



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

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7 March 2013

Ms. Wendy KAN
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Legal Service Division
Legislative Council Secretariat
Legislative Council Complex,
1 Legislative Council Road,
Central,
Hong Kong.

Dear Ms. KAN,

**Re: Import and Export (General)(Amendment) Regulation 2013
(L.N. 25 of 2013) (Amendment Regulation)**

Thank you for your letter of 1 March 2013. Our reply to your enquiries is set out in the ensuing paragraphs.

Chinese Equivalent of Powdered Formula

2. The Assistant Legal Adviser (ALA) asked whether it is more appropriate to render “powdered formula” as “嬰兒配方奶粉” in the Chinese text. The prohibited article in this exercise is described in a defined term, and “powdered formula” is a label to describe the defined substance. We consider that the word “配方粉” is the more appropriate Chinese equivalent of “powdered formula” (Please see paragraph 5 below on milk-like substance). The word “嬰兒” is not necessary since we have described “for consumption by a person aged under 36 months” and

“nutritional requirement of a person aged under 36 months” in the definition.

Definition of “powdered formula”

3. ALA asked for the reasons for including “appears to be” as an element in the definition of “powdered formula”. She further asked how one could determine from appearance that certain milk powder is for a person of any age or whether it satisfies the nutritional requirement of any person.

4. Under section 3 of the Amendment Regulation, a defined term “powdered formula” is added which “means a substance in powder form that (a) is or appears to be for consumption by a person aged under 36 months; and (b) is or appears to be milk or milk-like substance in powder form to satisfy wholly or partly the nutritional requirement of a person aged under 36 months.” We have included “appears to be” as an element in the definition of “powdered formula” to facilitate effective law enforcement as officers of the Customs and Excise Department can judge from the outlook of a can as to whether it falls within the definition of “powdered formula”. It should be noted that cans containing powdered formula will in general be clearly labelled that they are for consumption by a certain age group, for example, 0-6 months, and would state that they satisfy the nutritional requirement of that particular age group.

5. ALA asked the need to extend the definition of “powdered formula” to cover “milk-like substance” with examples. “Milk-like substance” is intended to cover soya-based formula, which is derived from soyabeans and not animal milk. Some parents prefer to feed their infants and young children under 36 months by such powdered formula due to various reasons, such as allergy to milk-based products and milk intolerance following a diarrhoea episode. Hence we need to include “milk-like substance” in the definition of “powdered formula”.

6. ALA further asked the grounds for making “nutritional requirement” as an element in the definition of “powdered formula”. She further asked if other kinds of milk powder for human consumption such as milk powder for the aged are able to satisfy partly the nutritional

requirement of a person aged under 36 months. In addition, she also asked if they are contained in cans of milk powder that are labelled as powdered formula for consumption by a child, whether they would appear to be milk in powder form that satisfied partly the nutritional requirement of a child.

7. Where breastfeeding is not feasible, powdered formula is the only processed foodstuff which wholly fulfils the nutritional requirements of infants during the first months of life until the introduction of complementary feeding¹. For young children above 6 months of age, we understand that some parents may still rely heavily on powdered formula to satisfy the nutritional requirements of their children under the age of 36 months. A key feature of powdered formula is that they will satisfy wholly or partly the nutritional requirements of infants and young children. By including the concept of “nutritional requirement” in the definition of “powdered formula”, it will therefore serve to reflect the policy intent clearly.

8. On whether other kinds of milk powder for human consumption such as milk powder for the aged are able to satisfy partly the nutritional requirement of a person aged under 36 months, we would not preclude such possibility. This would normally be stated clearly in the label of the can containing the powdered formula.

9. ALA further asked that if certain products of milk powder for the aged or pregnant women are contained in cans of milk powder that are labelled as powdered formula for consumption by a child, whether they would appear to be milk in powder form that satisfies partly the nutritional requirement of a child.

10. It should be noted that in determining whether a product of milk powder satisfies the definition of powdered formula in the Amendment Regulation, we take into account both parts (a) and (b) of the definition. (paragraph 4 above refers). In determining whether a certain product falls within the definition of “powdered formula”, officers of the Customs and Excise Department will take into account all relevant factors of the circumstances. For example, the information on the label

¹ Complementary feeding is normally introduced at 6 months of age.

of the can, whether the can is sealed or unsealed as well as the appearance and the state of the powdered substance.

Offence under section 6D(3) of the Import and Export Ordinance (Cap. 60)(IEO)

11. ALA asked whether a person exporting powdered formula (as defined) to a place outside Hong Kong without an export licence will be guilty of an offence under section 6D(3) of IEO unless an exemption applies and hence whether it is an offence of strict liability. Upon proof of the fact that a person exports a prohibited article, he shall be guilty of the offence unless an exemption applies and in this sense, section 6D(3) is a strict liability offence. However, it is not an absolute offence and therefore according to judicial authorities, albeit not directly ruling on section 6D(3) itself, it is open to that person to raise a common law defence, i.e. it is a defence for the accused to prove, on a balance of probabilities, that he honestly held (despite mistaken) upon reasonable grounds that the offence-creating provision has been complied with.

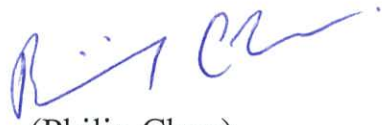
12. ALA further asked that if an elderly person fills empty cans of milk powder that are labelled as powdered formula for consumption by a child with milk powder made for the aged which exceeds 1.8 kg and exports these cans of milk powder to a place outside Hong Kong without an export licence, whether that person would commit the offence under section 6D(3) of IEO. In the scenario posed by ALA, the milk powder in the circumstances is likely to fall within the “appears to be for consumption by a person aged under 36 months” category and the person exporting it without an export licence may have committed an offence under section 6D(3) of IEO.

Exemption for Personal Use

13. ALA asked for the meaning of and reasons for mentioning “same composition” in the provision of the newly added regulation 6(1D) of the IE Regulations. The phrase “whether of the same composition” is to cover powdered formula of different brands or different types which may not be of the same exact composition. The reason for mentioning this is to ensure that when added together, they should not exceed the net weight of 1.8kg (under the new regulation 6(1D)(a)) and a reasonable quantity

(under the new regulation 6(1D)(b)). This will serve to achieve our policy objective.

14. ALA sought our clarification of the meaning of “together” as set out in the newly added regulation 6(1D)(b)(ii) of the IE Regulations. It is considered that the word “together” in the newly added regulation 6(1D)(b)(ii) should not be construed narrowly to mean only “carrying” the child. The court shall make a finding of fact as to who is “travelling together” with whom in light of all the evidence. Regarding the hypothetical case referred to in the penultimate paragraph of your letter, as far as the two persons (X and Y) aged 16 or above are both genuinely accompanying persons travelling with the child in question, both X and Y are considered as leaving Hong Kong together with the child. Whether the child is carried in X’s or Y’s arm is immaterial.



(Philip Chan)

for Secretary for Food and Health