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Department of Health and Social Care
FAO: Sir Chris Wormald KCB (Permanent Secretary for the Department of Health)
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Our ref
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Date
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By email

Dear Sir

RE: Consultation on Creating a smokefree generation and tackling youth vaping

1. We act for British American Tobacco UK Limited and Nicoventures Trading Limited.
2. We refer to the consultation paper "Creating a smokefree generation and tackling youth vaping", which was published on 12 October 2023 (the "**Consultation**"), which proposes a number of measures aimed at tackling smoking and youth vaping. Our clients recognise the concerns which have been raised by the Government in relation to the apparent rise in youth vaping and the health risks associated with the smoking of tobacco. Our clients are committed to continuing to work with you to address these matters.
3. However, as you note in the Consultation, the proposals run the risk of material adverse consequences meaning that particular care needs to be taken to balance the various considerations at play. In addition, as you will appreciate, both individually and cumulatively the proposals would, if implemented, materially impact the rights of our clients and others. For this reason, our clients are particularly concerned that the Consultation is not being conducted in a procedurally fair manner.
4. At the heart of our clients' concerns is that the consultation is being conducted without adequate information concerning the evidential basis for the proposals or adequate opportunity for our clients to engage with the evidence base for the proposals.
5. The first proposal relates to the creation of a "smokefree generation" by making it an offence for anyone born after 1 January 2009 to be sold tobacco products. The evidential basis for this proposal is identified in the Department of Health and Social Care's ("**DHSC**") command paper 949-I published on 4 October 2023 "Stopping the start: our new plan to create a smokefree generation". This identifies the following evidence in support of the policy:

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- a. Evidence that when the age of sale was raised to 18 in England, it purportedly led to around a 30% reduction in sales. Similar evidence relating to the increase in age of sale in the US is also cited.
 - b. Modelling done in New Zealand that predicts a law relating to a narrower band of products introduced in New Zealand could reduce their smoking rates by half within 10 to 15 years.
 - c. Modelling by the DHSC which forecasts the measure would further reduce smoking rates in England among 14 to 30 year olds by half current rates and close to 0% by 2040.
6. The modelling referred to in paragraphs 5.b and 5.c above is clearly of critical importance to the policy intention. Some information about the DHSC's modelling has been provided in Annex 1 of the command paper. However, the information that is provided is insufficient to enable the modelling to be properly understood or verified. The Annex contains only 4 pages of content, with imprecise descriptions of the specific data sources used, no description of how those data sources were combined, and brief and incomplete descriptions of the assumptions and calculations applied to those data.
 7. For example, the assumptions used by the New Zealand Government for its implementation of a smokefree generation underpin both Scenario 4 and Scenario 3 modelled by DHSC – the two scenarios reflecting (by far) the greatest impact of the proposed measure. However, the New Zealand modelling that reflects Scenario 4, including the basis for the assumptions used by the New Zealand Government, has not been disclosed. It is therefore not possible to evaluate or respond to the Scenario 3 or 4 projections.
 8. Complete disclosure of the model would be required for consultees to fully understand the DHSC modelling, including disclosure of all the underlying data sets used, with a precise and complete description of all of the steps performed with that data (including all assumptions and calculations made) to produce the final outputs shown in Figure 9 in the command paper.
 9. In addition, the modelling provided by the Government in relation to the proposed generation ban is stated as only being preliminary and subject to further refinement. Indeed, the modelling done by the Government appears to amount to no more than plotting four different percentages as hypothetical reductions in smoking amongst persons born from 2009: 10%, 30%, 60% and 90%.
 10. In relation to the proposal to restrict the supply of disposable vaping products, the Consultation refers to research commissioned by Material Focus. Whilst a hyperlink is given to a press release from Material Focus the research itself is not provided and is therefore not capable of scrutiny or being verified. We assume that the Government has not simply relied upon this press release and that it has considered the underlying material. It is important that consultees are also able to do so.
 11. Given these issues, and the absence of any full impact assessment, consultees have not been provided with sufficient information regarding the impacts and costs and benefits of the proposals to permit intelligent consideration and response.
 12. While the Consultation states that impact assessments will be published following the Government's consideration of the Consultation responses and a further review of the international evidence base, it is unclear whether stakeholders will be given the opportunity to comment on these impact assessments. If not, this would clearly go against better



regulation principles and procedural fairness, and the Government's Consultation Principles which require that consultations give enough information to ensure that those consulted understand the issues and can give informed responses, and that they include validated impact assessments of the costs and benefits of the options being considered when possible¹ (and no reason has been given as to why this is not possible in this case). If stakeholders are not to be provided with an opportunity to comment on the impact assessments before any decisions are taken on the proposals, then we believe that the current Consultation, which is based on inadequate and incomplete information, would be an inadequate and inappropriate basis to move forward with any of the proposals.

13. Allied to our clients' concern regarding the incomplete and inadequate nature of the Consultation, is that the Consultation and the associated Command Paper indicate that the Government has already decided how it will proceed in relation to some or all of the proposals. They state for instance that "[t]he UK Government, Scotland and Wales will bring forward legislation making it an offence to sell tobacco products to anyone born on or after 1 January 2009." The consultation therefore is asking consultees to provide views on a decision that has already been taken and not on a policy in its formative stage.
14. Our clients are also concerned by the following deficiencies in the Consultation:
 - a. Consultees are not provided with sufficient (or, indeed, any) information as to possible alternative options for many of the proposals in the Consultation and/or why these alternatives have been rejected. Similarly, the multiple-choice format and framing of the questions requires consultees to accept their premise. Taken together these issues preclude consultees from providing an adequate response and strongly suggest that the government has a "closed mind".
 - b. The 300-word limit for the free-text responses, and the inability to upload attachments containing detailed evidence. This is insufficient to allow consultees to respond adequately or intelligently to the Consultation or to propose substantiated, evidence-based alternatives.
 - c. The time period allotted for the Consultation (of less than 8 weeks) is insufficient and unreasonable. In order for consultees to provide considered and full responses on a plethora of different and relevant issues, including a future total ban on the sales of cigarettes which the Government is consulting on for the first time, we would expect a response period of 12 weeks. There is no good reason for the Consultation to be rushed; to the contrary, there is an overriding public interest in consultees being provided with a proper period in which to respond.
15. We note that in 2016 the Government argued, and the High Court accepted, that evidence submitted in response to consultations should seek to comply with standards of international best practice of scientific methodology (*R (on the application of BAT (UK) Ltd & Ors) v Secretary of State for Health [2016] EWHC 1169*). The numerous issues raised above mean that it is not practicable for consultees to do so in relation to all the issues being considered and the consultation is therefore proceeding on a basis that is not in line with the Government's Consultation Principles and unfair.
16. In the circumstances we therefore ask that you also take the following steps as a matter of urgency:

¹ Cabinet Office, [Consultation principles: guidance](#).



- a. Publish or provide the modelling by the DHSC which forecasts smoking prevalence in all smokefree generation scenarios, including disclosure of all the underlying data sets used, with a precise and complete description of all of the steps performed with that data (including all assumptions and calculations made) to produce the final outputs shown in Figure 9 in the command paper.
 - b. Publish or provide copies of the New Zealand modelling relied upon.
 - c. Publish or provide copies of the research by Material Focus relied upon.
 - d. Confirm that once the impact assessments on the proposals have been completed, a further consultation will be conducted to allow stakeholders to provide their comments/critiques substantiated by expert reports on the impact assessments before any decisions are taken on the proposals.
 - e. Confirm that the Government would be willing to consider alternative options to those proposed in the Consultation, that it has not decided upon the policy options proposed, and appropriately inform stakeholders and invite representations on such options. Insofar as the Government has already considered and rejected alternative options, we ask that the Consultation is amended to refer expressly to those options and the basis for their rejection.
 - f. Amend the Consultation to remove the word limits for the free-text responses and allow documents to be uploaded as attachments. These changes should be drawn to the attention of consultees (e.g., by expressly stating these changes in the preface to the Consultation).
 - g. Amend the multiple-choice options for responding to the questions to ensure that there is always an option to indicate that the consultee disagrees with the premise of the question or all of the options provided.
 - h. Extend the time period for responding to the Consultation to 12 weeks from the taking of the steps referred to above.
17. We request a response to this letter by next Wednesday 8 November 2023. Please let us know as soon as possible if you are unable to fully respond by this date, so that we might agree on another date.
18. All our clients' rights in respect of the above are expressly reserved.

Yours faithfully

Herbert Smith Freehills LLP