

**President's ruling on
the proposed resolution to amend
the Sewage Services (Trade Effluent Surcharge)
(Amendment) Regulation 2008
proposed by Hon Audrey EU Yuet-mee, SC, JP**

Hon Audrey EU Yuet-mee has given notice to move a proposed resolution to amend the Sewage Services (Trade Effluent Surcharge) (Amendment) Regulation 2008 (the Amendment Regulation), which was published in the Gazette as Legal Notice No. 106 of 2008 and laid on the table of the Legislative Council on 14 May 2008. Before making a ruling on the admissibility of the proposed resolution, I have invited the Administration to offer its comments on the proposed resolution, and Ms EU to offer her response. I have also sought the advice of the Counsel to the Legislature.

Hon Audrey EU Yuet-mee's proposed resolution

2. Section 4 of the Sewage Services (Trade Effluent Surcharge) Regulation (the TES Regulation) provides a mechanism for reassessing the generic trade effluent surcharge (TES) rates. Under section 4(1), a consumer or agent who is liable to pay a TES may, at his own expense, have his trade effluent tested by an approved laboratory and submit the test results to the Drainage Authority (DA). According to section 4(2), if DA is satisfied that according to the test, the trade effluent is less polluted than the prescribed level, DA shall determine a new TES rate.

3. Ms EU's proposed resolution seeks to require the Government to reimburse the expenses incurred for having a trade effluent test conducted pursuant to section 4(1) of the TES Regulation, if the application for reassessment of the TES rate is successful.

Relevant rule in the Rules of Procedure

4. Rule 31(1) of the Rules of Procedure (RoP) provides that:

"A motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by –

- (a) the Chief Executive; or
- (b) a designated public officer; or

- (c) a Member, if the Chief Executive consents in writing to the proposal."

The Administration's comments and the Member's response

5. The Administration submits that Ms EU's proposed resolution carries a charging effect as described in Rule 31(1) of RoP. Ms EU does not agree to the Administration's view. For easier reading, the Administration's comments and the Member's response are summarized in the **Appendix**.

Advice of the Counsel to the Legislature

6. Counsel advises that a proposed Committee Stage amendment (CSA) to a bill will be considered to have a charging effect if the President is of the opinion that the effect of the relevant CSA is to create a new function or power for, or to impose a new duty on, the Government and that the discharge of such function or duty, or the exercise of such power would incur public expenditure in respect of which no provision of public money has been made under existing law or, in the case of an original bill, it is beyond what is envisaged in the bill. This principle is equally applicable to the consideration of whether a proposed resolution to amend an item of subsidiary legislation will have a charging effect under Rule 31(1) of RoP.

7. In Counsel's view, as it is abundantly clear that pursuant to section 4(1) of the TES Regulation, the expenses incurred by a consumer or agent to have his trade effluent tested have to be borne by him, and that there is no provision under existing law which would oblige or authorize DA to reimburse the consumer or agent, who has submitted test results which led to DA's determination of a new TES rate, the imposition of a legal obligation on DA to so reimburse such a consumer or agent by the proposed resolution to amend would render it as having a charging effect under Rule 31(1) of RoP.

My opinion

8. Ms EU does not agree that a new expenditure item or a new head of expenditure has to be created. She points out that if the present reassessment scheme is fair, there should be very few successful reassessment applications. She also states that in any event, such expenditure may be paid from the operating expenses of DA instead of a new head of expenditure, and the operating expenses are shared between all polluters under the polluter-pays principle.

9. Using the same principle I adopted in a past ruling (23 June 2000), I am of the opinion that whether the expenditure arising from the reimbursement arrangement will be shared between polluters is not relevant to the question of whether the proposed resolution would have a charging effect.

10. Given that Ms EU's proposed resolution, if passed, will impose a legal obligation on DA to reimburse the reassessment cost to a successful applicant, I consider that it has a charging effect within the meaning of Rule 31(1) of RoP.

11. Ms EU has also mentioned the unfairness of the existing reassessment scheme to support her proposed resolution. I consider that the fairness of the scheme relates to the merits of the proposed resolution, which are not relevant to the issue of admissibility.

Ruling

12. Having considered the Administration's comments, Hon Audrey EU Yuet-mee's response and the advice of the Counsel to the Legislature, I rule that the proposed resolution has a charging effect and hence require, under Rule 31(1)(c) of RoP, the consent in writing of the Chief Executive for it to be moved.

(Mrs Rita FAN)
President
Legislative Council

30 June 2008

Sewage Services (Trade Effluent Surcharge) (Amendment) Regulation 2008

**Summary of Hon Audrey EU Yuet-mee's proposed resolution,
the Administration's comments and the Member's response**

Hon Audrey EU Yuet-mee's proposed resolution	Administration's comments	Hon Audrey EU Yuet-mee's response
<p><u>New section 3A</u> To add subsections (2A) and (2B) to section 4 of the Sewage Services (Trade Effluent Surcharge) Regulation (the TES Regulation)</p>	<p><u>Polluter-pays principle</u></p> <p>The objective of the proposed resolution is contrary to the established policy of applying the polluter-pays principle in the provision of sewage services.</p> <p><u>Charging effect</u></p> <p>The proposed resolution seeks to impose on the Government an obligation to reimburse the expenses incurred by an applicant seeking reassessment of the generic trade effluent surcharge (TES) rate. It carries a charging effect as described in Rule 31(1) of the Rules of Procedure. It will create a new expenditure item to the General Revenue. If adopted, the Government will have to create a new head of expenditure in order to cater for the reimbursement. This is a new charge to the revenue of the Government.</p> <p>There are at the moment 586 active cases with reassessed chemical oxygen demand values and hence TES rates from various trades, and the total estimated reassessment cost of these cases is</p>	<p><u>Polluter-pays principle</u></p> <p>The proposed resolution is not contrary to the polluter-pays principle. Under the proposed resolution, a trade operator is still required to pay TES under the TES Regulation at the prescribed rate, or at a rate reassessed by the Drainage Authority (DA). The proposed resolution has not touched on those rates.</p> <p>Section 4 of the TES Regulation provides for a mechanism for reassessment. A trade operator may, at his own expense, have his trade effluent tested by an approved laboratory. If DA is satisfied that the trade effluent is less polluted than the prescribed level, DA shall determine a new TES rate in accordance with the relevant matrix in Schedule 4 of the TES Regulation.</p> <p>During the deliberation of the Subcommittee on Sewage Services (Trade Effluent Surcharge) (Amendment) Regulation 2008, the Subcommittee notes that the costs of testing the trade effluent by an approved laboratory may be even higher than the TES charged. The high costs of laboratory test deter trade operators from applying for reassessment in appropriate cases and defeat the purpose of the reassessment scheme.</p>

Hon Audrey EU Yuet-mee's proposed resolution	Administration's comments	Hon Audrey EU Yuet-mee's response
	<p>\$5.7 million. When these active cases renew their reassessment applications, the reassessment cost involved will then need to be reimbursed. As the reassessment results will be valid for two years under the current TES Regulation, such reimbursement arrangement will cause an expenditure of \$2.8 million each year on average to the Government purely for the existing active cases. Furthermore, if the proposed resolution is carried, there will likely be more reassessment applications. Using a conservative assumption of the number of successful applications to rise to 1 880 cases, being about 10% of the total number of TES accounts, as a result of the change in the reassessment mechanism, the estimated average total cost could be as high as \$6.6 million each and every year. If all TES traders proceed with reassessment and 50% of them are successful, the estimated cost could be about \$33 million each and every year.</p>	<p>The high costs of laboratory test are also unfair to trade operators whose trade effluent is less polluted than the prescribed level but are forced to pay TES at the prescribed rate because of the high costs of laboratory test. It appears that the Administration is also aware of the unfairness since the Administration anticipates an increase of reassessment applications. If the present TES scheme is fair, there should be very few successful reassessment applications.</p> <p>What the proposed resolution aims to achieve is to require the Government to reimburse a trade operator in a successful application for reassessment of TES to:</p> <ul style="list-style-type: none"> (a) provide incentive to trade operators to improve the quality of their trade effluent; and (b) eradicate the unfairness in the present reassessment scheme. <p><u>Charging effect</u></p> <p>It is not agreed that a new expenditure item or a new head of expenditure has to be created. If the present scheme is fair, there should be very few successful reassessment applications. In any event, such expenditure may be paid from the operating expenses of DA instead of a new head of expenditure, and the operating expenses are shared between all polluters under the polluter-pays principle.</p>