

PARLIAMENT OF KENYA
THE SENATE
SENATE BILLS DIGEST
THE TOBACCO CONTROL (AMENDMENT) BILL, 2024
(SENATE BILLS NO. 35 OF 2024)

Sponsor: Sen. Catherine Muyeka Mumma, MP
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Committee referred to: Standing Committee on Health
Type of Bill: Ordinary Bill

1. PURPOSE OF THE BILL

The principal object of the Bill is to amend the Tobacco Control Act, Cap. 245A (the Act) to further regulate the production, sale, advertisement and smoking of nicotine products (both natural i.e. tobacco and synthetic), including by the use of nicotine pouches (packet containing powdered nicotine) and electronic nicotine delivery systems (popularly known as *vapes*).

The Bill prohibits the manufacture, importation, distribution, storage or sale of nicotine products without the prior approval of the Cabinet Secretary for Health. It further restricts the manufacture, distribution, marketing, sale and use of electronic nicotine delivery systems, their refill containers and nicotine pouches. It also restricts the advertisement of tobacco products, electronic nicotine delivery systems and nicotine pouches.

2. BACKGROUND OF THE BILL

What are the challenges?

The use of nicotine products in Kenya has increased exponentially over the years. This increase has been attributed to the largely unregulated distribution and use of electronic nicotine products and nicotine pouches. This prevalence is also largely attributed to the increase of use of electronic nicotine products and nicotine pouches by Kenyan adolescents and youth.

A World Health Organization (WHO) Global Youth Tobacco Survey conducted on students in standard 7 and 8 (primary school) and form 1 and 2 (secondary school) in 2007 indicated that 21.2% of the students have ever smoked a cigarette with 15.1% of the students using a tobacco product at the time of the survey. The numbers have increased and continue to increase, especially noting that back in 2001, the prevalence of smoking among students was at 6.6%.

Indeed, preliminary findings of a study conducted by the Kenya Tobacco Board on the use of tobacco and its products in four counties indicate that tobacco use among the youth in higher learning institutions is higher than in any age group. The study, commissioned in March 2022 and undertaken in Kisumu, Nakuru, Mombasa and Nairobi Counties indicates three out of ten youths (30%) use tobacco products.

The situation is dire especially considering that about nine thousand (9,000) annual deaths in Kenya are linked to causes that are related to tobacco use.

What does the law currently provide?

The Tobacco Control Act, Cap. 245A, was enacted on 27th September, 2007 to, among others, control the production, manufacture, sale, labelling, advertising, promotion and sponsorship of tobacco products and establish the Tobacco Control Board.

The Act domesticated the WHO Framework Convention on Tobacco Control, a treaty adopted by the World Health Assembly in 2003 and ratified by Kenya in 2004.

The Act, which has so far only been amended once back in 2009, is outdated as its provisions did not anticipate the explosion and prevalence of the use of electronic nicotine products and nicotine pouches. Indeed, the Act does not provide for the regulation of synthetic nicotine which is the type of nicotine mostly used in electronic nicotine products and nicotine pouches.

Why the Bill?

The Bill seeks to address the gaps identified in the regulation of tobacco and nicotine products under the current law. It makes specific provisions on the regulation and use of synthetic nicotine, nicotine pouches and electronic nicotine delivery systems.

The Bill also addresses the prevalence of the use of nicotine products by minors by explicitly prohibiting sale to them, restricting the use of sweet flavours in the products and regulating their marketing and advertisement, especially online.

3. OVERVIEW OF THE BILL

Definitions

The Bill amends the definition of the word “smoking” to include the inhalation of products other tobacco i.e. to include inhalation of synthetic nicotine whether by electronic means or ignition. The Bill also amends the definition of the word “tobacco product” to include synthetic nicotine.

The Bill further introduces the following new definitions in the Act—

- (a) “additive” to mean a substance other than tobacco that is added to a tobacco product;
- (b) “characterising flavour” to mean a smell or taste other than one of tobacco and includes fruit, spice, herbs, alcohol, candy, menthol or related flavours;
- (c) “electronic cigarette” to mean a product can be used for the consumption of nicotine-containing vapour through the mouth and which is neither a medical device nor containing medicine;
- (d) “electronic nicotine delivery system” to mean an electronic device that may be used to deliver nicotine vapor or other substances and includes electronic cigarettes, e-cigars, e-hookahs and pipes; and
- (e) “nicotine pouch” to mean a prefilled microfiber packet containing powdered nicotine.

Tobacco Control Fund

The Bill provides that the funds of the Tobacco Control Fund will include fifty percent (50%) of the fees paid for testing and approval of manufactured or imported tobacco products.

Can the Government increase the tax for tobacco products?

The Bill empowers the Cabinet Secretary for finance to implement tax policies, and where appropriate, price policies on tobacco and tobacco products, including—

- (a) distinct tax policies for electronic cigarettes and related products with consideration of the various forms and nicotine concentrations;
- (b) progressive taxation of products based on volume and nicotine concentration with higher concentrations incurring a higher tax rate to discourage excessive nicotine consumption; and
- (c) periodical review and adjustment of tax rates to ensure they reflect current public health objectives and market realities.

What is required for someone to manufacture or sell electronic nicotine delivery systems or nicotine pouches?

The Bill requires the following conditions to be met before a person can manufacture, offer for sale, distribute or use an electronic nicotine delivery system or refill container—

- (a) the nicotine-containing liquid is contained in a dedicated refill container not exceeding a volume of ten millilitres, in a disposable electronic cigarette or in single use cartridge and the cartridges or tank that does not exceed a volume of two millilitres;
- (b) the nicotine-containing liquid cannot contain nicotine exceeding ten milligrams per millilitre;
- (c) the nicotine-containing liquid does not contain restricted additives;
- (d) the nicotine-containing liquid is manufactured using pure ingredients as prescribed by the Cabinet Secretary for Health;
- (e) substances contained in the nicotine-containing liquid, other than the ingredients specified, are present in trace levels and are technically unavoidable during manufacture;
- (f) except for nicotine, only ingredients that do not pose a risk to human health in heated or unheated form are used in the nicotine-containing liquid;

- (g) the system delivers the nicotine doses at consistent levels under normal conditions of use; and
- (h) the system and refill container are child and tamper-proof, protected against breakage and leakage and have a mechanism that ensures refilling without leakage.

The Bill also requires the following conditions to be met before a person can manufacture or offer for sale nicotine pouches—

- (a) the pouches are child and tamper-proof and can be used without spilling their contents;
- (b) the pouches deliver nicotine doses at consistent levels;
- (c) the nicotine content of each pouch does not exceed 10 milligrams; and
- (d) each pouch has a removable sticker with a health warning printed on it in the prescribed form.

Can anyone manufacture or import a tobacco product?

The Bill prohibits manufacturing, importating, distributing, storing, selling or in any way dealing with a tobacco product that has not been approved by the Cabinet Secretary for Health. A person who deals with an unapproved product will have committed a crime punishable by—

- (a) a fine of not more than one million shillings or five percent of the person's gross turnover, whichever is higher; or
- (b) imprisonment for not more than two years,

or both fine and imprisonment.

The Bill requires persons applying for approval to deal in tobacco products to provide information on, among others—

- (a) the ingredients contained in the product with their quantities;
- (b) the emissions that would result from the use of the product;
- (c) toxicological data regarding the product's ingredients, including in heated form;

- (d) the effects on the health of consumers, taking into account any addictive effects;
- (e) the nicotine dose and uptake when consumed under normal conditions; and
- (f) the components of the product.

The Bill also requires manufacturers of nicotine products to submit samples for testing as they seek the approval of the Cabinet Secretary for Health. The Cabinet Secretary is then required to test the samples to determine their conformity to legal requirements and accuracy of information provided in the request for approval.

Are any tobacco products prohibited?

The Bill empowers the Cabinet Secretary for Health to ban any product that does not conform to the law. It also requires the Cabinet Secretary to publish a list of, among others, products that have been approved or banned and authorised manufacturers and importers.

Further, under the penalty of a fine of not more than one million shillings or imprisonment for not more than two years or both, the Bill makes it illegal for a person to produce or supply tobacco products containing any of the following—

- (a) vitamins or other additives that create the impression that a tobacco product has a health benefit or presents reduced health risks;
- (b) caffeine or other additives or stimulants that are associated with energy or vitality;
- (c) additives which have colouring effects on emissions;
- (d) additives that facilitate inhalation or nicotine uptake;
- (e) additives which increase the toxicity or addictiveness of the product; or
- (f) additives which result in a characterising flavour.

How does the Bill protect children?

The Bill also makes it illegal to manufacture or sell objects including sweets, snacks, toys, cartoon characters, popular youth motifs or other similar objects that would reasonably appeal to persons under the age of eighteen years in designs that resemble tobacco products. It further makes it illegal to manufacture or sell any tobacco product in a design that imitates sweets, snacks, toys, cartoon characters, popular youth motifs or other similar

objects that would reasonably appeal to persons under the age of eighteen years. The two offences are punishable by the penalty of a fine of not more than five hundred thousand shillings or imprisonment for not more than three years or both.

Can hawkers sell tobacco products?

The Bill makes it illegal for a person to sell tobacco products through hawking, from vehicles or through mobile vending, with offenders facing a fine of not more than fifty thousand shillings or imprisonment for a term of not more than six months or both.

Can a person advertise or sell tobacco products online or through brand ambassadors or social media influencers?

The Bill makes it illegal for a person to advertise, offer for sale or sell tobacco products in any online or digital platform, including social media sites, video-sharing platforms or other digital content platforms. It also makes it illegal for a person to promote or advertise tobacco products through influencers, brand ambassadors or similar entities. Offenders face a fine of not more than five hundred thousand shillings or imprisonment for a term of not more than three years or both.

Can a person offer free samples of tobacco products?

The Bill makes it illegal for a person to provide free samples of electronic nicotine delivery systems, nicotine pouches or related components with offenders facing a fine of not more than five hundred thousand shillings or imprisonment for a term of not more than three years or both.

Is a licence required to manufacture, distribute, store or sell tobacco products?

The Bill requires a person who intends to manufacture, distribute, store, sell or in any other way deal in tobacco products to first obtain a licence from the respective county executive committee member for health. It also requires licensed persons to only deal in the licenced tobacco products and in the licenced premises. Failure to adhere to the requirements is a criminal offence punishable by the penalty of a fine of not more than one hundred thousand shillings or imprisonment for not more than twelve months or both.

The Bill also empowers county assemblies to enact county legislation that is not consistent with the Tobacco Control Act to regulate licensing of premises within respective counties.

What is required to be included in the packaging of nicotine products?

The Bill requires every unit packet of nicotine pouch, electronic nicotine delivery system or refill container to include a leaflet with information on—

- (a) instructions for use and storage of the product, including a reference that the product is not recommended for use by young people and non-smokers;
- (b) contra-indications;
- (c) warnings for specific risk groups;
- (d) possible adverse effects;
- (e) addictiveness and toxicity; and
- (f) contact details of the manufacturer or importer and a legal or natural contact person within Kenya.

Where is smoking prohibited?

The Bill prohibits smoking in the following areas—

- (a) institutions of basic education and training;
- (b) places of worship;
- (c) hospitals, clinics and other health institutions;
- (d) children’s homes, child care facilities and children’s playgrounds;
- (e) residential houses and such other premises where children are cared for;
- (f) public service vehicles, passenger vehicles, school buses and vans, commercial passenger aircrafts, commuter boats and ferries; and
- (g) police cells.

The Bill further prohibits smoking in the following areas except in designated smoking areas—

- (a) offices and workplaces, including corridors, lounges, eating areas, reception areas, lifts, escalators, foyers, stairwells, toilets, laundries and amenity areas of such places;
- (b) court buildings;
- (c) factories;
- (d) cinema halls, theatres, video houses, such other halls or places of performance, disco halls or any other entertainment facilities at any time during which it is open to the public;
- (e) restaurants, hotels, bars or other eating place;
- (f) prisons;
- (g) police stations;
- (h) aircrafts, passenger ships or any other public conveyance;
- (i) education facilities other than institutions of basic education and training;
- (j) railway stations, airports, air fields, ports and other public transport terminals;
- (k) markets, shopping malls and retail and wholesale establishments;
- (l) stadia, sports facilities and other recreational facilities; and
- (m) public buildings.

What is required to be displayed in premises that sell nicotine products?

The Bill requires a person selling nicotine pouches and electronic nicotine delivery systems, including e-cigarettes and related products, to display the following warnings in their premises—

- (a) a clear warning that the sale and use of the products by persons under the age of eighteen is prohibited;
- (b) a clear warning about the specific health risks associated with the use of the products, including potential risks associated with additives or other unique e-liquid constituents;

- (c) a statement indicating that the products contain nicotine and highlighting the dangers of nicotine addiction and potential for overdose, especially with high-concentration e-liquids; and
- (d) a specific warning that the use of the products is not a safe alternative to traditional tobacco products and still poses health risks

4. CONSEQUENCES OF THE BILL

The Bill, once enacted, will further regulate the production, sale, advertisement and smoking of tobacco and other nicotine products. This will ensure that all nicotine products, including nicotine pouches and electronic nicotine products (e.g. vapes, hookahs, shisha) are properly regulated. The result will be a well regulated market with standardized and safe products.

It will also protect minors as it ensures that nicotine products are neither sold nor advertised to them and that the products will not be attractive to minors as they will be prohibited from having sweet flavours.

The Bill, once enacted, will also reduce the prevalence of smoking as the advertisement will be more regulated and the selling of nicotine products online or by hawking prohibited.

5. WAY FORWARD

What next?

The Bill was Read a First Time in the Senate on 6th August, 2024. Pursuant to standing order 145 of the Senate Standing Orders, the Senate Standing Committee on Health shall facilitate public participation and shall take into account the views and recommendations of the public when the committee submits its report to the Senate.

Pursuant to standing order 148 of the Senate Standing Orders, the Committee is required to submit its report to the Senate within thirty (30) calendar days of the committal of the Bill to the Committee, therefore, by 6th September, 2024.

What is expected of the members of public?

The members of the public are expected to present their views to the Standing Committee on Health for its consideration.

Note:

1. This Digest reflects the Bill as published and does not cover any subsequent amendments to the Bill made after its publication.
2. The Digest does not have any official legal status.