

Philippines Administrative Order 2019-0007 concerning Rules and Regulations on Electronic Nicotine and Non-Nicotine Delivery Systems WTO TBT Notification

Background

On 11 June 2019, the Philippines Department of Health's Food and Drug Administration notified Administrative Order 2019-0007 (AO 2019-0007) to the WTO¹ which intends to regulate electronic nicotine and non-nicotine delivery systems (ENDS/ENNDS). This AO proposes to: 1) ban advertising, promotion and sponsorship; 2) impose various premarket authorizations before being allowed to engage in the sale, distribution, manufacture, and importation of ENDS/ENNDS (mandatory obtention of a license to operate and of certificates of product registration); 3) cap nicotine content in liquids used in ENDS/ENNDS at 20 mg/ml; 4) limit the volume of refill containers used for ENDS/ENNDS to 10 ml; 5) impose a ban on certain flavors and additives used in ENDS/ENNDS liquids; 6) impose a minimum retail purchase age at 18; and 7) mandate graphic health warnings on ENDS/ENNDS.² AO 2019-0007 was signed on 14 June, was published on 9 July, and will enter into force on 24 July 2019.

Importantly, AO 2019-0007 specifically excludes Heated Tobacco Products (HTPs) and similar innovations which use tobacco products from its scope and only applies to ENDS/ENNDS.

As such, AO 2019-0007 discriminates between ENDS/ENNDS and HTPs and therefore violates the WTO Agreement on Technical Barriers to Trade (TBT), Article 2.1.

ENDS/ENNDS and HTPs are "like" products

The WTO TBT agreement Article 2.1 requires that "products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country".

- The *physical characteristics* of ENDS/ENNDS and HTPs are largely the same: the devices heat up a liquid or a tobacco product, respectively, with the aim to produce an aerosol for inhalation by the user.
- The *customs classification* for the device is the same.³ The current customs classification for the liquids used by ENDS/ENNDS and tobacco used in HTPs is currently different.⁴ However, the World Customs Organization is changing the classification as of 2022 for the two products to be joined under the same tariff heading.⁵
- The *end uses* of both ENDS/ENNDS and HTPs are largely the same by producing an aerosol for inhalation by the user. The consumers are largely the same, use the products interchangeably and there is a substitution effect in relation to the price of the products. Also, the Philippines have chosen to tax HTPs and ENDS/ENNDS equally. The views that electronic cigarettes and heated tobacco products are likely to be less harmful have been increasingly supported by

¹ WTO ref. G/TBT/N/PHL/219

² Administrative Order, Section III Scope, second paragraph

³ HS 8543.70

⁴ HS 3824.99 and HS 2403.99

⁵ HS 2404.11 and HS 2404.12

public health institutions and authoritative bodies all over the world^{6,7,8}. The end uses of both products provide a possible less harmful alternative to smoking.

This leads to the conclusion that there is a “competitive relationship” between ENDS/ENNDS and HTPs and that the products are therefore “like”.⁹ By excluding HTPs from the scope of AO 2019-0007, ENDS/ENNDS receive a less favorable treatment. This represents a violation of the WTO TBT Agreement Article 2.1.

The Philippines must therefore amend AO 2019-0007 to ensure that there is no “less favorable treatment” between ENDS/ENNDS and HTPs.

The Philippines breaches the WTO TBT notification procedures

The WTO TBT Agreement Articles 2.9.2 and 2.9.4 require the Philippines to notify their technical regulations to other WTO Members “at an early appropriate stage, when amendments can still be introduced and comments taken into account”, and “allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account”.

AO 2019-0007 will enter into force before the end of the WTO TBT consultation period. The Philippines would therefore not be in a position to take any comments into account from other WTO Members and possibly amend the regulation.

The Philippines should therefore ensure that AO 2019-0007 does not enter into force before comments from other WTO Members are taken into account.

⁶ The Science and Technology Committee of the UK House of Commons: “*There is clear evidence that e-cigarettes are substantially less harmful than conventional cigarettes*”, Report on e-cigarettes (August 2018), page 15
<https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/505/505.pdf>.

⁷ Public Health England: “The available evidence suggests that heated tobacco products may be considerably less harmful than tobacco cigarettes”, ‘Evidence review of e-cigarettes and heated tobacco products 2018’ (February 2018), page 220
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684963/Evidence_review_of_e-cigarettes_and_heated_tobacco_products_2018.pdf

⁸ The New Zealand Ministry of Health: “*it is clear that vaping is significantly less harmful than smoking*”, Impact Statement (January 2019), page 7

https://www.health.govt.nz/system/files/documents/pages/ris-support-smokers-to_switch-to-alternatives-jan-2019.pdf

⁹ As per the criteria set out by the WTO Appellate Body to determine “like” products, US-Clove Cigarettes (2012)