  
5/F, Main Wing, Justice Place,  
18 Lower Albert Road, Central,  
Hong Kong  
(By email and by hand)