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4 April 2024

By recorded delivery

Secretary of State for Health and Social Care / Global and Public Health Group
Department of Health and Social Care
39 Victoria Street
London
SW1H 0EU

The Treasury Solicitor
102 Petty France
Westminster
London SW1H 9GL

Copy by email to:

[REDACTED]

thetreasurysolicitor@governmentlegal.gov.uk.

Dear Sir/Madam

Proposed claim for judicial review

1. Introduction

This is a letter before claim pursuant to the Pre-Action Protocol for Judicial Review in respect of a proposed claim for judicial review against the Secretary of State for Health and Social Care (the **Secretary of State**), whose address is Department of Health and Social Care, 39 Victoria Street, London, SW1H 0EU.

2. The Proposed Claimants

2.1 The proposed claimants are:

- (a) Imperial Brands PLC;
- (b) Imperial Tobacco Limited; and
- (c) Fontem Ventures B.V..

(together the **Proposed Claimants**).

2.2 The address for Imperial Brands PLC and Imperial Tobacco Limited is 121 Winterstoke Road, Bristol, BS3 2LL. The address for Fontem Ventures B.V. is Radarweg 60, 1043 NT Amsterdam.

Proposed claim for judicial review:

2.3 The Proposed Claimants are all engaged in the business of supplying (i) re-usable and single-use vape, and/or (ii) tobacco, products.

3. **The Proposed Defendant's reference details**

The Proposed Claimants received a letter from the Secretary of State dated 27 March 2024 in relation to the matter that is the subject of the proposed claim. This does not contain reference details. A copy is enclosed for ease of reference.

4. **Details of the Proposed Claimants' legal advisers**

4.1 The Proposed Claimants are represented by Ashurst LLP whose address, including for service, is London Fruit & Wool Exchange, 1 Duval Square, London E1 6PW.

4.2 Please address future correspondence for the attention of [REDACTED] and [REDACTED] ([REDACTED] / [REDACTED]). Our reference is [REDACTED]

5. **Interested parties**

British American Tobacco, Gallaher Limited (trading as Japan Tobacco International UK) and Philip Morris International are interested parties. We confirm that they have been sent a copy of this letter.

6. **The decision under challenge**

6.1 The Secretary of State conducted a consultation on, among other things:

- (a) the introduction of a ban on single-use vapes, and
- (b) the regulation of re-usable vapes.

6.2 Recent correspondence discloses that:

- (a) in conducting the consultation the Secretary of State made a decision not to consider or take any account of the consultation responses of respondents with disclosed links to the tobacco industry (the **Refusal to Consider Decision**), and
- (b) the Secretary of State considers that this approach, namely refusing to consider or take any account of consultation responses of respondents with disclosed links to the tobacco industry, is one that she is required or entitled to apply to public consultation processes relating to the regulation of vape and/or tobacco products.

6.3 The Proposed Claimants contend that the Refusal to Consider Decision (and the approach which it encapsulates) was, and is, unlawful.

Proposed claim for judicial review:

7. Legal and factual background

The Consultation

7.1 On 12 October 2023, the Secretary of State published a UK-wide consultation paper in respect of a range of proposed measures relating to vape and tobacco products, "*Creating a smokefree generation and tackling youth vaping: your views*" (the **Consultation**). The Consultation stated:

"The UK Government and devolved administrations would like to understand the impacts on businesses and on people, and if there are any impacts on groups with protected characteristics (see Discrimination: your rights). We want to hear from:

- the public - from young people, parents, carers and teachers
- the retail sector and the independent vaping industry
- local authorities across the UK
- clinicians and medical professionals
- public health stakeholders and academic experts
- employers and trade unions

The UK Government and devolved administrations would like to receive as much detail as possible under each of the themes of the consultation. For each multiple choice question, you will be able to provide additional information and evidence to support your answer through free text boxes.

The UK Government and devolved administrations will only make any decisions on these proposed measures after fully considering:

- **the consultation responses we receive**
- **the evidence provided in those responses**
- *a further review of the international evidence base"*

(emphasis added)

Correspondence between ITL and the Secretary of State

7.2 On 1 December 2023, Imperial Tobacco Limited (**ITL**) wrote to the Secretary of State raising a number of concerns regarding the Consultation, including, relevantly, that companies producing the products that the Consultation proposed to ban or regulate did not appear to be included in those invited to respond. ITL requested "a

Proposed claim for judicial review:

commitment to review the Imperial full submission to the consultation which will be submitted...to the [Secretary of State]".

7.3 On 6 December 2023, the Proposed Claimants submitted a response to the Consultation. The Proposed Claimants' response was detailed and constructive. It engaged with the proposed measures and analysed the different proposals the Secretary of State had presented.

7.4 On 15 December 2023, ITL received a response to its letter of 1 December 2023 from Dame Andrea Leadsom DBE on behalf of the Secretary of State (the **Ministerial Letter**). This stated:

"All were welcome to respond to the consultation and the UK Government and devolved administrations wanted to understand the impact on businesses and on people. The list provided in the consultation was not exhaustive. No organisations or individuals were blocked from responding to the consultation. We note that Imperial Brands Limited [sic] submitted a response to the consultation" (emphasis added)

7.5 The statements in the Ministerial Letter highlighted above represented, and were reasonably understood to represent, that the Proposed Claimants' consultation response, and the responses of other respondents with disclosed links to the tobacco industry, would be properly and fairly considered by the Secretary of State.

The Consultation Response

7.6 On 29 January 2024, the Secretary of State published her response to the consultation "*Creating a smokefree generation and tackling youth vaping*" (the **Consultation Response**).

7.7 Materially, the Consultation Response stated:

"The UK is a party to the World Health Organization (WHO) Framework Convention on Tobacco Control ... and so has an obligation to protect the development of public health policy from the vested interests of the tobacco industry.

To meet this obligation, there was a mandatory question where we asked all respondents to disclose links to the tobacco industry. We analysed these alongside other responses using the methodology above.

In total, we received 307 responses from respondents who disclosed links to the tobacco industry. We analysed these alongside other responses using the methodology above.

In line with the requirements of article 5.3 of the FCTC, throughout this consultation response we summarise the views of respondents with

Proposed claim for judicial review:

*disclosed links to the tobacco industry. But **we have not considered these views when determining our policy response** due to the vested interests of the tobacco industry [the **Refusal to Consider Decision**]*

We did not ask directly if respondents were affiliated with the vaping industry. However, we have received a number of responses from the vaping industry, including vape retailers."

(emphasis added)

7.8 The Consultation Response was updated on 12 February 2024.

7.9 The Refusal to Consider Decision was, amongst other things, contrary to:

- (a) the terms of the Consultation highlighted at paragraph 7.1 above;
- (b) the terms of the Ministerial Letter highlighted at paragraphs 7.4 and 7.5 above, and
- (c) the Secretary of State's own Engagement Guidance (as defined below).

The ITL and BAT Letter

7.10 On 29 February 2024, ITL and British American Tobacco UK Limited (**BAT**) wrote to the Secretary of State raising their serious concerns in relation to the lawfulness of the Refusal to Consider Decision (the **ITL/BAT Letter**).

7.11 The letter requested that the Secretary of State confirm that the responses to the Consultation submitted by entities with disclosed links to the tobacco industry would be fully and carefully considered, and that the Secretary of State would withdraw and reconsider its Consultation Response.

The Draft Regulations

7.12 On 11 March 2024, the Environmental Protection (Single-use Vapes) (England) Regulations 2024 draft Statutory Instrument (the **Draft SI**) was published. The stated purpose of the Draft SI was to prohibit the supply, or offer for supply, of single-use vapes.

The Secretary of State's response to the ITL/BAT Letter

7.13 On 27 March 2024, the Secretary of State replied to the ITL/BAT Letter. Relevantly, the Secretary of State denied that the Refusal to Consider Decision was unlawful for the following reasons:

"As a party to the World Health Organisation Framework Convention on Tobacco Control (FCTC), the Government is committed to upholding its obligations, in particular those under Article 5.3. Article 5.3 of the FCTC

Proposed claim for judicial review:

requires that "in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."

The WHO Guidelines for Implementation of Article 5.3 FCTC also state that: "Parties are strongly urged to implement measures beyond those recommended in these guidelines when adapting them to their specific circumstances". In line with national law, the Government can therefore take further action to protect public health policy from the vested interests of the tobacco industry."

The Department of Health and Social Care has published guidance for engagement with the tobacco industry to support adherence to Article 5.3 across the UK Government. It is available here: www.gov.uk/government/publications/protocol-for-engagement-with-stakeholders-with-links-to-the-tobacco-industry/guidance-for-government-engagement-with-the-tobacco-industry. This guidance applies across the tobacco industry, including to vape organisations with links to the tobacco industry.

The consultation was undertaken by the Department of Health and Social Care on an entirely voluntary basis, and is not a mandated element of the legislative process.

This consultation response has been published and process is complete. The Government will not reopen the consultation nor withdraw the consultation response."

The Secretary of State's Guidance on Tobacco Industry Engagement

- 7.14 The Secretary of State's reply referred to her 'Guidance for government engagement with the tobacco industry' (the **Engagement Guidance**),¹. The Engagement Guidance states that it sets out how the Government "*limits interactions with the tobacco industry, in line with the requirements of [article 5.3 FCTC]*". So far as relevant, the content of the Engagement Guidance is addressed below.
- 7.15 Materially, the Engagement Guidance recommends the opposite approach to the unlawful conduct of the Secretary of State in the present case:
- (a) The Engagement Guidance states, under the heading "*Consultations*": "*When undertaking a consultation on tobacco policy, respondents should be*

¹ <https://www.gov.uk/government/publications/protocol-for-engagement-with-stakeholders-with-links-to-the-tobacco-industry/guidance-for-government-engagement-with-the-tobacco-industry>

Proposed claim for judicial review:

asked to declare any direct or indirect links to, or funding received from, the tobacco industry."

- (b) The Engagement Guidance then proceeds to give example scenarios and recommended actions grouped into three categories: (1) do not engage; (2) contact the DHSC Tobacco Control Team before engaging; and (3) engage following the guidelines set out in this document. The need for the latter categories is recognised on the basis that in some circumstances, *"interactions with the tobacco industry will be required to effectively regulate the tobacco industry and tobacco products"*.
- (c) Under the third heading, *"engage following the guidelines set out in this document"*, the Engagement Guidance gives the following example: *"[a]s part of a consultation on regulatory changes, responses are received from the tobacco industry."* The *"[a]ction to take"* in that scenario is: *"as part of the process for submitting their responses, respondents will have already been asked to declare links to or funding received from the tobacco industry."*

- 7.16 The Secretary of State's formal, published, policy position is, thus, that the Government should *"engage"* with the tobacco industry when consulting on regulatory changes and that requiring appropriate declarations is the appropriate action to take in this context.

The Secretary of State's previous practice on consultation relating to regulation of tobacco products

- 7.17 The Engagement Guidance reflects, and is consistent with, the Secretary of State's previous practice in respect of consultation relating to the regulation of tobacco products. For example, the consultation that was conducted relating to the introduction of regulations providing for the standardised packaging of tobacco products² stated:

"As a party to the World Health Organization's Framework Convention on Tobacco Control (FCTC), the United Kingdom has an obligation to protect the development of public health policy from the vested interests of the tobacco industry. To meet this obligation, we ask all respondents to disclose whether they have any direct or indirect links to, or receive funding from, the tobacco industry. We will still carefully consider all consultation responses from the tobacco industry and from those with links to the tobacco industry and include them in the published summary of consultation responses."
(emphasis added)

² A copy of the consultation is available at https://assets.publishing.service.gov.uk/media/5a755f85e5274a467f7e4021/Cons_doc.pdf

Proposed claim for judicial review:

8. Grounds of Challenge

8.1 The Refusal to Consider Decision was, and is, unlawful on the grounds that it was contrary to basic common law requirements of fair consultation and/or procedural fairness and/or the Claimants' procedural legitimate expectation.

The basic requirements of lawful consultation

8.2 A consultation must comply with the four requirements stated in ***R v Brent London Borough Council, ex p Gunning*** (1985) 84 LGR 168 at 189 (the **Gunning Requirements**), endorsed by the Supreme Court in ***R (Moseley) v Haringey London Borough Council*** [2014] UKSC 56 at [25], [44]:

"First, that consultation must be at a time when proposals are still at a formative stage.

Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.

Third [...] that adequate time must be given for consideration and response and,

finally, fourth, that the product of consultation must be conscientiously taken into account in finalising...proposals." (emphasis added)

8.3 The Refusal to Consider Decision (and the approach it encapsulates) was, and is, a plain and grave breach of the *fourth* Gunning Requirement, i.e. to the duty to conscientiously consider the consultation responses. It was also a breach of basic procedural fairness and the Secretary of State's own representations (and the procedural legitimate expectation which those representations founded).

8.4 The Secretary of State's unlawful conduct is particularly serious, and unfortunate, having regard to:

- (a) the significance of the Consultation and the matters being consulted upon for the Claimants' businesses, legal rights and employees: ***R v Secretary of State for Health, Ex parte United States Tobacco International Inc*** [1992] 2 QB 353;
- (b) the clear representation in the Consultation that decisions would only be made by the Secretary of State following full consideration of the consultation responses and evidence (see paragraph 7.1 above);
- (c) the clear representation in the Ministerial Letter that the Claimants' consultation response would be properly and fairly taken into account (see paragraphs 7.4 and 7.5 above);

Proposed claim for judicial review:

- (d) the terms of the Secretary of State's own Engagement Guidance (see paragraphs 7.14 to 7.16 above);
- (e) the historic practice of the Secretary of State relating to consultation in respect of the regulations of tobacco products (see paragraph 7.17 above);
- (f) the statement in the Secretary of State's letter of 27 March 2024 that the Refusal to Consider Decision: "*applies across the tobacco industry, including to vape organisations with links to the tobacco industry*". This statement indicates that the Secretary of State has treated, and will treat, consultation responses from vape organisations with links to the tobacco industry differently from other vape organisations without links to the tobacco industry. This risks creating an inequity between the evidence supplied by vape (only) companies and those with links to the tobacco industry which is unfair and illogical; and
- (g) the essential purposes of lawful consultation and the basic common law requirements in this field, including a requirement of fairness.

8.5 The common law imposes a requirement of fairness in consultation for good reasons:

- (a) it is "*liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested*";
- (b) it avoids the "*the sense of injustice which the person who is the subject of the decision will otherwise feel*"; and
- (c) it reflects "*the democratic principle at the heart of our society*"

(see **R (Moseley) v Haringey London Borough Council** [2014] UKSC 56 at [24] per Lord Wilson JSC);

8.6 The Refusal to Consider Decision (and the approach it encapsulates) was, and is, fundamentally contrary to these purposes of lawful consultation:

- (a) the Secretary of State cannot ensure that her decision is "*tested*" in light of "*all relevant information*" without considering the responses of those businesses most likely to have information relevant to the exercise of her power to make regulations: indeed, the Consultation document itself stated that part of the purpose of the exercise was to understand the *impact on businesses*;
- (b) nor can she avoid the perception of injustice by those whom she has chosen to ignore; and

Proposed claim for judicial review:

- (c) nor is her Decision consistent with "*the democratic principle at the heart of our society*". It is the antithesis of that principle to shut out from democratic debate the proponents of one side of an argument, rather than to engage in that argument with them (together, of course, with all the scrutiny of their position, and their commercial interests, that this entails).

The Secretary of State's responses provide no answer

- 8.7 The Secretary of State's letter of 27 March 2024 advanced three suggested answers, seeking to defend the lawfulness of the Refusal to Consider Decision (and the approach it encapsulates). However, none of these provides any satisfactory answer at all.
- 8.8 First, it was suggested that there was no requirement to conduct the Consultation lawfully or fairly because the Secretary of State chose to consult on a voluntary basis. This is a bad point. If consultation is conducted it must be carried out fairly and lawfully: ***R (Eveleigh) v Secretary of State for Work and Pensions*** [2023] EWCA Civ 810, [2023] 1 WLR 3599 at [92], [98]. Further, and in any event, for the reasons summarised at paragraphs 7.1, 7.4-7.5, 7.14-7.16, 7.17 and 8.3-8.4 above, the Claimant had a procedural legitimate expectation that its response to the Consultation would be properly and fairly considered by the Secretary of State.
- 8.9 Second, it was suggested that the Secretary of State's unlawful conduct was justified or excused by the Engagement Guidance. This is a further bad point. The terms of the Engagement Guidance are actually a further point *against* the Secretary of State: see paragraph 7.14-7.16 above.
- 8.10 Third, there is a suggestion the Secretary of State's unlawful conduct is justified or excused by article 5.3 of the Framework Convention on Tobacco Control (**FCTC**). This is misconceived. The FCTC is an unincorporated public international law treaty. It forms no part of English domestic law. It does not, and could not, disapply common law duties of fair consultation and/or procedural fairness. Only express words enacted in primary legislation could have such an effect. Indeed, article 5.3 of the FCTC states in terms that it is subject to the domestic law of signatory States. In any event, the Secretary of State (correctly) does not even attempt to suggest that article 5.3 *requires* the Refusal to Consider Decision (or the approach it encapsulates). It evidently does not: see, amongst other things, the terms of the Secretary of State's own Engagement Guidance (paragraphs 7.14-7.16 above).
9. **Action that the Secretary of State is expected to take**
- 9.1 Please confirm that:
- (a) the Secretary of State will consent to an Order declaring that the Refusal to Consider Decision (and the approach it encapsulates) was, and is, unlawful;

Proposed claim for judicial review:

- (b) the Secretary of State will take no future action to introduce or promote secondary legislation on the basis of the Consultation Response, pending proper, lawful consideration of the Proposed Claimants' response to the Consultation (for the avoidance of doubt, this confirmation is *not* sought in respect of the Draft SI);
- (c) the Secretary of State accepts that the Engagement Guidance does not provide that Government Departments must or should refuse to consider consultation responses submitted by entities with links to the tobacco industry when conducting public consultations concerning the regulation of vape and/or tobacco products; and
- (d) the Secretary of State will not repeat or apply the Refusal to Consider Decision (or the approach it encapsulates) in respect of any future consultation activity undertaken in relation to the regulation of vape and/or tobacco products.

9.2 There is no precedent or justification for the Refusal to Consider Decision which is plainly unlawful. Accordingly, and, absent such confirmation being provided by the Secretary of State, the Proposed Claimants would be entitled to a declaration that the Refusal to Consider Decision (and the approach it encapsulates) was, and is, unlawful. Our clients also reserve the right to seek further and additional relief in relation to any related decisions and/or actions by the Secretary of State.

10. Documents and information requested

10.1 You will be aware of the "Treasury Solicitor's Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings", which states:

"The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol".

10.2 We acknowledge that requests for documents at the pre-action stage "*should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues*" (See Pre-action Protocol for Judicial Review, paragraph 13). Our requests below are tailored for that purpose and should not be read as exhausting the Secretary of State's obligations of disclosure at the permission stage.

10.3 In accordance with the Secretary of State's duty of candour, we request that you provide:

- (a) any Ministerial Submissions in relation to:

Proposed claim for judicial review:

- (i) the Refusal to Consider Decision;
 - (ii) the decision to open the Consultation;
 - (iii) the decision to send the Ministerial Letter;
 - (iv) the decision to publish the Consultation Response; and
 - (v) the decision to send the letter of 27 March 2024;
- (b) any documents evidencing the relevant ministers' decisions in relation to the above, or their reasons, including in particular any 'read-out' email(s) sent by the relevant minister's private office; and
- (c) any documents evidencing consideration, by ministers or officials, of what account should be taken of Consultation responses from companies with disclosed links to the tobacco industry.

11. **ADR**

The Proposed Claimants confirm that they are willing to engage with the Secretary of State in alternative dispute resolution.

12. **Proposed reply date**

In accordance with the Pre-action Protocol for Judicial Review, please reply to this letter within 14 days, that is, no later than 18 April 2024.

Yours faithfully,

ASHURST LLP

Enc.