

立法會
Legislative Council

LC Paper No. CB(2)1340/16-17(03)

Ref : CB2/SS/4/16

**Subcommittee on the Smoking (Public Health) (Notices)
(Amendment) Order 2017**

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on the Smoking (Public Health) (Notices) (Amendment) Order 2017 ("the Amendment Order") and gives a brief account of the discussion by the Panel on Health Services ("the Panel") on the Administration's legislative proposals to amend the prescribed form (including specifications) of the health warnings and indication of tar and nicotine yields on packets or retail containers of tobacco products.

Background

2. According to the World Health Organization ("WHO"), well-designed health warnings and messages on tobacco product packages have been shown to be a cost-effective means to increase public awareness of the health effects of tobacco use and to be effective in reducing tobacco consumption. Article 11.1(b) of WHO Framework Convention on Tobacco Control ("FCTC")¹ requires each Party to adopt and implement effective measures to ensure that each unit packet and package of tobacco products and any outside packaging and labelling used in the retail sale of such products carry health warnings and messages. These warnings and messages shall be rotating; shall be large, clear, visible and legible; should be 50% or more, but no less than 30%, of the principal display areas; and may be in the form of or include pictures or pictograms.

¹ WHO FCTC entered into force in 2005. Parties are obliged to take a number of steps to reduce demand and supply for tobacco products. China is one of the signatories to and has ratified WHO FCTC, the application of which has been extended to Hong Kong since 2006.

3. The Smoking (Public Health) Ordinance (Cap. 371) ("the Ordinance") with its subsidiary legislation provide the legal framework on tobacco control for restricting the use, sale and promotion of tobacco products in Hong Kong. Under sections 8 and 9 of the Ordinance, health warnings in prescribed size and wording are required to be shown on the packets or retail containers, as the case may be, of cigarettes,² cigar, pipe tobacco and cigarette tobacco. According to paragraphs 3, 4A and 4AA of the Smoking (Public Health) (Notices) Order (Cap. 371B) ("the Order") as amended in 2006, the health warning shall be in one of the six prescribed forms as set out in the Schedule to the Order and shall appear on the two largest surfaces of the packet or the retail container concerned. Other than the case of retail container containing one cigar, the health warning concerned shall be of a size that covers at least 50% of the area of the surface on which it appears. Separately, section 8 of the Ordinance and paragraph 3 of the Order provide that the packets or retail containers of cigarettes should bear in the prescribed form and manner as set out in the Schedule to the Order the tar and nicotine yields which shall appear on the two largest surfaces of the packet or retail container concerned.

The Amendment Order

4. On 21 April 2017, the Administration published in the Gazette the Amendment Order. The Amendment Order is made by the Secretary for Food and Health under section 18(2) of the Ordinance to amend the prescribed forms (including specifications) of the health warnings, the size and number of the health warnings and messages for packet or retail container of cigarettes under the Order as follows:

- (a) generally, the Chinese version and English version of the same health warning shall cover at least 85% of the two largest surfaces of a packet or retail container. If a packet or retail container is in the shape of a cylindrical drum, the Chinese version of the health warning shall cover at least 85% of the area of the curved surface of the drum whereas the English version of the same warning shall cover at least 50% of the area of the top surface of the lid of the drum. For a retailer container of cigars, the Chinese version of the health warning shall cover at least 70% of the area of the largest surface on the front of the container whereas the English version of the same warning shall cover 100% of the area of the largest surface on the back of the container;

² Applies to any packet of cigarettes containing 20 or more cigarettes and any retail container of cigarette packets containing any number of cigarettes.

- (b) the six forms of health warnings are to be replaced by 12 new forms of health warnings. Two new messages "QUIT SMOKING FOR FUTURE GENERATIONS" and "QUITLINE 1833 183" are to be included in the new prescribed forms of health warnings; and
- (c) the indication of tar and nicotine yields should be separately printed on a surface of a cigarette packet or retail container other than the surface bearing the health warning.

5. The Amendment Order was tabled before the Legislative Council ("LegCo") at its meeting of 26 April 2017 and is subject to the negative vetting procedure. It will come into operation on 21 October 2017. It provides for a transitional period of six months beginning on the commencement date.

Deliberations of the Panel

6. The Panel discussed the Administration's preliminary legislative proposals on 18 May 2015, and received oral representations from 100 deputations on 6 July 2015. In the Sixth LegCo, the Panel discussed the latest legislative proposals of the Administration at four meetings held between December 2016 to March 2017, and received oral representations from 69 deputations at one of these meetings held on 17 January 2017. The major views and concerns of members are summarized in the following paragraphs.

Portion and forms of the health warning

7. Members noted the legislative proposal to increase the area of the graphic health warning from covering at least 50% to at least 85% of the two largest surfaces of the packet or the retail container of the tobacco product concerned. Some members were supportive of the proposal. However, some other members cast doubt on the effectiveness of the proposal to lower the already very low local smoking prevalence rate which stood at 10.5% in 2015. Given that the smoking prevalence and circumstance in Hong Kong were different from that of other countries, these members considered that strong supporting evidence, in particular local statistics and evidence-based analysis, should be provided to justify the proposal. They also noted with concern that only a few countries such as Nepal, Pakistan and Thailand required the size of health warnings to cover at least 85% of the two largest surfaces of cigarette packets. There was also a view that the Administration should instead strengthen the smoking cessation services. In addition, more resources should be allocated to the Hong Kong Council on Smoking and Health to step up publicity on the harms of smoking as well as to the Tobacco Control Office of the Department of

Health for effective enforcement of smoking ban at the statutory no smoking areas.

8. According to the Administration, it was recommended under WHO FCTC that Parties should implement larger, rotating health warnings on all tobacco product packaging and labeling in order to maintain saliency and enhance impact. According to empirical evidence from WHO and overseas experience, the effects of health warnings and messages in discouraging tobacco consumption increased with their prominence. The Thematic Household Survey of 2015 published by the Census and Statistics Department showed that 37% daily smokers had tried to quit or wanted to quit. These figures reflected the need to encourage smokers to quit smoking. The packets and retail containers of cigarettes and tobacco products, of which daily smokers accessed on average 13 times a day, were considered the most direct means of communicating the information relating to smoking cessation. A separate school-based survey conducted by the University of Hong Kong in 2014-2015 also indicated that secondary school students found health warnings a meaningful way to communicate the risks of smoking and deter them from picking up smoking.

9. The Administration further advised that plain (standardized) packaging had been advocated by WHO. Australia, France, Hungary, Ireland, New Zealand and the United Kingdom had already adopted or prepared to adopt plain packaging of tobacco products. In the Administration's view, the current proposal of increasing the area of the graphic health warning to a size that covered at least 85% of the two largest surfaces of the packet or the retail container was moderate and appropriate for the local context, and was in line with its progressive tobacco control strategy. When mapping out the proposal of increasing the area of the graphic health warning, the Administration had balanced the interest of tobacco industry and the need to protect public health. Given that the existing batch of health warnings on packet or retail container of cigarettes and relevant tobacco products had been used since 2007, the Administration considered it high time to change the prescribed forms of the health warnings. Apart from increasing the portion of the health warnings, it was proposed that the number of forms of health warning be increased from six to 12. These proposals would increase the awareness of the health hazards of smoking among existing smokers and potential smokers, so as to encourage cessation and discourage uptake. It was hoped that smoking prevalence in Hong Kong could be lowered to single digit in the not-too-far away future.

10. Some members shared the tobacco industry's concern that implementation of the legislative proposal would intensify the trade of counterfeit and illicit tobacco products, in particular that of cigar, due to the limited space left on the packets and retail containers for trademarks and branding. This would also

amount to unlawful deprivation of intellectual property rights, and violate Hong Kong's obligations under international trade agreements and international investment agreements. There was a concern that the Administration had formulated the proposal in the absence of public consultation and regulatory impact assessment. Members requested the Administration to address various legal issues and concerns raised by the tobacco trade.

11. The Administration advised that there was no solid evidence suggesting that increasing the size of graphic health warnings would lead to intensification of illicit cigarette trade. In its view, there was neither deprivation of property nor deprivation of business goodwill under the legislative proposal. The Administration stressed that the aim of introducing large health warnings on tobacco product packets and retail containers was to promote and protect public health in which the rights enjoyed by trademark owners in respect of the marks would not be prejudiced or impeded by the proposal. Hence, the proposal satisfied the "proportionality test" under which any interference with property rights would need to strike a balance between the general interest of society and protection of the individual's rights. In addition, the proposal would not constitute any breach of the Agreement on Technical Barriers to Trade as it was an appropriate, balanced and necessary means to achieve the desired level of protection for public health. The Administration further explained that the trademark holder did not enjoy an absolute right of use that was free of regulation but only an exclusive right to exclude third parties from using the trademark, subject to the local regulatory power. Given that the proposal was a valid exercise of the regulatory power to fulfill the obligation under Article 11 of FCTC and a non-discriminatory and proportionate measure adopted in good faith for the protection of public health, it would not violate the provisions on expropriation under the Investment Promotion and Protection Agreements entered into by Hong Kong.

12. There was a suggestion of allowing the trade to carry out the design work of some graphic health warnings. According to the Administration, under the Guidelines of Article 5.3 of WHO FCTC, the interests of tobacco industry were in direct conflict with the goals of public health. The tobacco industry should not be a partner in any initiative linked to setting or implementing public health policies. As the design of the health warnings should align with the Government's tobacco control policies and directives, there would be a conflict of interest for tobacco companies to design health warnings. This was also in line with the Government's policy to ban sponsorships by tobacco companies. A set of guidelines would be provided to the trade to facilitate their compliance with the amended laws. The Tobacco Control Office would provide soft copy of the graphical files of the new health warnings to the trade.

Practical implementation issues

13. Some members shared the tobacco industry's concern that the space on tobacco product packets and retail containers for the display of a tobacco trader's trademark would become limited under the legislative proposal. There was a suggestion that the Administration should allow area of the health warning to cover a different percentage of the two largest surfaces of the packet or the retail container concerned, say, 60% of one surface and 70% or 80% of another surface. Another suggestion was to follow the practice of Germany to require the area of health warnings to cover at least 65% of the two largest surfaces of the packet or the retail container concerned. The Administration explained that the proposal only affected the two largest surfaces of the packet or retail container. A tobacco trader could still display his trademark, though with adaptation or re-sizing in some cases, on the remaining areas (i.e. 15% of the two largest surfaces), as well as the lateral surfaces, of the packet or retail container in a way that did not alter the distinctive character of the trademark.

14. Question was raised as to whether the sealing, being printed in colour or made transparent, could overlay the area of the graphic health warning on a soft pack cigarette packet, as was the practice adopted in Thailand. According to the Administration, it would remove the current requirement that the top side of the health warning should be no more than 12 millimeters from the top edge of cigarette packet, and allow the health warning to be positioned at the lower part of the packet. There would be space available on the top of the two largest surfaces and the sides for accommodating the trademark and the brand name. As required under paragraph 3(7) of the Order, the health warning should not be obscured by any affixture to the packet or retail container, the wrapping of the packet or retail container, or any affixture to the wrapping of the packet or retail container. There was no specific requirement concerning the colour and design of the seal, provided that the relevant legal provisions were complied with. Apart from using transparent seals on soft pack cigarette packets, the trade might consider making the seal blend in with the design of the space for displaying the brand name.

15. There was a concern that the authenticity seals of the cigar products would be covered by the enlarged graphic health warnings under the preliminary legislative proposal. While the Administration had refined the legislative proposal such that the health warning would cover 100% of one of the two largest surfaces and 70% of the other largest surface of the cigar box, some members were of the view that the cigar industry still had operational difficulties to produce a unique graphic health warning for each cigar item that could match the exact size of its outer package as there were more than 800 cigar items with varying outer package sizes. Any workmanship error might result in

inadvertent breach of the proposed requirement. At the meeting on 20 March 2017, the Panel passed a motion urging the Government to reduce the proposed size of health warnings on the outer packages of cigars to cover 60% and 90% of the front and back surfaces of these packages respectively.

16. Concern was also raised about the display of an enlarged prescribed health warning on a square-shaped packet and a retail container in the shape of a cylindrical drum. The Administration advised that having taken into account the views expressed by the trade, it would adjust its earlier proposal and exempt the new health warning requirement for applying on the lid of a drum shape container.

Indication of tar and nicotine yields

17. Members noted that indication of tar and nicotine yields would continue to be required to appear on the packet and retail container of cigarette and relevant tobacco products. They noted that according to the guidelines published by WHO for implementing Article 11 of FCTC, Parties should not require, among others, quantitative statements on tobacco product packaging and labelling about tobacco constituents and emissions that might imply that one brand was less harmful than another, such as the tar, nicotine and carbon monoxide figures. Some members considered that the Administration should follow the guidelines of WHO in this regard.

18. The Administration advised that the indication of tar and nicotine yields would help to remind smokers that smoking was hazardous to health. In response to the trade's concern about the display of the tar and nicotine yield indication (to be printed on a white background with black characters, letters and numbers), its latest proposal was that there would be no restriction on the background colour of the tar and nicotine indication. Characters, letters and numbers, as long as being reasonably visible, could be printed in black or white.

Statement on the health warnings

19. Some members had reservation over the Administration's original legislative proposal to replace the existing statement "HKSAR GOVERNMENT WARNING" on the prescribed health warnings with the messages "Tobacco kills up to half of its users" and "Quitline: 1833 183", as the message "Tobacco kills up to half of its users" appeared to be merely a slogan without scientific proof. Members were subsequently advised that the latest legislative proposal was to include the messages "QUIT SMOKING FOR FUTURE GENERATIONS" and "QUITLINE: 1833 183" in the existing statement.

Adaptation period

20. Members noted that in the last legislative exercise to introduce, among others, the requirement that packets or retail containers of tobacco products should bear graphic health warnings of a size that covered at least 50% of the principal surface areas, sale of tobacco products with pre-amendment health warnings was allowed during the 12 months after the day on which the relevant provisions came into operation. There was a view that the tobacco trade should be given sufficient time in this legislative exercise to change the packaging of their products for compliance with the proposed new requirements and sell existing stock. Members noted with concern that the current legislative proposals would be subject to the negative vetting procedures under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). Given the tight timeframe under the negative vetting procedure, the Administration should adjust the proposed adaptation period from six months (counting from gazettal of the amendment order) to at least 12 months. Members called on the Administration to communicate well with, and pay due regard to the concerns of, the industry and relevant stakeholders in the tobacco sector before introducing the legislative proposals into LegCo.

21. Members were advised that to facilitate the tobacco trade's understanding and preparation for the implementation of the proposals, the Administration had issued a letter to the trade setting out the detailed specifications of the proposals in May 2016. A briefing on the technical issues relating to the implementation of the legislative proposals had been held on 23 November 2016. In the light of the concerns of the trade, the Administration would extend the adaptation period from 6 months to 12 months upon gazettal of the Amendment Order.

Timetable for introducing the subsidiary legislation

22. Some members were concerned that past experience revealed that LegCo had to devote several meetings held in May and June each year to scrutinize the Appropriation Bill. Hence, Members might not have the opportunity to amend the subsidiary legislation concerned by resolution at a Council meeting before the expiry of the scrutiny period. The Panel passed a motion at its meeting on 20 March 2017 requesting the Administration to defer the introduction of the relevant subsidiary legislation into LegCo to May 2017 or later, with a view to fully respecting Members' right and their constitutional role in respect of speaking on the subsidiary legislation and voting on any motion to amend the subsidiary legislation at the Council meeting concerned before the expiry of the scrutiny period.

Relevant papers

23. A list of the relevant papers on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
8 May 2017

**Relevant papers on the Subcommittee on the Smoking (Public Health)
(Notices) (Amendment) Order 2017**

Committee	Date of meeting	Paper
Panel on Health Services	18.5.2015 (Item V)	Agenda Minutes CB(2)1808/14-15(01)
	6.7.2015 (Item I)	Agenda Minutes
	19.12.2016 (Item IV)	Agenda Minutes CB(2)991/16-17(01)
	17.1.2017 (Item III)	Agenda CB(2)859/16-17(12)
	28.2.2017 (Item VII)	Agenda
	20.3.2017 (Item IV)	Agenda CB(2)1170/16-17(01)