

**For information on
9 January 2003**

**Paper for Bills Committee on the
Dutiable Commodities (Amendment) Bill 2002
Matters arising from the Bills Committee meeting
on 3 January 2003**

PURPOSE

This paper provides the Administration's response to the questions raised by Members at the meeting of the Bills Committee on the Dutiable Commodities (Amendment) Bill held on 3 January 2003.

(I) PAPER ON NEW CONTROL MEASURES UNDER OBS

2. As the Administration undertook at the last Bills Committee meeting, the Customs and Excise Department circulated a paper setting out clearly the new control measures under OBS to all existing warehouse licensees on 7 January.

(II) DRAFTING OF THE NEW SECTION 8A

Background to section 8A

3. At the last Bills Committee meeting, some Members commented that the proposed section 8A, in particular the clause of "any other relevant matter" in the section, might give the Commissioner of Customs and Excise (CCE) too wide a discretion in determining the grant and revocation of OBS licences.

4. As explained in paragraphs 6 - 8 of the Administration's letter to the Assistant Legal Advisor of LegCo on 28 February 2002, the purpose of having section 8A is to provide clarity by stating the factors which the

CCE would normally take into account in considering an application. It is possible that factors other than those set out in the proposed section 8A(1)(a)-(d), which may be relevant to the consideration of an application, would come to light and a provision to cater for these is necessary. That is why we have provided for “any other relevant matter” in the proposed section 8A(1)(e).

“Any other relevant matter”

5. “Any other relevant matter” refers to matters which are relevant to the CCE’s consideration of an application for grant or renewal of licence under section 8A(1). Under section 7(1)(a), CCE has an absolute discretion to grant and issue licences or permits. However, there is no unfettered discretion in public law. The term “absolute discretion” when used in relation to the exercise of public law powers already imports qualifications upon “absolute”. The following passage from *Wade & Forsyth’s Administrative Law 8th Ed. (p.357)* clearly explains this principle -

“The powers of public authorities are therefore essentially different those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish ... This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interests.

There is nothing paradoxical in the imposition of such legal limits ... Nor is it (the principle) confined to the sphere of administration; it operates wherever discretion is given for some public purpose.”

6. Therefore, CCE in exercising his discretionary power under section 7(1)(a) must act reasonably, in good faith and upon lawful and relevant grounds of public interest in accordance with the above principle. He shall only take into account matters which are relevant to the consideration. His discretion is thus subject to limitations imported by the above principle under the administrative law. Any decision of the CCE could be reviewed by the Administration Appeals Board under section 7(2) of the Dutiable Commodities Ordinance and by the Court.

7. Examples of “any other relevant matter” which are relevant to CCE’s consideration of a licence application or renewal and which we can give at this stage include the following, which all relate to the operation of the bonded warehouse. For example, in order that CCE can take enforcement action to protect revenue, he needs to trace the whereabouts of a bonded warehouse. CCE will not grant a licence to premises which have no fixed addresses, e.g. vessels or vehicles. CCE will only grant licence to the applicant provided that he has the proper authority to use the premises for operating a bonded warehouse. CCE must take into consideration circumstances which are specific to the type of bonded warehouse under application which cannot be spelt out exhaustively. For example, CCE will require that a duty-free shop must operate within an entry point or that a general bonded warehouse for receiving goods from/releasing goods to carriers must be adjacent to any entry point before he would grant a licence/renewal.

8. As can be seen from the above examples, it will not be possible to make an exhaustive list of these scenarios and circumstances as they differ for individual cases and change from time to time. As the bonded warehouse trade and the market develop, there will be new relevant matters that come to light. To facilitate traders’ application for issue and renewal of licence and to facilitate CCE’s enforcement effort, we consider it necessary to have a provision capable of covering these.

Similar provisions in existing legislation

9. As explained above, the existing section 7(1)(a) of the Dutiable Commodities Ordinance already provides a discretion for CCE to grant and issue licences subject to the provisions of the Ordinance.

10. The discretionary power of the Administration in granting licences or giving approval is in fact very common in the laws of Hong Kong. Section 41(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that: -

“Where any Ordinance confers power upon any person to issue, grant, give or renew any licence, Government lease, authority,

approval, exemption or permit, the person so empowered shall have a discretion either to issue, grant, give or renew or to refuse to issue, grant, give or renew such licence, Government lease, authority, approval, exemption or permit.”

In general, when Government departments consider application/renewal of licences, they have the flexibility and discretion under section 41(1) of Cap. 1 to consider all relevant matters.

11. There is other legislation which bears provisions having structures similar to that of the proposed section 8A. Examples are section 21 of the Electronic Transactions Ordinance (Cap. 553), section 36AA of the Telecommunications Ordinance (Cap. 106) and section 32 of the Firearms and Ammunition Ordinance (Cap. 238).

Amendment to Section 8A

12. We have reconsidered the drafting of section 8A in the light of Members' expressed concern. We are prepared to withdraw the reference to “any other relevant matter” in sections 8A(3)(e) and 8A(4)(e). We are also prepared to limit the scope of “any other relevant matter” in section 8A(1)(e) by limiting the relevant matter to those relating to the operation of licensed premises, i.e. the bonded warehouses. We trust these proposals would meet the concerns expressed by Members.

**Financial Services and the Treasury Bureau/
Customs and Excise Department
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