



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

Dear Ms KAN,

Smoking (Public Health) (Amendment) Bill 2019 (“the Bill”)

I refer to your letter dated 4 April 2019. I set out below our response to the issues raised in the said letter.

Legal issues raised by Messrs Herbert Smith Freehills

2. Messrs Herbert Smith Freehills, acting for British-American Tobacco Company (Hong Kong) Limited, issued a letter dated 18 February 2019 to the Legislative Council Members regarding the views of its client on the Bill.

3. We consider that the Bill is in conformity with the right to privacy under Article 14 of the Hong Kong Bill of Rights (“BOR”) which is in identical terms to Article 17 of the International Covenant on Civil and Political Rights. Article 14 of the BOR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy. This right to privacy is not absolute. Even if the proposed full ban would engage the right to privacy of people who wish to use alternative smoking products (“ASPs”), the right would not be

violated if the interference with their privacy is not unlawful or arbitrary. In determining whether an interference is arbitrary or not, the courts would consider whether it satisfies the proportionality test.¹

4. With the latest scientific evidence and World Health Organization (“WHO”) recommendations, we consider that the proposed full ban is a necessary measure for the protection of public health, which is clearly a legitimate aim for the Government to pursue. The ban is also rationally connected to that aim because the use of ASPs causes addiction and poses health risks to the smokers and people exposed to second-hand smoke. It is the Government’s policy objective to accord a very high level of protection to the public from the health risks and the gateway and renormalisation effects posed by the ASPs (please see Annex B of the Legislative Council brief for details). The proposed full ban is not disproportionate to the accomplishment of that legitimate aim, as there are no less restrictive measures that can achieve the very high level of public health protection. The pursuit of the societal benefits of the ban would not result in an unacceptably harsh burden on people who wish to use ASPs. The Government and the legislature enjoy a wide margin of discretion in this area which involves social policy relating to public health, particularly when the proposed full ban would not undermine any core values relating to personal characteristics such as race, colour, gender or sexual orientation. Overall, protecting public health should be the Government’s prime consideration. We must ensure that our achievements in tobacco control over the years would not be undermined, and must prevent the harm of new products from taking root.

5. With regard to the protection of property rights under Articles 6 and 105 of the Basic Law, it is the Government’s assessment that the Bill would not give rise to deprivation of property requiring real value compensation under the Basic Law. On the other hand, similar to the constitutional right to privacy, property rights protected under Articles 6 and 105 of the Basic Law are not absolute, and the law may validly create restrictions limiting such rights. The courts would decide the permissible extent of the restrictions by applying the four-step proportionality test.² Given the similar considerations stated in

¹ The courts would consider the following questions in applying the proportionality test: (a) whether the restriction pursues a legitimate aim; (b) whether the restriction is rationally connected with advancing that aim; (c) whether the restriction is no more than necessary for that purpose (or whether the restriction is manifestly without reasonable foundation); and (d) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the rights of the individual, asking in particular whether pursuit of the societal benefits of the restriction results in an unacceptably harsh burden on the individual: *Hysan Development Co. Ltd v Town Planning Board*, FACV 21/2015, 26 September 2016, at paras. 133-137.

² Please refer to footnote 1.

paragraph 4 above, the proposed ban on ASPs under the Bill would likely satisfy the proportionality test under Articles 6 and 105 of the Basic Law.

6. The Bill is also consistent with Articles 114 and 115 of the Basic Law. It is pertinent to note that the import and export of specified goods have been restricted, or even prohibited, by statutes well before the enactment of the Basic Law³. It is the Government's view that even assuming (without admitting) that the proposed ban on ASPs engages Articles 114 and 115 of the Basic Law, in light of the theme of continuity of the Basic Law⁴ and given that the proposed ban is a necessary measure for achieving a high-level protection of public health, it is highly unlikely that the courts would find the proposed ban inconsistent with the maintenance of the HKSAR's status as a free port under Article 114 of the Basic Law, or the pursuit of the policy of free trade and the safeguarding of the free movement of goods, intangible assets and capital under Article 115 of the Basic Law.

7. Moreover, the Bill is in conformity with Hong Kong's obligations under (a) the General Agreement on Tariffs and Trade 1994 ("GATT 1994") of the World Trade Organization and (b) the Investment Promotion and Protection Agreements ("IPPAs"). With respect to GATT 1994, the proposed full ban under the Bill does not, in our view, engage Article XI (General Elimination of Quantitative Restrictions) of GATT 1994. In any event, the proposed full ban is justifiable as a necessary measure for the protection of human health under Article XX(b) (General Exceptions) of GATT 1994. In particular, the protection of public health, as a policy objective, is of vital importance and any failure to achieve the very high level of public health protection as chosen by the Government will seriously undermine Hong Kong's hard-earned achievements in tobacco control over the years and pose grave concerns to public health. In this regard, the proposed full ban is a necessary measure for the protection of public health and is capable of making a material contribution to and achieving the said policy objective.

8. With respect to Hong Kong's obligations under IPPAs, the proposed full ban under the Bill is neither arbitrary nor discriminatory, and is in compliance with the fair and equitable treatment obligation. Furthermore, such measure does not constitute an unreasonable or discriminatory measure that impairs the use and enjoyment of the relevant foreign investor's investment in Hong Kong. Moreover, the proposed full ban is a good faith measure aimed at the protection

³ For instance, the Smokeless Tobacco Products (Prohibition) Regulations, which were enacted in 1987 and are still in force as of today, prohibits, *inter alia*, the import of smokeless tobacco products.

⁴ *HKSAR v Ma Wai Kwan, David & Others* [1997] 1 HKLRD 761

of public health and would constitute a legitimate exercise of the regulatory power of the Government, thus not being expropriatory in character.

Clause 4(9) of the Bill

Definition of “conventional smoking” under section 1 of the proposed new Schedule 7

9. According to the proposed section 2 of Cap. 371, “smoking act” means smoking or carrying –

- (a) a lighted cigarette, cigar or pipe; or
- (b) an activated ASP.

Meanwhile, under section 1 of Part 1 of the proposed new Schedule 7, “conventional smoking” means the smoking of a cigarette, cigar or pipe.

10. In terms of referring to the act of smoking any smoking product, taking cigarettes for example, it would be sufficiently clear to refer to “smoking a cigarette” (but not necessary to refer to “smoking a lighted cigarette”), because it is well understood that a cigarette can only be smoked if it is lighted, and therefore “smoking a cigarette” clearly implies “smoking a lighted cigarette”. In other words, a reference to “smoking a cigarette” would mean the same thing as “smoking a lighted cigarette”. Hence, the word “lighted” is not necessary and not included in the said definition of “conventional smoking”. In this connection, it is noteworthy that the existing section 15B(1) and (2) of Cap. 371 also refers to the “smoking... of cigarettes...”.

11. As for the carrying of a cigarette, the above analysis does not apply, because it is feasible for a cigarette to be carried without being lighted. Therefore, for the said definition of “smoking act”, it is necessary to refer to “carrying a lighted cigarette” because that reflects the intent.

12. Accordingly, the said definition of “smoking act” may be worded along the following line (emphasis added).

“*smoking act* (吸煙行為) means—

- (a) smoking—
 - (i) a cigarette, cigar or pipe; or
 - (ii) an alternative smoking product; or
- (b) carrying—

- (i) a lighted cigarette, cigar or pipe; or
- (ii) an activated alternative smoking product;”

13. However, in terms of drafting, the approach used above is unnecessarily complicated because, as mentioned above, it is also correct (although not necessary *if* the context is confined to “smoking” (as opposed to “carrying”) itself) to refer to “smoking a lighted cigarette, cigar or pipe” and “smoking an activated [ASP]”. The drafting approach used in the Bill for the said definition of “smoking act” would achieve the same effect without the unnecessary complication.

14. It would not be necessary to add “lighted” before “cigarette” in other references to “smoking a cigarette” in Cap. 371 because of a drafting concern that arises in the particular context of the definition of “smoking act” in section 2.

Whether smoking waterpipe tobacco would be a “smoking act”

15. According to section 2 of Cap. 371 (as amended by the Bill), “pipe” means “**a receptacle or other device designed for use for smoking tobacco in a form other than as a cigarette or cigar**, but does not include any [ASP]” (emphasis added). Meanwhile, “waterpipe”, as defined in section 1 of Part 1 of the proposed new Schedule 7, means “**a receptacle or other device designed for use for smoking tobacco in a form other than as a cigarette or cigar**” with certain restrictive conditions in addition (emphasis added). It follows that a “waterpipe” must be a “pipe” in the first place unless the “waterpipe” is an ASP. However, a “waterpipe” would not be an ASP because it is expressly excluded from being a device under item 1.1 or 2.1 of Part 2 of the proposed new Schedule 7, and a “waterpipe” does not fall within any of the descriptions of items 1.2, 1.3, 2.2, 2.3 and 3 of Part 2 of that Schedule. Accordingly, a “waterpipe” must fall within the definition of “pipe” in section 2. Hence, it is unnecessary to amend the proposed definition of “pipe” in section 2 in order to ensure that “waterpipe” would be covered.

16. Since a “waterpipe” is a “pipe”, tobacco packaged as being suitable for smoking in a “waterpipe” is “pipe tobacco” as defined in section 2 of Cap. 371. Accordingly, smoking such tobacco would be a “smoking act” under the proposed regime of Cap. 371.

17. In this connection, it is noteworthy that the Bill does not change any legal position regarding the smoking of a conventional waterpipe, because a conventional waterpipe is “**a receptacle or other device designed for use for**

smoking tobacco in a form other than as a cigarette or cigar” (definition of “pipe” in the existing section 2 of Cap. 371).

Clause 5 of the Bill

18. Section 3(2A) of Cap. 371 currently provides that a person is not prevented from smoking or carrying a lighted cigarette, cigar or pipe in a no smoking area if he is exempted under Schedule 5, including live performance and recording for film or television programme. Such exemptions are not proposed to be extended to ASPs under the Bill.

19. While currently the use of ASPs is not banned under the Bill otherwise than in a no smoking area or public transport carrier, the purpose of the Bill is to discourage the use of such products through prohibiting supply, by banning the import, manufacture, sale, distribution and promotion of the products as they are harmful to health and can bring about gateway and renormalisation effects. We would like to avoid the situation where the use of ASPs during a live performance and recording for film or television programme generates public interest in such products. Moreover, there should no longer be any local supply of ASPs upon enactment of the Bill and therefore we consider it not necessary to extend the exemption under the current section 3(2A) to ASPs.

Clause 14(4) and (5) of the Bill

20. According to the proposed section 12(4) of Cap. 371, an exemption is provided for the display of a smoking product advertisement in or upon any premises of any manufacturer of conventional smoking products (“CSPs”) or any wholesale dealer dealing in CSPs that are used for the manufacturing of CSPs or for the purpose of dealing by wholesale in CSPs, and that the advertisement is not visible from outside the premises. Such exemption is not proposed to be extended to that of ASPs, i.e. the premises of any manufacturer of ASPs or any wholesale dealer dealing in ASPs that are used for the manufacturing of ASPs or for the purpose of dealing by wholesale in ASPs.

21. The manufacture, sale and distribution of ASPs are prohibited under the proposed new section 15DA(1) of Cap. 371. The exemption of sale for export is only to allow retailers to clear out remaining stocks of ASPs. There would not be any local manufacture or wholesale of ASPs after the ban comes into operation. Therefore, we consider it not necessary to extend the exemption provided under the proposed section 12(4) to that of ASPs.

Clauses 18(13), (16) to (20) and 29 of the Bill

List of words or phrases not to be included in smoking product advertisements

22. According to the proposed section 14(2) of Cap. 371, an advertisement or object shall be deemed to be a smoking product advertisement if it includes the name or trade name of any person associated with the marketing of any smoking product, or any trade mark or brand name of a smoking product, or any pictorial device or part thereof commonly associated therewith. The proposed section 14(4) provides an exemption to the proposed section 14(2) if certain conditions are satisfied, one of which is that such advertisement or object does not mention the words or phrases as listed under the proposed new Schedule 8. Therefore, an advertisement or object merely having the letters “HTP” would not be considered as a smoking product advertisement under Cap. 371.

23. Moreover, abbreviations as listed under the proposed new Schedule 8 are capable of having smoking product-related meanings, for example, “HTP” is the abbreviation for “heated tobacco products” used by the World Health Organization⁵ for HNB products. Although some words or phrases as listed under the proposed new Schedule 8 are capable of bearing an unrelated meaning, they would very easily make people think of smoking products or smoking. We are of the view that amendment to the proposed new Schedule 8 is not necessary.

Display of specified price marker, price board or catalogues

24. Under the proposed section 14(6) of Cap. 371, the display of price marker, price board or catalogues at any premises where CSPs are offered for sale is not a smoking product advertisement. We consider it not necessary to extend such exemption to premises where ASPs are offered for sale as local sale is prohibited after the enactment of the Bill, and the exemption of sale for export is only to allow retailers to clear our existing stocks of ASPs.

Clause 23 of the Bill

Penalty level under the proposed new section 15DA

25. Under the Bill, any person who contravenes the proposed new section 15DA(1) commits an offence and is liable to a fine at level 5 and to

⁵ https://www.who.int/tobacco/publications/prod_regulation/heated-tobacco-products/en/

imprisonment for 6 months. We consider the nature of the offences under the current Cap. 371 different from that under the proposed new section 15DA(1). The proposed new section 15DA(1) seeks to ban the import, manufacture, sale, distribution for certain purposes, possess for certain purposes, or promoting in certain ways of ASPs, which imposes a more stringent control than the regulation of CSPs under the current Cap. 371. Contravention of the proposed new section 15DA(1) should constitute a more serious offence. Therefore, with reference to the Smokeless Tobacco Products (Prohibition) Regulations (Cap. 132BW) which similarly prohibit the import, manufacture, sale, possession for sale, offer or exposure for sale etc. of smokeless tobacco product, we propose to set the penalty for the offence under the new section 15DA(1) as a fine at level 5 and to imprisonment for 6 months.

Liability of officers of bodies corporate

26. The proposed new section 15DB states that if a body corporate commits an offence under the proposed new section 15DA(4), and it is proved that the offence was committed with the consent or connivance of an officer of the body corporate, or is attributable to any neglect on the part of an officer of the body corporate, the officer also commits the offence. Even without the provisions as the proposed section 15DB, directors of a body corporate may be liable under section 101E of Criminal Procedure Ordinance (Cap. 221), which provides that where an offence has been committed by a company and it is proved that the offence was committed with the consent or connivance of a director or other officer concerned in the management of the company, or any person purporting to act as such director or officer, the director or other officer shall be guilty of the like offence. The difference between the proposed section 15DB of Cap. 371 and section 101E of Cap. 221 is that under the proposed section 15DB, an officer may be found guilty if the commission of the proposed section 15DA offence by the body corporate is attributable to the officer's neglect. This offers an additional means by which an officer would become liable for the offence committed by a company (apart from where the director/officer has consented or connived to the commission).

27. As the Bill aims to impose a ban on ASPs rather than CSPs, we do not propose to have similar provision to the other offences under Cap. 371.

Definition of "specified cargo transshipment area"

28. For both the proposed new section 15DD of Cap. 371 and section 2 of the Import and Export Ordinance (Cap. 60), the policy intent is that for an area to fall within the definition in question, it is sufficient for the area to be either

designated under section 35 of the Aviation Security Ordinance (Cap. 494) or approved under section 2AA of Cap. 60.

29. In the proposed new section 15DD of Cap. 371, the use of “or” as the conjunction reflects the above intent clearly.

30. For section 2 of Cap. 60, the use of “and” as the conjunction would also reflect the same intent, because if the intent were that both the designation under Cap. 494 and approval under Cap. 60 were necessary, that definition should have been drafted along the following line instead.

“cargo transshipment area of Hong Kong International Airport” (機場貨物轉運區) means any part of Hong Kong International Airport that is—

- (a) designated under section 35 of the Aviation Security Ordinance (Cap. 494) as a restricted area; and
- (b) approved by the Commissioner of Customs and Excise under section 2AA;”

Registration of ASPs under Pharmacy and Poisons Regulations (Cap. 138A)

31. Under the Pharmacy and Poisons Ordinance (Cap. 138), “pharmaceutical product” includes any substance or combination of substances that may be used in, or administered to, human beings or animals for specified purposes. A pharmaceutical product can come in different preparations and dose forms. It may also comprise a delivery system (e.g. aerosol inhaler for nasal administration and syringe for injection) which, by control of the dosage and route of administration, affects the safety and efficacy of the product. Therefore, any item of ASP as set out in the Part 2 of the proposed new Schedule 7 may be registered as a pharmaceutical product upon satisfying the relevant authority of its safety, quality, and efficacy in accordance with regulation 37 of Cap. 138A.

32. The sale control of a pharmaceutical product is determined by the Pharmacy and Poisons Board based on the advice of the Poisons Committee in accordance with section 31 of Cap. 138. Under Cap. 138A, a pharmaceutical substance listed under Part 1 of Schedule 10 (the “Poisons List”) may only be sold on the registered premises of an authorized seller of poisons by a registered pharmacist or in the presence and under his/her supervision. A pharmaceutical substance listed under Part 2 of the Poisons List may only be sold on the registered premises of an authorised seller of poisons or by a listed seller of poisons. A pharmaceutical product that does not contain any substance listed under the Poisons List may be sold in any retail shop, unless it contains

substance that are regulated and subject to different sale control under the Antibiotics Ordinance (Cap. 137) or the Dangerous Drugs Ordinance (Cap. 134).

33. Ingredients of ASPs are highly variable and may include unknown substances. Applicants for registration of pharmaceutical product must provide, among other things, details of ingredients and proof in relation to the safety, efficacy and quality of the products or substances to be registered. If a product contains any poison included in Schedule 1 or Schedule 3 to Cap. 138A, it is subject to restrictions on sale, supply and record keeping applicable to such poison.

Disposal of ASPs by the Department of Health ("DH")

34. The proposed section 15DG(1) of Cap. 371 provides an inspector with the power to seize, remove or detain any article if the inspector reasonably suspects that the article is an ASP and an offence under the proposed section 15DA(4) has been committed, is being committed or is about to be committed in respect of the article. For any article removed or detained with the power provided under the proposed section 15DG(1), an inspector will, after further examining such article, determine whether the article should be seized and disposed of under section 15H(1) or released.

Persons detained by an inspector

35. According to the proposed new section 15DG(2), if an inspector reasonably suspects that a person has committed or is committing an offence under section 15DA(4), the inspector may detain the person to facilitate the enforcement of the proposed new section 15DA. An inspector shall detain such person for a reasonable period as long as it is necessary to facilitate the enforcement of the aforementioned section. As for when the suspect would be cautioned by the inspector, this will depend on the actual facts of the case. As soon as the inspector has reasonable grounds to suspect that there has been a commission of the proposed new section 15DA offence, the inspector should caution the suspect before putting any questions to the suspect. Where the inspector is of the view that the suspect may be prosecuted for an offence, he should further caution the suspect.

ASPs seized, removed or detained by a Customs and Excise (“C&E”) officer

36. According to the proposed new section 15DH(3), a C&E officer may seize, remove or detain any article if the officer reasonably suspects that the article is an ASP and an import offence has been committed or is being committed in respect of the article. A C&E officer may detain an article suspected to be ASP until the handing over of the article to DH officers for examination and to determine whether the article should be seized and transferred to DH inspectors for follow up.

Persons detained by a C&E officer

37. The proposed new section 15DH(5) provides that if a C&E officer reasonably suspects that a person has committed or is committing an import offence, the officer may detain the person to facilitate the enforcement of section 15DA in relation to the offence. C&E officers may detain such person who was found in possession of suspected ASP at any entry point until DH officers arrive at the scene to take over the subject person and ASPs for follow-up investigation and prosecution, as appropriate.

38. The power to detain a person as provided under the proposed section 15DH(5)(a) of Cap. 371 should be sufficient for handling an import offence under normal circumstances. It is only under very rare circumstances, such as when such person becomes very uncooperative or even attempts to escape, that a C&E officer may need to effect an arrest under the proposed section 15DH(5)(b) of Cap. 371.

Clause 26(1) to (5) of the Bill

39. According to the proposed item 10 of Part 2 of Schedule 2 to Cap. 371, a room which is designated for tasting or testing of smoking products in the manufacturing or business premises of a business engaged in the smoking products trade is, subject to compliance with the specified conditions, exempted from the smoking ban. After the ban comes into operation, even though there should not be any import or local manufacture of ASPs, it is possible that businesses engaging in the ASP trade will carry out tasting or testing of ASPs with their remaining stocks in their business premises as necessary for conducting the business of export. As tasting or testing of ASPs within the aforementioned premises is unlikely to generate public interest in ASPs or create possible loophole that undermines the very high level of protection to the public this Bill is seeking to achieve, we propose to extend the exemption of

smoking ban to the tasting or testing of ASPs as set out under the proposed item 10 of Part 2 of Schedule 2 to Cap. 371.

Yours sincerely,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

(Miss Carol WONG)
for Secretary for Food and Health