



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

本函檔案 Our ref. : FH CR1/3231/13
來函檔案 Your ref. : CB2/SS/4/12

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18 March 2013

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

Dear Miss Ma,

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

With regard to your email dated 14 March 2013 relaying Members' requests for supplementary information at the meeting of 14 March 2013, and the follow-up questions raised in the letter of 15 March 2013 by Hon Tommy CHEUNG Yu-yan as well as the letter of 16 March 2013 from Hon CHUNG Kwok-pan to the Chairman of the Subcommittee, our reply is as follows:

(1) Information/evidence (including the surveys conducted by/number of visits to retail outlets/telephone calls made by the Administration, the findings and relevant statistics) indicating a recent shortage of powdered formula in Hong Kong

On the basis of information received from various channels, the Administration has confirmed that there is a problem of powdered formula shortage. Since January 2013, we have observed a serious

shortage of certain brands of powdered formula at some retail outlets. The brands of powdered formula in shortage constitute a market share of over 60% in Hong Kong. The situation was widely covered by the media. The Government closely monitored the development of the matter and deployed staff to inspect pharmacies and major chain retailers to obtain information on the shortage problem in the market. At the same time, we liaised closely with representatives from the Hong Kong General Chamber of Pharmacy and major chain retailers.

In addition, we were in frequent touch with major suppliers of powdered formula who also observed an acute shortage at the retail level. In response, they put in place stringent measures to combat the malpractices of some retailers¹, arranged local parents to place purchase orders through hotlines to collect the powdered formula at more retail outlets, and expedited replenishment at the retail level. Certain suppliers remarked that calls to their hotlines had multiplied. An approximate of 20 000 local customer calls were received by a supplier around that period. These indicated that there was indeed a shortage of powdered formula at that time.

Between January 2013 and the Chinese New Year, the Food and Health Bureau received letters and calls from over 100 members of the public, reflecting their concern about the shortage of powdered formula and related issues. Many of them were parents of infants and young children, who informed us that they had not been able to purchase powdered formula for their children even after visiting a number of retail shops in various districts, or get through the hotlines of suppliers despite repeated calls, and that the suppliers had failed to follow up within a short period of time. That being the case, they hoped that the Administration could provide assistance to them. There were also a substantial number of people who reported the shortage of powdered formula in online discussion forums.

Through the above channels, we observed that the shortage of powdered formula had become more and more acute, and that parallel trading activities of powdered formula had spread from areas in the New Territories, including Sheung Shui, Fanling and Tai Po, to urban areas

¹ In January 2013, major suppliers of powdered formula issued 77 warnings to these retailers and restricted supply to 27 retailers. Besides, supply to 11 retailers has been suspended.

such as Kowloon Bay, Tseung Kwan O and Eastern District on the Hong Kong Island. The community at large was extremely concerned about the situation.

The Government has set up a special hotline since 1 February 2013 to help relieve the pressure on the hotlines of seven major brands of powdered formula. During the period (less than eight days) from 1 February 2013 to 8 February 2013, the special hotline received a total of 5 808 calls, reflecting the concern of local parents about the problem. We have referred 3 190 purchase orders to suppliers of the seven major brands.

The LegCo Panel on Food Safety and Environmental Hygiene also convened a special meeting on 4 February 2013 to reflect the concern of Members about the shortage problem and urged the Administration to take follow-up action.

On the basis of the above, it is an indisputable fact that there is a shortage of powdered formula recently in Hong Kong.

(2) Expert opinion on whether powdered formula is a major source of foodstuff for babies aged over 12 months

According to “A Survey of Infant and Young Child Feeding in Hong Kong” published by the Department of Health in 2012, for young children in the 12-month age group, the source of nearly half of their energy intake was from milk. As for young children in the age groups of 18 and 24 months, about one-third of their energy intake was from milk. In all three age groups, 90% of them used powdered formula as their source of milk. In addition, milk is also the major source of many kinds of nutrients, including calcium (69%-80%), iron (55-67%) and vitamin C (49%-65%).

(3) Estimated monthly/annual consumption of powdered formula by all babies in Hong Kong

We are unable to provide the figures since parents will choose their own way of feeding their infants and young children for various reasons such as the age group of their infants and young children and the

mode of life of parents.

(4) Legal opinion on the importance/significance of a sunset provision to the proportionality test

Please refer to the reply of the Department of Justice in the Annex.

(5) Statistics on the import and re-export of powdered formula broken down by brands

The Administration does not collect statistics on the import and re-export quantities of each brand of powdered formula.

(6) To explain the legal basis (quoting the empowering provisions in existing legislation) for the Director-General of Trade and Industry to impose conditions on the issuance of an export licence for powdered formula

Under section 3(1) of the Import and Export Ordinance (Cap. 60), the Director-General of Trade and Industry (DGTI) may issue any licence and may attach thereto such conditions as he may see fit to impose.

The Import and Export (General) (Amendment) Regulation 2013 (the Amendment Regulation) amends the Import and Export (General) Regulations (Cap. 60, sub. leg. A) by including powdered formula² as an item of specified articles in the second column of Schedule 2 so that an export licence must be obtained from DGTI issued under Section 3 of the Import and Export Ordinance (Cap. 60) to export such articles (unless otherwise provided in the legislation).

² Section 3 of the Amendment Regulation defines powdered formula as “*powdered formula* (配方粉) 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;”.

As Hong Kong does not produce powdered formula, all demands for powdered formula are met by imports. All Hong Kong food importers, including importers of “infant/follow-up/growing-up formula (for babies up to 36 months)”, must register with the Director of Food and Environmental Hygiene in accordance with the Food Safety Ordinance (Cap. 612)(the Ordinance). To safeguard legitimate trading activities, the Trade and Industry Department in general issues export licences only to relevant importers who have registered³ under the Ordinance or exempted from the registration requirement under section 4(3)(a) of the Ordinance⁴.

(7) To provide a full list of the basket of indicators for discontinuation of the Amendment Regulation

We are of the view that the supply chain failure in relation to powdered formula has a major bearing on the serious shortage of powdered formula recently. We consider that powdered formula suppliers must step up their efforts to improve the supply chain to ensure an adequate, stable and timely supply of powdered formula for Hong Kong people. In this regard, we will urge local suppliers of powdered formula to:

- (a) increase the efficiency of stock replenishment from places outside Hong Kong by reducing the time required;
- (b) enhance the capacity for distribution and delivery of goods to improve the supply chain management at the retail and wholesale levels and replenish the stock at retail outlets expeditiously;
- (c) commit additional resources to boost the number of hotlines for taking purchase orders and establish a mechanism for promptly increasing the number of hotlines and staffing

³ At present, there are about 460 importers of “Infant/follow-up/growing-up formula (for babies up to 36 months)” on the register.

⁴ These are persons who have already registered or have obtained a licence under other Ordinances, for example, food business licence holders under the Food Business Regulation (Cap.132X). As the Government already possesses their information, they have been exempted from the registration requirement as a trade facilitation measure.

level under exceptional circumstances to handle the purchase orders; and

- (d) examine and set up services for advance order of powdered formula at retail outlets of different regions throughout the territory.

(8) To review the definition of "powdered formula", having regard to the views expressed by members

Under section 3 of the Amendment Regulation, we have included a definition for the term "powdered formula" 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 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.

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

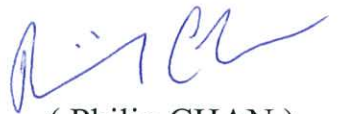
Letter of 15 March from Hon Tommy CHEUNG Yu-yan to the Chairman of the Subcommittee

For our response to the above-mentioned letter, please refer to the reply set out in part (1) above.

Letter of 16 March from Hon CHUNG Kwok-pan to the Chairman of the Subcommittee

For our response to the above-mentioned letter, please refer to the reply set out in part (7) above.

Yours sincerely,



(Philip CHAN)

for Secretary for Food and Health

Import and Export (General)(Amendment) Regulation 2013
- Re: Members' Questions on "Sunset Clauses"

At the meeting of the Subcommittee on the Import and Export (General)(Amendment) Regulation 2013 ("the 2013 Amendment Regulation") held on 14 March 2013, Members asked about the relevance of "sunset clauses" in the application of the proportionality test¹. This paper briefs Members on the Administration's views on the above question.

BL 115

2. The Administration maintains its view stated in the paper submitted on 14 March 2013 that Article 115 of the Basic Law ("BL 115") is broadly-worded and the regulation of trade as manifested in the Import and Export Ordinance (Cap. 60)("IE Ordinance") is part of the context of the provision. It is therefore reasonably arguable that BL 115 does not prohibit restriction on the exports of goods, provided that the policy of free trade as a whole is implemented.

Proportionality Test

3. There is yet to be any local case law on BL 115. Assuming that the proportionality test applies in the examination of the constitutionality of the 2013 Amendment Regulation, it would involve the considerations of whether (i) the alleged interference is prescribed by law; (ii) the 2013 Amendment Regulation pursues a legitimate aim; (iii) there is rational connection between the 2013 Amendment Regulation and the legitimate aim; and (iv) a reasonable relationship of proportionality exists between the 2013 Amendment Regulation and the legitimate aim.

Sunset Clause

4. Assuming that a sunset provision is included in the 2013 Amendment Regulation, Hong Kong courts may take the provision into account in considering whether the 2013 Amendment Regulation satisfies the proportionality test.

¹ In this paper, a sunset clause is defined to be a legal provision that provides for the expiry of a statute (or a statutory provision) at a specified date.

2013 Amendment Regulation Is Proportionate

5. It is the Administration's view that whether a sunset provision is included is one of the factors that Hong Kong courts are entitled to consider. Other factors include whether the human rights of other parties may be affected (e.g. *HKSAR v. Au Kwok Kuen* [2010] 3 HKLRD 371 (where the interference with the defendants' right to freedom of assembly was held to be reasonable for, *inter alia*, the protection of others' privacy and property rights)) and whether socio-economic policies are in question (e.g. *Fok Chun Wa v. Hospital Authority* [2012] 2 HKC 413).

6. In the case of the 2013 Amendment Regulation, we maintain that it would satisfy the proportionality test (if such test is applicable):-

- (a) the alleged interference is prescribed by law, namely, the IE Ordinance and the Import and Export (General) Regulations (Cap. 60 sub. leg. A).
- (b) the courts will likely consider the following to be legitimate aims: a guaranteed supply of powdered formula for parents of children below the age of three and the protection of the health of these children in Hong Kong.
- (c) It is arguable that there is a rational connection between the 2013 Amendment Regulation and these legitimate aims.
- (d) It is also reasonably arguable that a reasonable relationship of proportionality exists between the 2013 Amendment Regulation and the legitimate aims, as only some forms of trading are regulated:-
 - (i) the licenced export from Hong Kong of any amount of powdered formula is lawful;
 - (ii) for pure re-export where the powdered formula is "article in transit" or "air transshipment cargo" etc., no export licence is even necessary;
 - (iii) 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; and

- (iv) trade of any amount of powdered formula within Hong Kong is no concern of the 2013 Amendment Regulation.

Conclusion

7. The Administration is of the view that the 2013 Amendment Regulation would satisfy the proportionality test (assuming that such test is applicable) even in the absence of a sunset clause in this Regulation.

**Legal Policy Division
Department of Justice**

15 March 2013

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