

Import and Export (Amendment) Bill 2023

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A BILL

To

Amend the Import and Export Ordinance to provide for the prohibition on importing alternative smoking products and the exemptions from it; and to make related amendments to certain other enactments.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title

This Ordinance may be cited as the Import and Export (Amendment) Ordinance 2023.

2. Enactments amended

The enactments specified in Parts 2 and 3 are amended as set out in those Parts.

Part 2

Amendment to Import and Export Ordinance (Cap. 60)

3. Part IIIA added

After Part III—

Add

“Part IIIA

Prohibition on Importing Alternative Smoking Products and Exemptions

Division 1—Preliminary

13A. Interpretation (Part IIIA)

In this Part—

alternative smoking product (另類吸煙產品) has the meaning given by section 2(1) of the Smoking (Public Health) Ordinance (Cap. 371);

specified intermodal transshipment cargo (指明聯運轉運貨物) means an article—

- (a) imported in a vehicle or vessel; and
- (b) consigned—
 - (i) on a through bill of lading from a place outside Hong Kong to another place outside Hong Kong; and
 - (ii) for export in an aircraft departing from the Hong Kong International Airport.

Division 2—General Prohibition on Importing Alternative Smoking Products

13B. Offence of importing alternative smoking products

A person who imports an alternative smoking product commits an offence and is liable—

- (a) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years; or
- (b) on conviction on indictment to a fine of \$2,000,000 and to imprisonment for 7 years.

13C. Liability of officers of bodies corporate, partners and members of unincorporated bodies

- (1) If a body corporate commits an offence under section 13B, and it is proved that the offence—
 - (a) was committed with the consent or connivance of a person specified in subsection (2); or
 - (b) is attributable to any neglect on the part of the person,

the person also commits the offence.
- (2) The person referred to in subsection (1) is—
 - (a) a director, manager, secretary or other similar officer of the body corporate; or
 - (b) a person purporting to act in the capacity of a person referred to in paragraph (a).
- (3) If a partner in a partnership commits an offence under section 13B, and it is proved that the offence—
 - (a) was committed with the consent or connivance of a person specified in subsection (4); or

- (b) is attributable to any neglect on the part of the person,
the person also commits the offence.
- (4) The person referred to in subsection (3) is—
 - (a) any other partner in the partnership or any other person concerned in the management of the partnership; or
 - (b) a person purporting to act in the capacity of a person referred to in paragraph (a).
- (5) If a member of any other unincorporated body commits an offence under section 13B, and it is proved that the offence—
 - (a) was committed with the consent or connivance of a person specified in subsection (6); or
 - (b) is attributable to any neglect on the part of the person,
the person also commits the offence.
- (6) The person referred to in subsection (5) is—
 - (a) any other member, or any manager, secretary or other similar officer, of the unincorporated body; or
 - (b) a person purporting to act in the capacity of a person referred to in paragraph (a).

Division 3—Exemptions from Prohibition on Importing Alternative Smoking Products and Related Matters

Subdivision 1—Articles in Transit and Certain Transshipment Cargoes

13D. Interpretation (Subdivision 1)

(1) In this Subdivision—

practice guidelines (實務指引) means the guidelines issued under section 13H(1);

registered operator (登記營運人) means a person in respect of whom a registration under section 13G has effect.

(2) For the purposes of this Subdivision—

(a) a vehicle is a person's business vehicle if the person imports any article in the vehicle as a registered operator; and

(b) a vessel is a person's business vessel if the person imports any article in the vessel as a registered operator.

13E. Exemption for articles in transit and certain transshipment cargoes

(1) Section 13B does not apply in relation to an alternative smoking product that is—

(a) an article in transit;

(b) an air transshipment cargo; or

(c) a specified intermodal transshipment cargo imported by a registered operator.

- (2) However, section 13B does apply in relation to an alternative smoking product mentioned in subsection (1) if, at any time between its being brought into and taken out of Hong Kong—
 - (a) for an article in transit on an aircraft—the product is removed from the aircraft other than in the cargo transshipment area of Hong Kong International Airport;
 - (b) for an article in transit in a vessel—the product is removed from the vessel;
 - (c) for an air transshipment cargo—the product is removed from the cargo transshipment area of Hong Kong International Airport; or
 - (d) for a specified intermodal transshipment cargo—
 - (i) if the product has not entered the cargo transshipment area of Hong Kong International Airport or an area specified under section 13I(1) (each a *specified area*)—the product is removed from the vehicle or vessel in which it is imported; or
 - (ii) if the product has entered a specified area—the product is removed from that area.
- (3) If section 13B applies in relation to a product because of subsection (2), for the purposes of the application—
 - (a) the product is deemed to be imported at the time of the removal mentioned in that subsection; and

- (b) the person who brought the product, or caused it to be brought, into Hong Kong as an article in transit, air transshipment cargo or specified intermodal transshipment cargo is deemed to be the person who imported the product.

13F. Defence related to import of alternative smoking products deemed under section 13E

- (1) It is a defence for a person mentioned in section 13E(3)(b) who is charged under section 13B to show that the person took all reasonable steps and exercised reasonable diligence to avoid the removal mentioned in section 13E(2).
- (2) Subsection (3) applies if a defence under subsection (1) involves an allegation that the offence was committed because of—
 - (a) another person’s act or default; or
 - (b) the defendant’s reliance on information given by another person.
- (3) Without the leave of the court, the defendant may not rely on the defence unless, at least 10 days before the hearing of the proceedings, the defendant has served a written notice on the prosecutor giving particulars of—
 - (a) the person who allegedly committed the act or default, or allegedly gave the information; and
 - (b) the act, default or information concerned, of which the defendant is aware at the time the notice is served.

- (4) The defendant may not rely on a defence under subsection (1) claiming that the offence was committed because of the defendant's reliance on information given by another person unless the defendant shows that the reliance was reasonable in all the circumstances, having regard in particular to—
 - (a) the steps that the defendant took, and those which might reasonably have been taken, for verifying the information; and
 - (b) whether the defendant had any reason to disbelieve the information.

13G. Import of specified intermodal transshipment cargoes: registration as registered operator

- (1) A person who intends to import any articles in reliance on an exemption under section 13E(1)(c) may, in accordance with the practice guidelines and in the form specified under subsection (9), apply to the Commissioner for registration as a registered operator.
- (2) The Commissioner may—
 - (a) approve an application made under subsection (1); or
 - (b) refuse the application.
- (3) After determining an application made under subsection (1), the Commissioner must, as soon as practicable, inform the applicant in writing of—
 - (a) if the application is approved—
 - (i) the approval; and

- (ii) the date on which the registration is to take effect; or
 - (b) if the application is refused—
 - (i) the refusal; and
 - (ii) the reasons for the refusal.
- (4) If the Commissioner is satisfied that a person is no longer fit to be a registered operator, the Commissioner may by written notice given to the person—
 - (a) cancel the registration; or
 - (b) suspend the registration.
- (5) For the purposes of subsection (4)(b), the Commissioner may—
 - (a) determine a period the Commissioner considers appropriate so that a registration suspended under that subsection has no effect for the period; or
 - (b) impose any terms or conditions the Commissioner considers appropriate so that a registration suspended under that subsection has no effect until the Commissioner is satisfied that the terms or conditions are complied with.
- (6) If the Commissioner decides to cancel or suspend under subsection (4) a person's registration, the Commissioner must, as soon as practicable after so deciding, inform the person in writing of—
 - (a) if the registration is cancelled—
 - (i) the cancellation;
 - (ii) the reasons for the cancellation; and

- (iii) the date on which the cancellation is to take effect; or
 - (b) if the registration is suspended—
 - (i) the suspension;
 - (ii) the reasons for the suspension; and
 - (iii) the period, or terms or conditions, mentioned in subsection (5).
- (7) The Commissioner—
 - (a) in considering an application made by a person under subsection (1); or
 - (b) in considering for the purposes of subsection (4) whether a person is no longer fit to be a registered operator,
may have regard to any matters that the Commissioner considers relevant, including whether the person has contravened any practice guidelines.
- (8) For determining for the purposes of subsection (7) whether a person has contravened any practice guidelines, the Commissioner—
 - (a) may by written notice given to the person require the person to provide any information that is specified in the notice; and
 - (b) may at any reasonable time inspect any vehicle or vessel that the person intends to use as a business vehicle or business vessel.
- (9) The Commissioner may specify the form required for the purposes of this section.

13H. Import of specified intermodal transshipment cargoes: issue of guidelines

- (1) The Commissioner may issue guidelines setting out—
 - (a) the manner in which an application under section 13G(1) must be made;
 - (b) the requirements that a registered operator's business vehicle or business vessel must meet;
 - (c) the manner in which any articles intended to be imported in reliance on an exemption under section 13E(1)(c) must be transported, stored and otherwise handled before being transferred to an aircraft for export; and
 - (d) any other matters that the Commissioner considers relevant to the import of any articles in reliance on that exemption.
- (2) The Commissioner—
 - (a) must publish the practice guidelines in a manner appropriate to bring them to the notice of persons affected by them; and
 - (b) must make copies of the practice guidelines available to the public (whether in hard copy form or electronic form).
- (3) The practice guidelines are not subsidiary legislation.
- (4) The Commissioner may amend or revoke any of the practice guidelines.
- (5) Subsections (2) and (3) apply to an amendment or revocation of the practice guidelines in the same way as they apply to the practice guidelines.

13I. Import of specified intermodal transshipment cargoes: area specified for section 13E

- (1) The Commissioner may, after consultation with the Airport Authority, by notice published in the Gazette specify an area for the purposes of section 13E(2)(d).
- (2) A notice published under subsection (1) is not subsidiary legislation.

Subdivision 2—Pharmaceutical Products and Poisons

13J. Relationship with Pharmacy and Poisons Ordinance

- (1) This Part does not limit the Pharmacy and Poisons Ordinance (Cap. 138).
- (2) If an alternative smoking product is registered as a pharmaceutical product under regulation 36 of the Pharmacy and Poisons Regulations (Cap. 138 sub. leg. A), other provisions of this Part do not apply in relation to the product.

Subdivision 3—Other Exemptions

13K. Exemption for persons in transit at Hong Kong International Airport

Section 13B does not apply to a person who—

- (a) arrives at the Hong Kong International Airport from a place outside Hong Kong; and
- (b) while in Hong Kong, does not pass through any immigration control.

13L. Exemption for Government Chemists

Despite section 13B, a Government Chemist (as defined by section 2 of the Evidence Ordinance (Cap. 8)) may import an alternative smoking product so far as it is necessary for the performance of the Government Chemist's functions.

Division 4—Enforcement

13M. Meaning of *inspector*

In this Division—

inspector (督察) means a public officer referred to in section 13P.

13N. Enforcement powers of members of Customs and Excise Service

- (1) This section applies to the exclusion of Part V (except sections 20(1)(c)(ii) and (d), 21(2)(c), (d) and (e) and 26) and of section 35.
- (2) For the enforcement of section 13B, a member of the Customs and Excise Service—
 - (a) may stop and search a person, and search anything in the person's possession;
 - (b) may stop, board and search any transport carrier;
 - (c) may examine any article (including cargo, unaccompanied baggage or unaccompanied personal belongings) that is not contained in a postal packet; and

- (d) may, in the presence of, and under the directions of, an officer of the Post Office, open and examine any postal packet.
- (3) A person searched under subsection (2)(a)—
 - (a) may only be searched by a person of the same sex; and
 - (b) may not be searched in a public place if the person objects to being so searched.
- (4) A member of the Customs and Excise Service may seize, remove or detain any article if the member reasonably suspects that—
 - (a) the article is an alternative smoking product; and
 - (b) an offence under section 13B has been, is being or is about to be committed in respect of the article.
- (5) If a member of the Customs and Excise Service reasonably suspects that a person has committed, is committing or is about to commit an offence under section 13B, the member—
 - (a) to facilitate the enforcement of that section, may detain the person for a reasonable period; and
 - (b) may arrest the person without warrant.
- (6) A magistrate may issue a warrant empowering a member of the Customs and Excise Service named in the warrant to at any time enter any place that is neither a public place nor a domestic premises if it appears to the magistrate from information on oath that there is reasonable cause for suspecting that—

- (a) an offence under section 13B has been, is being or is about to be committed in that place; or
 - (b) anything that is or contains, or that is likely to be or contain, evidence of an offence under section 13B is in that place.
- (7) A member of the Customs and Excise Service may use any force reasonably necessary for exercising a power under or pursuant to this section.
- (8) In this section—
- officer of the Post Office*** (郵政署人員) has the meaning given by section 2(1) of the Post Office Ordinance (Cap. 98);
- postal packet*** (郵包) has the meaning given by section 2(1) of the Post Office Ordinance (Cap. 98);
- transport carrier*** (交通工具) includes an aircraft, vehicle, vessel or train, and any other means of travel or transport.

13O. Supplementary provisions about enforcement powers of members of Customs and Excise Service

- (1) Part VI does not apply to any article seized, removed or detained under section 13N(4).
- (2) Such an article may be retained in the custody of a member of the Customs and Excise Service until it is transferred to an inspector for the enforcement of section 13B.
- (3) However, if the article is, or a member of the Customs and Excise Service reasonably suspects that it is, a specified intermodal transshipment cargo, subsection (2) also does not apply to the article and,

accordingly, section 102 of the Criminal Procedure Ordinance (Cap. 221) applies to the article.

13P. Inspectors to enforce section 13B

- (1) If a public officer is appointed under section 15F of the Smoking (Public Health) Ordinance (Cap. 371) to exercise a power and perform a duty, the officer may also exercise a power conferred, and perform a duty imposed, on the officer by section 13Q.
- (2) For the purposes of subsection (1), it does not matter whether the appointment is made before, on or after the date on which the Import and Export (Amendment) Ordinance 2023 (of 2023) comes into operation.

13Q. Enforcement powers of inspectors

- (1) An inspector—
 - (a) may seize, remove or detain any article if the inspector reasonably suspects that—
 - (i) the article is an alternative smoking product; and
 - (ii) an offence under section 13B has been, is being or is about to be committed in respect of the article; and
 - (b) may seize any other thing that appears to the inspector to be evidence of an offence under section 13B.
- (2) If an inspector reasonably suspects that a person has committed, is committing or is about to commit an offence under section 13B, the inspector may detain the person for a reasonable period to facilitate the enforcement of that section.

- (3) An inspector may do all or any of the following—
 - (a) require any person to give the person's name and address and to produce proof of identity if the inspector reasonably suspects that the person has committed, is committing or is about to commit an offence under section 13B;
 - (b) take photographs or make sound or video recording for obtaining evidence in connection with an offence under section 13B;
 - (c) require any person to produce for inspection documents or records under the control of the person for enabling the inspector to ascertain whether the person has committed, is committing or is about to commit an offence under section 13B;
 - (d) make copies of all or any part of the documents or records;
 - (e) require any person to provide the inspector with any assistance or information that is reasonably necessary to enable the inspector to exercise a power conferred, or perform a duty imposed, by this section.
- (4) A magistrate may issue a warrant empowering an inspector named in the warrant to at any time enter any place that is neither a public place nor a domestic premises if it appears to the magistrate from information on oath that there is reasonable cause for suspecting that—
 - (a) an offence under section 13B has been, is being or is about to be committed in that place; or

- (b) anything that is or contains, or that is likely to be or contain, evidence of an offence under section 13B is in that place.
- (5) In exercising a power under subsection (1), (2) or (3), or under a warrant mentioned in subsection (4), an inspector must, if requested, produce proof of his or her authority as an inspector.
- (6) A person who wilfully obstructs an inspector who is in the exercise of a power conferred, or in the performance of a duty imposed, by this section commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.
- (7) A person who, when required under subsection (3)(a) to give the person's name and address or to produce proof of identity—
 - (a) fails to do so; or
 - (b) gives a false or misleading name or address, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.
- (8) If an inspector seizes any property while exercising a power conferred, or performing a duty imposed, by this section, section 102 of the Criminal Procedure Ordinance (Cap. 221) applies as if the inspector were the police within the meaning of that section and the property were property that had come into possession of the police in connection with a criminal offence.
- (9) For the purposes of subsection (8), an article transferred to an inspector as mentioned in section 13O(2) is regarded as an article seized by the inspector.

(10) In this section—

proof of identity (身分證明文件) has the meaning given by section 17B(1) of the Immigration Ordinance (Cap. 115).”.

Part 3

Related Amendments

Division 1—Amendment to Specification of Public Offices Notice (Cap. 1 sub. leg. C)

4. Schedule amended (specification of public offices)

The Schedule, entry relating to the Commissioner of Customs and Excise specified for the purposes of the Import and Export Ordinance (Cap. 60), after “12,”—

Add

“13G, 13H.”.

Division 2—Amendments to Smoking (Public Health) Ordinance (Cap. 371)

5. Long title amended

The long title—

Repeal

“import,”.

6. Section 15DA amended (prohibition on import, manufacture or sale, etc.)

(1) Section 15DA, heading—

Repeal

“import,”.

(2) Section 15DA(1)—

Repeal paragraph (a).

- (3) Section 15DA, note—
Repeal
“*Import* and *export* are”
Substitute
“*Export* is”.

7. Sections repealed

Sections 15DC, 15DD, 15DE and 15DH—

Repeal the sections.

8. Section 15DI added

At the end of Part 4AB—

Add

“15DI. Saving provision relating to Import and Export (Amendment) Ordinance 2023

If an alternative smoking product is imported before the date on which the Import and Export (Amendment) Ordinance 2023 (of 2023) (*amending Ordinance*) comes into operation, this Ordinance as in force immediately before that date continues to apply in relation to the import as if the amendments to this Ordinance made by the amending Ordinance had not been made.”.

9. Section 15H amended (disposal of property seized by inspectors)

Section 15H—

Repeal subsection (2).

Explanatory Memorandum

The object of this Bill is to amend the Import and Export Ordinance (Cap. 60) (*principal Ordinance*) to provide for the prohibition on importing alternative smoking products and the exemptions from it. The Bill also makes related amendments to certain other enactments.

2. The Bill is divided into 3 Parts.

Part 1—Preliminary

3. Clause 1 sets out the short title.

Part 2—Amendment to Principal Ordinance

4. Clause 3 adds a new Part IIIA (new sections 13A to 13Q) to the principal Ordinance.
5. The new section 13B prohibits the import of alternative smoking products (which is defined by the new section 13A).
6. The new section 13C provides for the liability of officers of bodies corporate etc. for an offence under the new section 13B.
7. The new sections 13D to 13I provide for exemptions from the prohibition on importing alternative smoking products in the case of articles in transit, air transshipment cargoes and specified intermodal transshipment cargoes. For alternative smoking products that are specified intermodal transshipment cargoes, the exemption applies only to such products imported by a registered operator. A person who intends to import such products as a registered operator must make an application to

the Commissioner of Customs and Excise under the new section 13G. In determining the application, the Commissioner may have regard to whether the person has contravened any guidelines issued by the Commissioner under the new section 13H.

8. The new section 13J exempts alternative smoking products that are registered pharmaceutical products from the new section 13B.
9. The new sections 13K and 13L provide for exemptions from the prohibition on importing alternative smoking products in the case of persons in transit and the performance of relevant functions by Government Chemists.
10. The new sections 13M to 13Q provide for the enforcement powers of members of the Customs and Excise Service and certain other public officers in relation to an offence under the new section 13B.

Part 3—Related Amendments

11. Clause 4 consequentially amends the Specification of Public Offices Notice (Cap. 1 sub. leg. C).
12. The prohibition on importing alternative smoking products, and the exemptions from it, are currently provided for under the Smoking (Public Health) Ordinance (Cap. 371). Clauses 5 to 9 amend that Ordinance because of the provision for such prohibition and exemptions in the principal Ordinance as amended by the Bill.