Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill

ECITA (EU) Ltd

We address herein only the provisions relating to Electronic Cigarettes, and not to the other policy areas covered by the Bill, i.e. the first of the three key parts identified in the call:

1. Nicotine Vapour Products and smoking in hospital grounds –
The Bill will introduce restrictions on the sale of nicotine vapour products (NVPs) such as e-cigarettes and shisha pipes. These restrictions will include: a minimum purchase age of 18, prohibiting the sale of NVPs via vending machines, requiring NVP retailers to register on the tobacco retailer register, prohibit ‘proxy-purchasing’ for under 18s, restrict domestic advertising and promotions, implement an age verification policy for the sale of NVPs and ban staff under the age of 18 from selling tobacco and NVPs. The Bill would also make it an offence to smoke in parts of hospital grounds.

We shall endeavour to address our views to the specific questions put in relation to this first part, as follows:

“NVPs and smoking in hospital grounds

1. Do you support the Bill’s provisions in relation to NVPs?

2. Do you support the proposal to ban smoking in hospital grounds?

3. Is there anything you would add/remove/change in the Bill with regards to NVPs or smoking in hospital grounds?”

1. Do you support the Bill’s provisions in relation to NVPs?

We are pleased to note that the proposed definition of nicotine vapour products is well-constructed, and carefully sets out the parameters of what is and is not covered. Unfortunately, however, despite the specific mention of “shisha pipes” in the call for written views, the Bill itself specifically excludes non-nicotine containing electronic cigarette products. This includes the vast majority of the e-shisha products, as opposed to the shisha pipes which are used with tobacco, and are not part of the vaping product sector. This is a matter of considerable concern, particularly in the context of the young people which the Bill is aimed at protecting. Non-nicotine shisha vaping products have become increasingly popular amongst teenagers, and we have always taken the view that, irrespective of nicotine content, products designed for inhalation – such as all vaping products, with and without nicotine – must meet appropriate standards and be carefully regulated. Furthermore, we have always believed that vaping products should be age-restricted in the same way as tobacco products, whether or not they contain nicotine.
BSI PAS 54115 has now been published, and defines ‘vaping product’ as follows:

“vaping product (VP)

Product, and/or part of product, which is used within a device designed to produce vapour for inhalation, and which may or may not contain nicotine

NOTE Includes electronic cigarettes, e-shisha products, e-liquids, mixing kits, mods, batteries and all other products and accessories which are sold for the purpose of vaping.”

This definition was very carefully constructed to ensure that all vaping products were captured, irrespective of nicotine content. We are concerned that the Scottish Bill leaves all vaping products without nicotine outside of the provisions in Part 1, Chapter 1, sections 2, 3, 4 and 5 of the Bill – provisions which we find to be entirely reasonable, and with appropriate recourse to defence clearly set out.

Treating all vaping products in the same way, regardless of nicotine content, would aid enforcement since otherwise a test for the presence or absence of nicotine would need to be undertaken before deciding which set of regulations would apply. As currently proposed, an enforcement officer would be unable to ascertain whether or not a sale to an underage person was in breach of the Act at the time the sale occurred; if the product did not contain nicotine, no offense would have been committed. This would add considerable complexity and cost to enforcement actions.

Section 6’s prohibition of proxy sales is also sensible in our view, on the understanding that there will be ‘intelligent enforcement’, as your civil servants described it to us, to ensure that parents or older siblings trying to help a teenage smoker out of their habit would be treated reasonably and appropriately.

Section 7 extending the vending machine prohibition seems to be entirely appropriate.

Sections 8, 9, 10, 11, 12, 14 and 15 are problematic because of the exclusion of such a significant part of the market, i.e. the non-nicotine containing vaping products. We are grateful to the Scottish government for having taken on board our concerns about the name of the register, but believe that the more generic term ‘vaping products’, defined to specifically include non-nicotine containing products, would provide a better and more useful (and enforceable) cover for all the provisions in the Bill.

Chapter 2, section 17 provides a very ‘wide power’ (as described in the explanatory notes) for the Scottish Ministers to introduce prohibitions and/or restrictions on advertising, and to provide specific exemptions, should they so choose. Without knowing how Scottish Ministers might choose to exercise such powers, it is difficult to support or oppose this provision. We should be most grateful if you would carefully consider our letter of 8th June, which
specifically addresses the issues surrounding advertising restrictions on vaping products, and the Committees of Advertising Practice (CAP) Rules. (The problem of the term ‘nicotine vapour product (NVP)’ occurs in this context, too. How would the Scottish Ministers decide whether an advert for a vaping product was advertising a nicotine or non-nicotine containing device?)

Section 18 has the potential for unfortunate unintended consequences. It is a crucial part of the operation of the vast majority of the specialist retailers to allow adult consumers to try products before they purchase them. While we agree with the aim of the Bill, i.e. to avoid the indiscriminate promotion of nicotine products, there are circumstances in which providing products free can assist in moving people away from tobacco smoking, with the obvious public health benefits. (Please see the documents attached herewith.) Again, as with sections 17 and 19, there is no clarity as to what the regulations might look like, since this Bill merely provides wide-ranging powers to introduce regulation. This makes it very difficult to assess how Scottish Ministers might choose to exercise such powers.

In section 19, while there may be some forms of sponsorship which are clearly inappropriate, the ability to promote the products to demographics which include large numbers of smokers should not be arbitrarily ruled out because of the potential gains for public health if more smokers can be persuaded to stop smoking tobacco.

2. Do you support the proposal to ban smoking in hospital grounds?

Since the definitions of “smoke” and “no-smoking premises” in the Smoking, Health and Social Care (Scotland) Act 2005 very clearly exclude vaping products (with and without nicotine), this does not fall within our remit.

3. Is there anything you would add/remove/change in the Bill with regards to NVPs or smoking in hospital grounds?

To summarise the points made above, here are the specific changes we should like to see in the Bill:

- The title of the Bill would be more representative of its contents if changed to ‘Health (Tobacco, Vaping Products and Care) (Scotland) Bill.

- In a similar vein, every occurrence of the term “nicotine vapour products” and/or “NVP” would benefit from being replaced with “vaping products” and “VP”. This should include any occurrences of the term “nicotine vapour products” and/or “NVP” suggested for other Scotland Acts.

- It would probably be helpful to alter the definition in Part 1, Chapter 1, Section 1 to define ‘vaping products’ in line with the definition in BSI PAS 54115 as:

  Product, and/or part of product, which is used within a device designed to produce vapour for inhalation, and which may or may not contain nicotine
NOTE Includes electronic cigarettes, e-shisha products, e-liquids, mixing kits, mods, batteries and all other products and accessories which are sold for the purpose of vaping.

and specifically exclude the list provided at subsection 2 (a) to (d) inclusive, but stating:

“But the following are not vaping products---“.

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