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Date
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By email and by hand

Dear Sirs

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

1. We act for British American Tobacco Company (Hong Kong) Limited ("**BATHK**").
2. We refer to the captioned Bill, which seeks amongst other things to ban the import, manufacture, sale, distribution and advertisement of Alternative Smoking Products (as defined in the Bill). We understand the Bill is to be tabled for a first reading in the Legislative Council on 20 February 2019. We should be grateful if you could kindly pass a copy of this submission for the members' consideration.
3. BATHK strongly opposes the Bill which would effectively ban Alternative Smoking Products in Hong Kong outright. The Bill is neither evidence-based, nor rational – it bans products that are potentially less harmful than traditional cigarettes, including electronic cigarettes ("**e-cigarettes**") and tobacco heating products ("**THPs**"), and ignores the potential harm reduction benefits associated with the use of such products. The Bill is also unconstitutional and contravenes the Basic Law; and is inconsistent with Hong Kong's international trade obligations.
4. British American Tobacco ("**BAT**") has long been working to develop potentially less harmful products that could help reduce the public health impact of smoking. To that end, it has invested in a whole new generation of alternative products, including THPs and e-cigarettes.
5. The Government previously agreed that these products should continue to be available for sale and consumption in Hong Kong. Indeed the Government proposed in June 2018 that they should be regulated in a way similar to traditional 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 that

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a total ban might be inconsistent with Hong Kong's international trade obligations.¹

6. 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 tantamount to a blanket ban on e-cigarettes and THPs in Hong Kong – although the Bill does not directly prohibit use of Alternative Smoking Products and excludes enforcement in private domestic premises, the ban would make it practically impossible for any Hong Kong resident to legally transport, possess or purchase any of these products in(to) Hong Kong, all of which steps would be necessary to enable a Hong Kong resident to use these products, including to use them privately.

Tobacco harm reduction is an essential part of an effective tobacco control policy

7. BATHK submits that the Bill is irrational and disproportionate. Rather than being evidence-based, the Bill is being driven by an irrational and outdated ideology of an '*abstinence-only*' approach to tobacco control that ignores the potential public health benefits that tobacco harm reduction strategies can bring and undermines individual autonomy.
8. 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.² There is also recognition that different tobacco and nicotine products can have vastly different risk profiles, and that potentially reduced-risk products 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)³ Indeed subsequent reports by Royal College of Physicians, as well as other world's leading public health authorities, have echoed this view.⁴

¹ <https://www.legco.gov.hk/yr17-18/english/counmtg/hansard/cm20180712a-translate-e.pdf>

² 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)).

³ 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'.

⁴ For example, (a) Public Health England (2018), '[Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England](#)'; (b) UK National Health Service (2016), '[Stop smoking treatments](#)'; (c) Cancer Research UK (2016), '[E-Cigarettes in Stop Smoking Services](#)'; (d) UK Royal College of Physicians (2016), '[Nicotine without smoke: Tobacco harm reduction](#)'; (e) Committee on Toxicity (2017), '[Statement on the toxicological evaluation of novel heat-not-burn tobacco products](#)'; (f) American Cancer Society (2018), '[American Cancer Society Position Statement on Electronic Cigarettes](#)'; (g) US Food and Drug Administration (2018), '[Statement from FDA Commissioner Scott Gottlieb, M.D., on new enforcement actions and a Youth Tobacco Prevention Plan to stop youth use of, and access to, JUUL and other e-cigarettes](#)'; and (h) New Zealand Ministry of Health (2018), '[Ministry of Health position statement – Vaping products](#)'.



9. A recent letter from a group of 72 independent specialists in nicotine science, policy and practice, calling on the World Health Organisation ("**WHO**") to embrace innovations in technology in the fight against diseases caused by smoking, also stated: "*[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 Development Goal to reduce premature deaths through non-communicable diseases (SDG Target 3.4).*"⁵
10. 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*". The Government in its Legislative Council Brief (FH CR 1/3231/19) omits to mention that 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 e-cigarettes and THPs.⁶ Accordingly, the Government, as a party to which the FCTC applies (through China), is obliged to consider harm reduction strategies as part of a tobacco control strategy and should not filter the information without giving the full picture and transparency to the members of the Legislative Council and the public for evaluation.
11. The Government has failed to assess the impact of the Bill on public health overall or to value appropriately the rights of adult consumers. The Government has not tested BAT's THPs but merely cited results for the products of other companies in its legislative document. According to BAT, its THPs heat at a much lower temperature at around 240°C (as opposed to 350°C of other similar products selectively used by the Government for testing), and the testing results could be very different if proper methodologies are followed. BATHK has not been given the equal opportunity of having BAT's THPs being tested or properly assessed, nor even a chance to have an open dialogue with the Government to explain the science of its products. The Government should not use one company's product testing results as the "objective" base of a blanket prohibition of all different products in the market. In any event, a blanket ban on a product cannot be justified merely by a concern that some risk may be associated with the use of the product. Due regard must be given to the overall balance of the harms and the benefits arising from interventions. In addition, the world's leading health regulators and experts have opted for reasonable regulation on e-cigarettes and THPs, bearing in mind the potential public health

⁵ Abrams et al. (2018), '[Letter from seventy-two specialists in nicotine science, policy and practice](#)'.

⁶ [https://www.who.int/fctc/cop/sessions/cop8/FCTC__COP8\(22\).pdf](https://www.who.int/fctc/cop/sessions/cop8/FCTC__COP8(22).pdf)



benefits of providing smokers with access to such products. Indeed, data from the UK⁷, where there are substantial regulatory freedoms in relation to these products indicate that it has experienced vast reductions in smoking prevalence.

The Bill is unconstitutional and contravenes local and international law

12. The Bill 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 THPs and e-cigarettes, regardless of one's age, the place or the purpose for which they are to be consumed. For example, a person cannot even exercise one's freedom to consume these products (because one has no means to acquire them legally in Hong Kong in the first place when the Bill comes into effect), in private, in order to switch away from smoking conventional cigarettes.
13. The Hong Kong Court⁸ 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 ("ECHR"), which has observed 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" and that "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".⁹
14. The Bill also 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 and investments in its THPs and e-cigarettes. If the Bill is passed, BATHK could not sell, nor could Hong Kong residents purchase, import or use, *glo*¹⁰ or *Neostiks* in Hong Kong,¹¹

⁷ For example: Institute for Economic Affairs (2017), '[Vaping Solutions: An easy Brexit win](#)'; West R et al. (2016), '[Estimating the population impact of e-cigarettes on smoking cessation in England](#)'; Beard E et al. (2016), '[Association between electronic cigarette use and changes in quit attempts, success of quit attempts, use of smoking cessation pharmacotherapy, and use of stop smoking services in England: time series analysis of population trends](#)'.

⁸ *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804.

⁹ *Pretty v United Kingdom* [2002] 2 FLR 45 at [62]. The UK Supreme Court (whose decisions are highly persuasive in Hong Kong) has also held in *McCann v State Hospitals Board for Scotland* [2017] 1 WLR 1455 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. 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 traditional cigarettes.

¹⁰ *glo* is BAT's battery-powered THP product. It heats specifically-designed tobacco sticks called *Neostiks*.

¹¹ Although BATHK has not yet completed its launch of *glo* and *Neostiks*, 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 (*La SociÉTÉ Anonyme Des Anciens Établissements Panhard Et Levassor v Panhard Levassor Motor Company, Limited* [1901] 2



and all of BAT and BATHK's goodwill and investments in *glo* and *Neostiks* will become 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 of BAT and BATHK's property rights constitutionally protected under Articles 6 and 105 of the Basic Law and such deprivation is not necessary to achieve any legitimate aim of the Bill. Any objective to prevent youth from accessing these products could be achieved by, for example, restricting sales of these products to minors. The Bill also exposes the Government to significant risks of claims and liabilities for compensation.

15. The Government has not properly consulted all stakeholders. It is inappropriate to treat submissions received for the previous regulatory proposal to regulate Alternative Smoking Products (which is an entirely different framework to the newly proposed blanket ban) as public consultation for the current Bill. This practice is in breach of the principles of procedural justice by not giving relevant stakeholders (such as trade participants, retailers and consumers) a fair opportunity to express their views on the Bill, particularly when the Bill has the effect of depriving certain stakeholders of their fundamental human rights as well as fundamental property rights.
16. The Bill also 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 in the Bill. The European Court of Justice ("ECJ") found in *Rosengren and Others v Riksaklagaren*¹² that a ban imposed by the Swedish Government on the importation of alcoholic drink by private individuals into Sweden engaged Article 34 of the Treaty on the Functioning of the European Union (the European counterpart to Articles 114 and 115 of the Basic Law). The ECJ also found that the Swedish Government could not show that the complete ban on import of alcoholic drink by private individuals was necessary 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. Similar considerations apply to the Bill. It is plainly not necessary to impose a blanket ban on these products – any objective of the Bill can be achieved by less extensive restrictions, including an age restriction on purchasing products as applies to conventional cigarettes.
17. Furthermore, the Bill is inconsistent with Hong Kong's international trade obligations (again a concern apparently shared by the Chief Executive)¹³. The absolute ban on the importation of e-cigarettes and THPs as proposed by the Bill is in violation of Article XI of the General Agreement on Tariffs and Trade ("GATT") of the World Trade Organisation.¹⁴

Ch. 513). The goodwill attached to *glo* and *Neostiks* is therefore constitutionally protected in Hong Kong. The trademarks of *glo* and *Neostiks* are also registered under Trade Mark Ordinance (Cap. 559), and hence, legally protected as personal property in Hong Kong.

¹² (Case C-170/04) [2007] ECR I-4071.

¹³ In her explanation to the members of the Legislative Council on 12 July 2018 the Chief Executive stated 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.*"

¹⁴ Article XI of the GATT of the WTO, of which Hong Kong is a member, provides that:



The blanket ban will also prohibit legitimate importations of these products for export purpose,¹⁵ despite this kind of transshipments will not impact the domestic market or the consumers in Hong Kong.

18. The Bill also amounts to a complete deprivation of the investments of foreign investors, such as BAT, in breach of bilateral agreements signed by Hong Kong, including, *inter alia*, the Investment Promotion and Protection Agreement ("IPPA") signed between Hong Kong and the United Kingdom.¹⁶ BATHK has invested substantial resources in Hong Kong based on the Government's previous proposal to regulate (instead of ban) Alternative Smoking Products, including brand designs, personnel recruitment, logistic planning and other administrative work. Various BAT entities have also invested in Hong Kong including on research and development, vendor sourcing, trademark and patent registrations, etc. The Government's inconsistent policy moves have caused BAT substantial damage to the investments made in Hong Kong.
19. Rather than banning these new technologies, the Government should develop appropriate regulatory pathways for bringing high quality potentially reduced-risk products to market and supporting smokers who want to switch. Any legitimate concerns about safety and quality and youth access can be addressed by appropriate product regulations of which there is growing international experience, including from the European Union, the US, Canada, the UK 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 by taking the "all or nothing" (or "zero sum game") extreme approach.
20. BATHK therefore respectfully urges the Government to withdraw this Bill. Before deciding to introduce this Bill and/or any other severe regulatory measures, it should first conduct a public consultation in relation to these matters. In this respect, BATHK is committed to working together with the Legislative Council and the Government to establish a more appropriate regulatory regime that properly reflects the risk profile of e-cigarettes and THPs and respects the constitutionally protected rights and freedoms of Hong Kong residents.

Yours faithfully,

Herbert Smith Freehills

"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."

¹⁵ The Bill prohibits import of Alternative Smoking Products to be stored temporarily in Hong Kong (outside an aircraft, a specified cargo transshipment area or vessel) solely for the purpose of export.

¹⁶ The IPPA signed between Hong Kong and the United Kingdom provides that:
"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)).
"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).



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Date
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Letter to
The Honourable Members of the Legislative
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