



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

---

*Our Ref:* FH CR 1/3231/19  
*Your Ref:* LS/B/11/18-19

*Tel. No.:* 3509 8961  
*Fax No.:* 2840 0467

18 November 2019

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 3 June 2019. I set out below our response to the issues raised therein.

**A. SCHEDULE I OF THE INCOMING LETTER**

**Paragraph 2 of the Administration’s letter of 15 May 2019 (same below unless otherwise specified)**

**Paragraph 15 of Messrs Herbert Smith Freehills’s letter of 18 February 2019**

2. Messrs Herbert Smith Freehills, acting for British-American Tobacco Company (Hong Kong) Limited, issued a letter dated 18 February 2019 to Legislative Council Members regarding the views of its client on the Bill. Paragraph 15 concerns the need for public consultation on the proposed ban. In gist, it is argued that the Government has not properly consulted all stakeholders and that constituted a breach of procedural fairness.

3. Although, as a matter of administrative law, there is generally no right to be heard before the making of specific legislation, the Government often allows relevant stakeholders reasonable opportunities to present their views on legislative proposals directly or indirectly. The Food and Health Bureau first raised the idea of a full ban on e-cigarettes at a Legislative Council (“LegCo”) Panel on Health Services (“HS Panel”) meeting in May 2015. The HS Panel arranged a meeting with deputations in July 2015, at which the public were invited to express their views on the various tobacco control legislative proposals, including the ban on e-cigarettes. A total of 100 organisations and individuals presented their views at the meeting and 54 written submissions were received from those not attending the meeting. Later in June 2018, the Government briefed the LegCo HS Panel on the regulatory proposal for alternative smoking products (“ASPs”). 104 submissions were received. We also received close to 2 000 letters or email messages from the public or organisations expressing their views on a full ban. The Hong Kong Council on Smoking and Health alongside representatives from the medical professions, patient groups and the education sector meanwhile held joint press conferences on 15 June, 27 September and 15 October 2018. Upon reviewing the submissions by the public or different organisations and weighing the pros and cons of a regulatory approach as opposed to a full ban by the Government, the Chief Executive, with the protection of public health as the prime consideration, announced in the 2018 Policy Address to propose a full ban of ASPs. The Food and Health Bureau has taken into account all the submissions and representations received when formulating the legislative proposals and finalising the Bill.

4. Having said that, we should also be mindful of the tobacco industry’s tactics of interfering with implementation of tobacco control measures, including direct and indirect political lobbying and campaign contributions, financing of research, attempting to affect the course of regulatory and policy machinery.<sup>1</sup> Article 5.3 of the World Health Organisation (“WHO”) Framework Convention on Tobacco Control (“FCTC”) requires that Parties shall, in setting and implementing public health policies with respect to tobacco control, act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law. FCTC defines the tobacco industry as “tobacco manufacturers, wholesale distributors and importers of tobacco products”. The Guidelines for implementation of Article 5.3 contain, *inter alia*, the principle that “there is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public

---

<sup>1</sup> Guidelines for implementation of Article 5.3 of the FCTC, as adopted by the Conference of the Parties to the FCTC.

health policy interests.”<sup>2</sup> Therefore, any public consultation on tobacco control measures needs to be viewed in the light of the efforts of the tobacco industry to resist and derail legislative efforts to implement effective tobacco control.

#### **Paragraph 4 of the Administration’s letter**

##### Proportionality test

5. There is increasing evidence that ASPs are definitely harmful to health and would bring about gateway effects. Please refer to Annex B of the LegCo brief for detailed information on the health risks, gateway and renormalisation effects, prevalence, the WHO recommendation, etc., in relation to ASPs. A full ban will be the most effective form of control when a new product has not yet established itself in a market. This is particularly true for products that are expected to be aggressively marketed in whatever way possible. With increasing evidence on the adverse effects of ASPs, WHO recommendations and overseas experience, we consider that any control short of a full ban undermines our ongoing efforts on tobacco control, and requires a complex enforcement regime with a whole new set-up involving extra resources, the use of which we do not consider well-justified. A fundamental question would be why we should put in significant public resources to “facilitate” the introduction of new products that are known to be harmful.

6. We must also stress that although these new products have been marketed just for a short period of time, we must avoid what had happened regarding the regulation of conventional tobacco products. On the one hand, a mere regulatory approach may be construed as the Government formally endorsing these ASPs. On the other, heat-not-burn (“HNB”) products in particular contain real tobacco and are designed to be as addictive as conventional cigarettes. With the intended attraction of these new products to the younger generation drawn to new technology, we could be faced with a new generation with nicotine dependence. Not only has smoking prevalence in Hong Kong reached a historic low of 10% in 2017, we also have a low smoking prevalence among young people, 1% among those aged 15-19 and 6.7% among those aged 20-29. The formal introduction of these products into the local market could reverse this trend. We must therefore take action before these products become popular. We must ensure our achievement in tobacco control over the years will not be undermined, and prevent the harm of these new products from taking root. A full ban of these products will be necessary to achieve these objectives in protecting public health.

---

<sup>2</sup> Article 1(e) of the FCTC.

7. The proposed ban only covers import, manufacture, distribution, sale and advertisement of ASPs. It does not propose to ban the purchase and export of ASPs and the use of these products except in no smoking areas. Besides, the proposed ban will not preclude the registration of ASPs that are pharmaceutical products with the Pharmacy and Poisons Board, provided that the requirements on safety, quality and efficacy under the Pharmacy and Poisons Ordinance (Cap. 138) are met. Moreover, the courts would accord a wide margin of discretion to the Government and the legislature in the present context which involves a matter of social policy relating to public health. As ASPs are not daily necessities but are merely consumer goods that can have prejudicial effect on the health of users and indeed others, any interference with smokers' private lives, put into perspective, would be minimal if not negligible and the burden on people who wish to use ASPs is not unacceptably harsh in the circumstances. Considering the immense societal benefits, the proposed ban is not disproportionate to the legitimate aim of the protection of public health.

### **Paragraph 5 of the Administration's letter**

#### Deprivation of property

8. While the Bill would restrict the use of ASPs (as regards import, manufacture, sale, etc.), it would not give rise to deprivation of property requiring real value compensation under the Basic Law. It is pertinent to note that the relevant property owners would retain full legal title and control of their property under the Bill. The proposed ban on ASPs would not strip the property of all its meaningful use, or all its economically viable use. For instance, the owners concerned would have the possibilities to export ASPs and conduct certain re-export trade of ASPs.<sup>3</sup> Insofar as registered trademarks are concerned, trademark owners would still be able to enforce the negative rights conferred by the registrations of their marks against third parties. Hence, it is the Government's assessment that the Bill would not have the effect of "depriving" owners of their property with respect to ASPs under Article 105 of the Basic Law.

### **Paragraph 7 of the Administration's letter**

#### Article XI (General Elimination of Quantitative Restrictions) of the General Agreement on Tariffs and Trade 1994

---

<sup>3</sup> Import of ASPs which are articles in transit and air transshipment cargoes are exempted from the proposed ban.

9. Under the General Agreement on Tariffs and Trade 1994 (“GATT 1994”), Article XI (General Elimination of Quantitative Restrictions) generally prohibits quantitative restrictions on the import or the export of any product. Article XI applies to **border measures**.

10. On the other hand, Article III (National Treatment on Internal Taxation and Regulation) of GATT 1994 requires that WTO Members provide national treatment to all other WTO Members. Article III:1 stipulates the general principle that WTO Members should not apply internal taxes or other internal charges, laws, regulations and requirements to imported or domestic products in a manner that protects domestic production. With regard to internal laws and regulations, Article III:4 provides that WTO Members shall accord imported products of the other WTO Members treatment no less favourable than that accorded to the like domestic products. Article III applies to **internal measures**.

11. Article III and Article XI are mutually exclusive in that Article III applies to internal measures and Article XI applies to border measures. As such, before considering which of these provisions is applicable to the present situation, it is important to firstly determine whether the proposed full ban under the Bill is an internal measure or a border measure. For the texts of Article III and Article XI of GATT 1994, please see [https://www.wto.org/English/Docs/E/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/English/Docs/E/legal_e/gatt47_01_e.htm).

12. The interpretative note to Article III of GATT 1994 clarifies that any internal regulation, which applies to an imported product and to the like domestic product and is enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal measure and accordingly subject to Article III of GATT 1994. The interpretative note to Article III of GATT 1994 states that “[a]ny internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III:1] which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in [Article III:1], and is accordingly subject to the provisions of Article III”.

13. The proposed full ban involves an import ban on ASPs. On the basis of the aforesaid interpretative note to Article III of GATT 1994, the prohibition to import ASPs is considered only as the “border arm” of the prohibition on the manufacture and sale of those products in Hong Kong. As such, the proposed

full ban should be regarded as an internal measure and is accordingly subject to Article III, rather than Article XI, of GATT 1994.

14. Furthermore, given that the proposed full ban applies equally to imported and domestic ASPs and is not a protectionist measure, no discrimination is involved and the proposed full ban is in compliance with the obligation of national treatment under Article III of GATT 1994.

### **Paragraph 8 of the Administration's letter**

#### Investment Promotion and Protection Agreements

15. The proposed full ban under the Bill is in compliance with obligations under the Investment Promotion and Protection Agreements ("IPPAs") of Hong Kong (including the IPPA with the United Kingdom) for the following reasons.

16. Firstly, with regard to the obligation on expropriation under Hong Kong's IPPAs, the proposed full ban is not expropriatory in character because it falls squarely within the police powers exception to the prohibition of expropriation.

17. The existence of police powers exception is well-recognised in investment arbitration jurisprudence. In particular, it has been noted in such jurisprudence that protecting public health has long been recognized as an essential manifestation of government's police powers. Furthermore, it is well-established in international law that government is not liable to pay compensation to a foreign investor when, in the normal exercise of its regulatory powers, it adopts in a non-discriminatory manner *bona fide* regulations that are aimed to the general welfare.

18. Under the Bill, the proposed full ban will apply regardless of nationality, and is clearly not designed to cause any foreign investor to abandon property to the Government or sell property at a distress price. We consider that the proposed full ban is a good faith measure aimed at protection of public health. As such, the proposed full ban is a legitimate exercise of the regulatory power of the Government and is thus not expropriatory in character.

19. Furthermore, it is well-established in investment arbitration jurisprudence that expropriation requires substantial deprivation. The proposed full ban under the Bill will not constitute a substantial deprivation of the relevant foreign investor's investment in Hong Kong because the relevant

foreign investor will still be in full control of the investment and is able to export ASPs.

20. Secondly, the proposed full ban is also in compliance with the fair and equitable treatment obligation under Hong Kong's IPPAs and does not constitute an unreasonable or discriminatory measure that impairs the use and enjoyment of foreign investor's investment in Hong Kong. The proposed full ban pursues the rational policy of protecting the public from the health risks and the gateway and renormalisation effects posed by ASPs and ensuring that Hong Kong's hard-earned achievements in tobacco control over the years will not be undermined. In fact, such policy is not merely reasonable but of fundamental public health importance.

21. As mentioned above, the proposed full ban is a proportionate measure for the legitimate purpose of public health protection. As such, the proposed full ban bears a reasonable relationship to the policy of protection of public health.

22. Investment arbitration jurisprudence has also noted that arbitral tribunals will accord a degree of deference in examining or assessing the acts of a given government, especially in the context of public health. In particular, such jurisprudence emphasises that substantial deference is due as regards government authorities' decisions on the measure(s) which should be taken to address an acknowledged and major public health problem.

23. In light of the aforesaid, given that the proposed full ban is a good faith measure that pursues the rational and important policy of protection of public health and applies equally to both Hong Kong's investors and foreign investors, the proposed full ban is neither arbitrary nor discriminatory and is in compliance with the fair and equitable treatment obligation and the obligation of non-adoption of unreasonable or discriminatory measures that impair the use and enjoyment of foreign investor's investment under Hong Kong's IPPAs.

## **Paragraphs 26 to 27 of the Administration's letter**

### Liability of officers of bodies corporate

24. The proposed 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. While currently HNB products

are mainly developed by large tobacco companies, it is possible that an ASP business is run by an unincorporated body, such as a partnership. To ensure that we impose the same level of control over various ASP businesses, we are considering a Committee Stage amendment (“CSA”) to have similar provisions of the proposed section 15DB for partnerships and other unincorporated bodies.

### **Paragraphs 31 to 33 of the Administration’s letter**

#### Registration of ASPs as pharmaceutical products

25. As explained in paragraphs 31 and 32 of the Administration’s letter, any item of Category 2 of ASP may be registered as a pharmaceutical product if it meets the criteria of safety, quality and efficacy. If an ASP, regardless of category as defined under the proposed Schedule 7 to the Smoking (Public Health) Ordinance (Cap. 371), were successfully registered as a pharmaceutical product, whether such product should be put under sales control would depend on the consideration by the Pharmacy and Poisons Board taking into account the risk of the product. The Board may amend the schedule for sale restriction under the Pharmacy and Poisons Regulations (Cap.138A). In principle, any item Category 2 of ASP, upon registration as a pharmaceutical product and subject to any condition imposed on such registration, could be sold to any persons in any retail shop if it does not contain any substance listed under Schedule 10 of Cap.138A or any substance that is regulated and subject to different sale control under the Antibiotics Ordinance (Cap.137) or the Dangerous Drugs Ordinance (Cap.134).

### **Paragraph 34 of the Administration’s letter**

#### Release of ASPs seized, removed and detained by a Department of Health (“DH”) inspector

26. As mentioned in paragraph 34 of the Administration’s letter, where any article is 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 to the owner, the person in whose possession the article is found or any person who is entitled to it. This is in line with the established practice in respect of conventional smoking products even though the relevant release procedures are not provided under the existing section 10A of Cap. 371, on which the drafting of the proposed new section 15DG(1) is modelled. There are in general no equivalent provisions concerning the release procedures in other ordinances which provide for a power to seize, detain or remove an article.



As such, we consider it not necessary to stipulate the relevant procedure in the Bill.

### **Paragraph 35 of the Administration's letter**

#### Persons detained by an inspector

27. According to the proposed section 15DG(2) of Cap. 371, if an inspector reasonably suspects that a person has committed or is committing an offence under the proposed section 15DA(4), the inspector may detain the person to facilitate the enforcement of the proposed section 15DA. As mentioned in paragraph 35 of the Administration's letter, such person shall be detained for a reasonable period of time as long as it is necessary to facilitate the enforcement of the proposed section 15DA. Article 5 of the Hong Kong Bill of Rights ("BOR") and Article 28 of the Basic Law protect everyone from arbitrary or unlawful arrest or detention. Detention which is not reasonable or necessary in all circumstances would be in breach of BOR 5 which implements Article 9 of the International Covenant on Civil and Political Rights ("ICCPR").<sup>4</sup> In other words, the "reasonable time" requirement is implied if we read the proposed new section 15DG(2) together with BOR 5. Nonetheless, for the sake of clarity and user-friendliness, we are considering a CSA to provide expressly that the power of an inspector to detain a person pursuant to the proposed new section 15DG(2) is only for a reasonable time.

### **Paragraph 36 of the Administration's letter**

#### ASPs seized, removed and detained by a Customs and Excise ("C&E") Officer

28. According to the proposed new section 15DH(3) of Cap. 371, 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 an ASP until DH officers arrive at the scene to advise whether such article is indeed an ASP. If such article is an ASP, it will be seized and transferred to DH inspector for follow up. Otherwise, such article will be released to its owner, the person in whose possession the article is found or any person who is entitled to it. The release procedure for articles seized, removed

---

<sup>4</sup> As explained by the United Nations Human Rights Committee in their General Comment No. 35 (2014) on the right to liberty and security of person under the Article 9 of the ICCPR, the notion of "arbitrariness" must be interpreted to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as reasonableness, necessity and proportionality.

or detained by C&E officers is similar to that applicable to DH inspectors described in paragraph 26 above. As such, we consider it not necessary to stipulate the release procedure under both sections 15DH(3) and 15DG(1).

29. Regarding ALA's concern that the proposed new section 15DH(4) only deals with the seizure, but not the removal or detention, of ASPs by a C&E officer, we are considering a CSA to add the "remove or detain" elements to section 15DH(4) for the sake of clarity and alignment between 15DH(3) and (4).

### **Paragraphs 37 and 38 of the Administration's letter**

#### **Persons detained by a C&E Officer**

30. The proposed 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 the proposed section 15DA in relation to the offence. As similarly stated in paragraph 27 above, we are considering a CSA to provide expressly that the power of a C&E officer to detain a person pursuant to the proposed new section 15DH(5) is only for a reasonable time.

31. As for when the suspect would be cautioned by a C&E officer, generally speaking, as soon as the officer has reasonable grounds to suspect that there has been a commission of an import offence, the officer should, before putting any questions to the suspect, caution the suspect. In reality, C&E officers may detain a suspect and the suspected ASPs to facilitate the enforcement of the proposed section 15DA until DH officers preliminarily check whether the subject articles are ASPs and if necessary, take over the suspect and the ASPs for follow-up investigation and prosecution, as appropriate. 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. After an arrest is effected, C&E officers will take the arrested person to an office of Customs and Excise Service for further inquiries. The arrested person will be released if C&E officers decide not to bring any charges against the person. If a charge is to be laid against the arrested person, he/she will be taken to a police station to be dealt with under the Police Force Ordinance (Cap. 232).

## **B. SCHEDULE II OF THE INCOMING LETTER**

### **Clause 4(9) of the Bill**

32. The word “advertising” appears in the English text of the long title and the heading of Part 4 of Cap. 371 (whether as amended by the Bill or not). According to the online edition of the *Oxford English Dictionary*, “advertising” as a noun means “the action or process of advertis[ing]”. Since section 5 of the Interpretation and General Clause Ordinance (Cap. 1) provides that “[w]here any word or expression is defined in any Ordinance, such definition shall extend to the grammatical variations and cognate expressions of such word or expression”, the word “advertising” can be readily understood by a reader of the English text by reference to the definition of “advertisement (廣告)” in section 2 of Cap. 371. There is no need to define “advertising”.

33. The corresponding Chinese term for “advertising” should not be “廣告” in the abovementioned provisions in Cap. 371, as “廣告” means advertisements and cannot be stretched to mean the action or process of advertising. To clearly convey the meaning, a new definition of “宣傳” is added for the Chinese text.

### **Clause 5 of the Bill**

34. Section 3(2A) of Cap. 371 provides that subsection (2) does not prevent a person from smoking or carrying a lighted cigarette, cigar or pipe if the person is exempt from subsection (2) under Schedule 5 to Cap. 371. Schedule 5 as amended concerns only “conventional smoking act (傳統吸煙行為)”, which is defined in section 1(1) of that Schedule in Chinese as “吸用或攜帶燃着的香煙、雪茄或煙斗”. To align with the wording of that definition, a CSA will be proposed to amend the Chinese text of section 3(2A) by replacing “吸煙” with “吸用”.

### **Clauses 18(4) and 27(19) of the Bill**

35. Clause 18(4) of the Bill seeks to amend section 14(1)(b) of Cap. 371, while clause 27(19) of the Bill seeks to amend the Chinese text of section 4(b) of Schedule 5 to Cap. 371. The English text of both sections refer to “to promote...the use of”. The target of promotion in both scenarios is the act of using certain smoking products. It is proposed that in these sections, the corresponding Chinese term for “promote” to be changed from “推廣” to “提倡” to improve collocation. According to *現代漢語詞典*(繁體字版), “提倡” means “指出事物的優點鼓勵大家使用或實行” and is more suitable for an act.

36. By contrast, where Cap. 371 (including provisions that are to be amended by the Bill) and any proposed new section refers to the promotion of a

product, “推廣” is a more appropriate Chinese term, as it means “擴大事物的使用範圍或起作用的範圍” according to *現代漢語詞典(繁體字版)*.

### **Clauses 21(2) of the Bill**

37. The Administration agrees to introduce a CSA to the Chinese text of the proposed section 15A(3)(a) of Cap. 371 along the following line: “任何人不得將或要約將傳統吸煙產品售賣予任何其他人，或將傳統吸煙產品給予任何其他人，以換取換物憑證”.

### **Clauses 23 of the Bill**

38. This is a clerical error which the Administration undertakes to amend by way of CSA.

Yours sincerely,



(Miss Emily) CHAN

for Secretary for Food and Health