



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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13 March 2013

Miss Betty MA
Clerk to Subcommittee on
Import and Export (General)(Amendment) Regulation 2013
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Hong Kong

Dear Miss MA,

**Subcommittee on
Import and Export (General)(Amendment) Regulation 2013**

Thank you for your letter dated 8 March 2013. Please find in the Annex the supplementary information requested by Members at the meeting on 8 March 2013.

Yours sincerely,

(Jeff LEUNG)
for Secretary for Food and Health

**The Administration's Position on
the Proposed Inclusion of a "Sunset Clause" in
the Import and Export (General)(Amendment) Regulation 2013**

At the first meeting of the Subcommittee to scrutinise the above-mentioned Amendment Regulation, Members suggested including in the Amendment Regulation a date for its repeal (i.e. the so-called "Sunset Clause").

2. We are of the view that since the Amendment Regulation just commenced operation on 1 March, inclusion of a "Sunset Clause" at this stage is premature and will convey a wrong message. The import figures of powdered formula in the past showed a rising demand for powdered formula due to parallel trading activities. If a date is fixed for the repeal of the Amendment Regulation without regard to the actual situation, we will have difficulty ensuring that upon the repeal, there will not be a revival of parallel trading activities causing serious impact on the supply of powdered formula at the retail level.

3. We will continue to closely monitor the situation of the powdered formula market in Hong Kong, and review the relevant measure from time to time to ensure an adequate and stable supply of powdered formula at the local retail level to meet the needs of infants and young children in Hong Kong. Since the supply chain failure in relation to powdered formula has a major bearing on the serious shortage of powdered formula recently, a crucial consideration in our review of the relevant measure is whether suppliers of powdered formula have effectively strengthened their supply chain to cater for the needs of infants and young children in Hong Kong.

4. We will continue to maintain close liaisons with retailers and suppliers and urge them to step up their efforts to improve the supply chain operation, thereby ensuring an adequate and stable supply of

powdered formula for Hong Kong people. We will advise local suppliers of powdered formula to increase the efficiency of their stock replenishment from places outside of Hong Kong, as well as the capacity for product distribution and delivery to ensure an adequate and stable supply of powdered formula at local retail outlets for Hong Kong's infants and young children. Furthermore, we will request suppliers of powdered formula to commit additional resources to increase the number of hotlines for taking purchase orders so as to facilitate local parents in purchasing powdered formula directly via this channel when the need arises.

Food and Health Bureau
March 2013

Import and Export (General)(Amendment) Regulation 2013 and Article 115 of the Basic Law

At the meeting of the Subcommittee on the Import and Export (General)(Amendment) Regulation 2013 (“the 2013 Amendment Regulation”) held on 8 March 2013, Members raised the question whether the 2013 Amendment Regulation is consistent with Article 115 of the Basic Law (“BL 115”). This paper briefs Members on the Administration’s views on the above question.

2013 Amendment Regulation

2. The 2013 Amendment Regulation amends the Import and Export (General) Regulations (Cap. 60 sub. leg. A (“IE Regulations”)) so as to prohibit the export of powdered formula to all places outside Hong Kong, except under an export licence or an exemption.

BL 115

3. BL 115 provides that the Hong Kong Special Administrative Region (“HKSAR”) shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital. It is reasonably arguable that BL 115 states a general policy which by itself does not confer any right on any person. BL 115 is in very broad terms and the Basic Law has no definition for “policy of free trade” and “free movement of goods.” It is suggested that the purpose of BL 115 is to manifest the actual practice since Hong Kong became a port, which is “now laid down in the Basic Law as a long-term guideline in the future”¹. In view of the broad wordings of BL 115 and its purpose to provide a general policy guideline, it is arguable that BL 115 does not prohibit regulation of import and export of goods in specified situations, provided that the policy of free trade as a whole is implemented in the HKSAR. We, therefore, consider that the 2013 Amendment Regulation would not engage BL 115.

Import and Export Ordinance as a Context

4. It is important to note that decisions of the Court of Final Appeal have confirmed that, when interpreting Basic Law provisions, the courts have to consider the relevant context and purpose (see, e.g. *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211, 223J – 224B).

¹ Wang Shuwen (ed.), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd ed.)(Law Press, 2009) at p.589.

5. The Import and Export Ordinance (Cap. 60) (“IE Ordinance”) and the IE Regulations were enacted before the Basic Law was drafted in the 1980s. Further, they were in force during the entire period of the drafting of the Basic Law. The Long Title of the 1970 version of the IE Ordinance was:- “to provide for the regulation and control of the import...., ... the export of articles from Hong Kong, and any matter incidental to or connected with the foregoing.” Such regulation and control are, *inter alia*, concerned with export of articles from Hong Kong in the form of parallel trading or smuggling, as demonstrated in case law decided before (and after) the Basic Law was drafted. The existence of the IE Ordinance and IE Regulations at time of the drafting of the Basic Law is part of the context of BL 115.

6. Various restrictions on the import and export of goods have been practiced in Hong Kong well before the reunification in 1997 under the IE Ordinance and IE Regulations. Section 6D(1) of the IE Ordinance provides that, subject to the IE Regulations, no person shall export any article specified in the second column of Schedule 2 to the IE Regulations to the country or place specified opposite thereto in the third column of that Schedule except under and in accordance with an export licence issued by the Director-General of Trade and Industry (“DGTI”) under section 3 of the IE Ordinance. Part 1 of Schedule 2 to the IE Regulations currently has nine items. Some of these items were included under Schedule 2 before the reunification in 1997. It is arguable that the intention of BL 115 is not to render the above restrictions inconsistent with the policy of free trade or safeguarding free movement of goods. It would be surprising that the Basic Law drafters found the regulatory framework under the IE Ordinance and IE Regulations to be unconstitutional for violating the “policy of free trade” or “free movement of goods.” Further, the 2013 Amendment Regulation only purports to regulate one more item (namely, powdered formula) using the above regulatory framework.

“Policy of Free Trade”

7. In any event, the term “policy of free trade” under BL115 is arguably not engaged by the 2013 Amendment Regulation because BL 115 is concerned with the policy. It is unlikely that regulation of the trade of powdered formula for persons under the age of 3 (i.e. one kind of item) would by itself affect the free trade policy.

2013 Amendment Regulation Is Proportionate

8. Assuming that BL 115 is engaged and that the proportionality test is applicable to BL 115, we consider that the 2013 Amendment Regulation would satisfy this test for the following reasons.

9. It is beyond doubt that the alleged interference with the “policy of free trade” and/or “free movement of goods” is prescribed by law, namely, the IE Ordinance and IE Regulations. Further, it is likely that the courts will consider that the following are legitimate aims: (i) a guaranteed supply of powdered formula for parents of children below the age of three (so that the parents can discharge their child-rearing responsibilities) and (ii) the protection of the health of these children in Hong Kong. It is arguable that there is a rational connection between the 2013 Amendment Regulation and the above legitimate aims.

10. It is also reasonably arguable that the 2013 Amendment Regulation is proportionate to the above legitimate aims. First, only some forms of trading are regulated under the 2013 Amendment Regulation. The export from Hong Kong of any amount of powdered formula is lawful as long as the DGTI has issued a licence for such export. In the case of pure re-export, when the powdered formula is “article in transit” or “air transshipment cargo” etc., no export licence is even necessary. Moreover, except where there is a breach of conditions of stay, parallel trading of powdered formula is essentially permissible as long as the statutory exemption applies, namely when a parallel trader brings with him or her 1.8 kg or less powdered formula across the border every 24 hours. In addition, trade of any amount of powdered formula within Hong Kong is no concern of the 2013 Amendment Regulation.

Conclusion

11. The Administration is of the view that the 2013 Amendment Regulation is consistent with BL 115 because the court will likely find that BL115 is not engaged and even if BL 115 is engaged, it is reasonably arguable that the 2013 Amendment Regulation would satisfy the proportionality test (assuming that such test is applicable).

Legal Policy Division
Department of Justice
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Joint Operation Conducted by the Hong Kong Customs and Mainland Customs to Combat Smuggling Activities of Parallel Traders

Details of the joint operation conducted by the Hong Kong Customs and Mainland Customs to combat smuggling activities of parallel traders are set out as below –

2. The Hong Kong Customs and Shenzhen Customs mounted a special joint operation to combat smuggling activities by parallel traders from 7 September to 31 December 2012. In view of the encouraging results of the joint operation, the two sides agreed, starting from 1 January 2013, to continue with the joint operation and to make it a routine measure with a view to combating smuggling by parallel traders more effectively.
3. During the operation (from 7 September 2012 to 28 February 2013), the Hong Kong Customs detected 4 339 cases at the land boundary crossing points, with a total seizure value of HK\$30.79 million and 4 325 arrests (including 231 Mainland residents and 4 090 HK residents). Major seizures included dutiable cigarettes, dangerous drugs, computer parts, smartphones, powdered formula, dried seafood, and other foodstuffs.
4. Cases effected at the passenger arrivals halls mainly involved parallel traders bringing in dutiable cigarettes and liquors in excess of the duty free concession, contravening the Dutiable Commodities Ordinance. There were also cases involving trafficking / possession of dangerous drugs.
5. Due to the stepped-up enforcement actions at the passenger front, smuggling activities by parallel traders were shifted to using cross-boundary private cars and goods vehicles to smuggle high-end electronics goods and expensive foodstuffs to the Mainland. Such cases would be dealt with in accordance with the Import and Export Ordinance.
6. During the operation, the Shenzhen Customs detected over 210 000 cases of violation by parallel traders, including 5 885 smuggling cases (handed over to the Anti-smuggling Bureau for investigation), 23 877 duty-payment cases, 76 303 shut back cases, and 109 326 cases that were handed over to other agencies for follow-up actions. Furthermore, through mutual intelligence exchange with the Hong Kong Customs, the Shenzhen Customs successfully

eradicated a number of storage locations of parallel trading syndicates and arrested 24 persons. Major seizures included smartphones, tablet computers, and notebook computers.

7. In February 2013, in response to the concerns arising from the supply situation of powdered formula in Hong Kong, the Hong Kong Customs and Shenzhen Customs mounted another special joint operation against the smuggling of daily commodities, especially powdered formula, by parallel traders. During the operation (from 1 to 28 February 2013), the Hong Kong Customs referred 657 cases involving parallel traders who were found carrying powdered formula when departing Hong Kong to the Shenzhen Customs for follow-up actions, among which 636 cases were detected at the passenger hall while the other 21 cases were detected onboard cross-boundary private cars.

8. The referrals were handled by the Mainland Customs according to Mainland customs laws, such as duty payment, shut back, release with no further action or hand over to the Anti-smuggling Bureau for investigation. From 1 to 28 February 2013, through stepped-up inspections, 5 821 cases of importing excessive powdered formula were detected by the Shenzhen Customs, with a total weight of 55 417 kg. Among these cases, 15 were handed over to the Anti-smuggling Bureau for criminal proceedings.

Customs and Excise Department
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