

立法會
Legislative Council

LC Paper No. CB(1)1075/13-14

Ref. : CB1/BC/9/12

**Report of the Bills Committee on
Product Eco-responsibility (Amendment) Bill 2013**

Purpose

This paper reports on the deliberations of the Bills Committee on Product Eco-responsibility (Amendment) Bill 2013 ("the Bills Committee").

Background

2. Introduced under the Product Eco-responsibility Ordinance (Cap. 603) ("the PERO"), the Environmental Levy Scheme on Plastic Shopping Bags ("the Levy Scheme") was launched on 7 July 2009 as the first mandatory producer responsibility scheme ("PRS") in Hong Kong to discourage the indiscriminate use of plastic shopping bags ("PSBs"). It currently applies to some 3 500 registered retail outlets and the relevant registered retailers are required to charge their customers an amount of 50 cents as an environmental levy for each PSB provided to them. The registered retailers have to submit to the Administration quarterly returns setting out the number of PSBs distributed to customers in the non-exempted areas¹ in all of their registered retail outlets as well as the amount of levy collected for such bags. Further, the retailers have to pay to the Administration their levy income as stated in their returns on a quarterly basis.

3. According to the Administration, the Levy Scheme has, upon its first year of implementation, yielded positive results and has estimated to have reduced the excessive use of PSBs significantly by up to 90%. However, according to subsequent landfill surveys conducted by the Environmental Protection Department ("EPD"), the problem of excessive PSB use remains serious outside the current scope of the Levy Scheme. Within the retail categories other than the regulated sectors², PSB disposal at the landfills was found to have increased by about 6% between mid-2009 to mid-2010.

¹ At present, there are two types of exemption, one for non-specified goods (i.e. goods other than food or drink, medicine or first-aid item and personal hygiene or beauty product) and the other for third-party operators.

² Namely chain or large retailers such as supermarkets, convenience stores and medicare and cosmetic stores.

4. In May 2011, the Administration launched a three-month public consultation on whether and how to extend the Levy Scheme. On the whole, the community was supportive of extending the scope of the Levy Scheme to further address the problem of excessive PSB use in Hong Kong. In particular, there was majority support for the Levy Scheme to cover also small and medium enterprises ("SMEs"). On the other hand, there were concerns about the potential implications on the operation of and compliance costs on SMEs.

The Bill

5. Taking account of the views of the community, the Administration considered it opportune to expand the coverage of the mandatory PRS on PSBs and introduced the Product Eco-responsibility (Amendment) Bill 2013 ("the Bill") into the Legislative Council ("LegCo") on 8 May 2013 to propose the following changes to the existing Levy Scheme –

- (a) the Levy Scheme will be extended to cover the entire retail sector. Free distribution of PSBs will be banned in the retail sales of goods. Save for the exemption arrangements, where PSBs are distributed in the retail sales of goods, the retailer will be required to charge the customer not less than 50 cents for each PSB provided to that customer ("the PSB charge"), irrespective of the type of business of the retailer or where the sales transaction is completed;
- (b) free distribution of PSBs that contain only an item of food, drink or medicine for human or animal consumption (collectively as "foodstuff") will be excluded from the ban, except where the foodstuff item is already contained in airtight packaging; or even though not contained in airtight packaging, no part of the foodstuff item is exposed to the environment, and nothing may spill out of the packaging in the course of conveyance;
- (c) flat-top bags will also be subject to regulation under the extended Levy Scheme ("the extended Scheme");
- (d) retailers may retain the PSB charge without the need of remitting it to the Government. The existing administrative requirements comprising registration of retailers and retail outlets, keeping of records as well as submission of quarterly returns to the Government will be removed; and
- (e) a fixed penalty system will be introduced to enhance enforcement efficiency and uphold the deterrent effect.

6. The main provisions of the Bill are summarized below –
- (a) Clause 10 adds new sections 18A, 18B and 18C to the PERO, which introduce the requirement to charge for PSBs;
 - (b) Clauses 6, 11, 12, 13, 14, 16 and 20 repeal the provisions in the PERO relating to the existing regulatory regime on the imposition of an environment levy under a "remittance" approach. Clauses 3, 4, 5, 7, 8 and 9 provide for related amendments; and
 - (c) Clause 15 adds a new Division 4A to Part 3 of the PERO, providing for a fixed penalty for an offence for failing to charge for PSBs at the time of the sale and for offering rebate or discount with the effect of offsetting that charge.

The Bills Committee

7. At the House Committee meeting on 10 May 2013, members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Dr Hon Kenneth CHAN Ka-lok, the Bills Committee has held 11 meetings to discuss with the Administration and received views from the public at one of the meetings. A list of the deputations and individuals who have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

8. Members of the Bills Committee generally support the extended Scheme in view of its effectiveness in promoting the Bring Your Own Bag ("BYOB") habit and reducing the excessive use of PSBs, as demonstrated by a remarkable reduction in the number of PSBs disposed by some 3 500 registered retail outlets under the scheme from some 657 million in 2009 to 156 million in 2012. Hon Vincent FANG and Hon WONG Ting-kwong, however, do not support the Administration's proposals which, in their opinion, would lead to difficulties in compliance and enforcement given the unclear criteria for exemption provided in the Bill, and the public and the business community will also be confused.

9. In the course of deliberation, members have examined the concerns about the switch to using other types of bags, such as non-woven bags, by the retailers (known as "switching effect") under the extended Scheme, the various types of exemptions provided under the Bill (including exemption for food hygiene purpose and exemption for reason that a bag forms part of the goods concerned),

retention of the PSB charge by retailers without the need of remitting it to the Government, removal of the administrative requirements comprising registration of retailers and retail outlets, keeping of records as well as submission of quarterly returns to the Government, the measures to monitor the effectiveness and ensure the compliance of the extended Scheme, the fixed penalty system, issues relating to implementation of the extended Scheme, and the savings and transitional arrangements.

10. The deliberations of the Bills Committee and the Administration's response are set out below.

Switching effect

11. In considering whether the Levy Scheme should be extended, the Bills Committee and some deputations/individuals have raised query about the effectiveness of the scheme and pointed out that the scheme has caused a switching effect. They have also questioned whether the excessive use of non-woven bags has aggravated as a result of the implementation of the Levy Scheme starting from July 2009.

12. The Administration has advised that according to the landfill surveys, the number of reusable shopping bags, which may or may not be non-woven bags, disposed of at landfills has increased from 9.88 million in mid-2009 to 17.74 million in mid-2010. Albeit a sizeable increase by percentage, the disposal figure is equivalent to less than 0.5% of the overall landfill disposal of PSBs in mid-2010. Also, during the same period, disposal of PSBs at landfills from the regulated retail sectors has significantly dropped from 657.34 million to 153.12 million. The Administration's observation is that the excessive distribution of non-woven bags could have been a time-limited phenomenon in view of the run up to the commencement of the Levy Scheme in July 2009. Guidelines were issued to bureaux and departments in November 2011 advising them against the indiscriminate distribution of non-woven bags. Coupled with enhanced publicity and public education, the problem of excessive distribution appears to have subsided.

13. As regards the concern about the switching to other types of bags, such as garbage bags, the Administration has pointed out that garbage bags have their functional use and there is no evidence from the landfill surveys that the use of garbage bags is excessive in Hong Kong. It has liaised with the property management sector and noted that initiatives to reduce the excessive distribution of plastic garbage bags are progressing well.

14. The Administration has also advised that flat-top bags will be covered in the extended Scheme. Drawing reference from the overwhelming public support in the public consultation for the extension of the Levy Scheme, it is

envisaged that the BYOB habit will continue to gain prevalence in the community. This will result not only in the reduced use of PSBs but also paper bags and other associated products.

Exemptions under the Bill

Exemption for PSBs used for food hygiene purpose

15. According to the Administration, as a matter of principle, the ban on free PSB distribution should not discourage the use of PSBs which are necessary for ensuring food hygiene. The use of PSB would not be necessary where an item of food, drink or medicine for human or animal consumption (collectively as "foodstuff") has already been properly packaged to address food hygiene concerns. Hence, by way of clause 18 of the Bill, the Administration proposes to exclude those PSBs that contain only an item of foodstuffs from the ban on free PSB distribution (hereinafter referred to as "food hygiene exemption"), except where the foodstuff item is already contained in airtight packaging; or even though not contained in airtight packaging, no part of the foodstuff item is exposed to the environment and nothing may spill out of the packaging in the course of conveyance. However, PSBs that are used to carry securely packed frozen/chilled food will not be exempted.

16. The Bills Committee has expressed serious concern that the scope of exemption under the extended Scheme as proposed in the Bill is not clear. Conflicts between customers and retailers could arise over whether the PSB charges should apply to PSBs which contain foodstuff items and pre-packaged promotional items. Members opine that as the purpose of the Levy Scheme is to change consumer behaviour towards BYOB, the legislation should be lenient and avoid creating conflicts between customers and sellers over whether the PSB charge should be collected. It should also avoid causing difficulties to frontline staff in deciding if a charge should apply.

17. Given that the proposed food hygiene exemption can be confusing and may easily cause misunderstanding, Hon Vincent FANG is of the view that PSBs used for carrying any foodstuff items should be exempted for ease of compliance by retailers. Other members have requested the Administration to consider granting exemption to PSBs that are used for carrying fruits or "temperature-controlled food", i.e. food which will change its physical state due to temperature difference in the course of its conveyance and something may spill out of the packaging despite that such packaging may have already rendered no part of the food being exposed to the environment, such as butter.

18. Regarding members' suggestion of granting exemption to certain types of foodstuffs, the Administration has explained that the provisions relating to food hygiene exemption are intended to apply across the board to different types

of food, drink or medicine that are for human or animal consumption. As revealed from the survey on food packaging methods, the same type of foodstuffs may be packaged in different ways; whether a food hygiene concern exists depends more on the packaging method than the food type. Accordingly, it would not be practical to spell out specific types of food for food hygiene exemption purposes.

19. On members' proposal to grant exemption to PSBs used for carrying "temperature-controlled food" across the board, the Administration has responded that it is now a common practice for consumers to use flat-top bags to carry such food items and flat-top bags may be distributed for free under the current Levy Scheme. The Administration's analysis is that the use of flat-top bags is mainly to deal with condensation which results from a temperature difference and could not be avoided by another layer of wrapping. Therefore, it has proposed not to exclude any PSBs that are used for carrying securely packed frozen/chilled food under the Bill. However, in the light of the Bills Committee's concern about "temperature-controlled food", the Administration will move Committee Stage amendments ("CSAs") to Schedule 2 to the effect that a foodstuff item that is in chilled or frozen state will be entitled to food hygiene exemption such that a PSB containing such foodstuff item will not be subject to the mandatory charge irrespective of how the item concerned is packaged. The CSAs also seek to improve the drafting of Schedule 2 by incorporating the comments of the Legal Adviser to the Bills Committee ("the Legal Adviser").

Exemption for reason that a bag forms part of the goods concerned

20. Under the proposed section 1(1)(e) of Schedule 2, a bag that forms part of the goods concerned is exempted from the PSB charge. Under the proposed section 1(4)(a) of Schedule 2, a bag "specifically designed for containing the goods" will be regarded as forming part of the goods concerned. The Bills Committee has expressed concern that as the Bill does not provide for a definition for the term "specifically designed", it can be subject to different interpretations and the exemption criteria are confusing. Members have therefore studied in detail how a bag will be regarded as a bag which is "specifically designed for containing the goods" by making reference to specific cases, including unsealed plastic bags used for pre-packaging clothes items and plastic bags commonly used by confectionary sellers for holding small pieces of candies that are already individually contained in airtight packaging.

21. The Administration has advised that in general, "a bag which is specifically designed for containing the goods" refers to (i) a bag, (ii) the bag carries certain design features (such as size, colour, material or shape) and (iii) such design features are specific for the purpose of containing the goods. The exemption seeks to implement the policy intent that a plastic bag that "forms

part of the goods concerned" should not be subject to the mandatory charge. Whether a bag falls under the relevant exemption under section 1(4)(a) of Schedule 2 will depend on actual circumstances.

22. According to the Administration, plastic bags used for pre-packaging to give protection to the goods (such as individual woven bags provided for each shoe) can be regarded as forming part of the goods and should satisfy the condition for exemption given in the proposed section 1(1)(e) of Schedule 2, irrespective of the mode of sealing.

23. Regarding the plastic bags commonly used by confectionary sellers, the Administration has responded that confectionaries are often sold in packs. Generally speaking, in cases where confectionaries are already contained individually in airtight packaging, an ordinary plastic bag distributed by the seller will be subject to a mandatory charge under section 18A(2). If a confectionary seller provides a carrying bag that resembles other confectionary packaging, then the carrying bag would be regarded as a bag "specifically designed for containing the confectionaries" and would be entitled to exemption under section 1(4)(a) of Schedule 2.

24. The Administration has further clarified that in cases where a bag used as a "container" for specific goods is also used to contain other goods that can be fitted into it, such bag will not be exempted under section 1(4)(a) of Schedule 2.

25. In response to the Administration's clarification, the Bills Committee has stressed the importance of making available clear exemption criteria to avoid confusion and disputes in implementing the extended Scheme. The Administration has responded that as a general rule, whether a carrying bag will be entitled to the exemptions under the Bill will depend on actual circumstances. The bag does not necessarily have to carry any particular features in order to be regarded as "specifically designed". It will provide guidelines to the retail trade to explain the principles involved in determining the scope of exemption under section 1(4)(a) of Schedule 2. Extensive education and publicity programmes will also be organized for retailers and the public to enhance their understanding in the implementation of the proposed extension.

Applicability of the exemption provisions

26. Noting the concern of the Hong Kong Doctors Union, the Bills Committee has asked whether exemption can be granted to plastic bags used for medications prescribed by doctors. The Administration has advised that medical consultation is not regarded as a retail activity. Plastic bags distributed in relation to medical consultation are therefore not subject to the Levy Scheme which regulates the distribution of PSBs in the retail sales of goods. Even though there are retail sales of drugs, it is common that such drugs are contained

in a plastic bag where there is information on how to consume or use the drugs printed, written or labelled on the bag. As proposed under the Bill, the plastic bag will be regarded as forming part of the goods and its distribution will not require a PSB charge (the proposed section 1(4) of Schedule 2 refers).

27. The Bills Committee has expressed concern about whether PSBs distributed at conferences and exhibitions, be they distributed by individual exhibitors or the organizer with the exhibitors' name printed on the bags, would be excluded from the application of the Bill. The Administration has explained that whether the PSBs distributed are subject to the PSB charge would depend on whether retail sales of goods are involved. Under the extended Scheme, a seller must charge at least 50 cents for each PSB provided to a customer, irrespective of the type of business of the seller or where the retail sales of goods took place.

28. Regarding the question of whether plastic bags distributed at shopping malls for containing wet umbrellas will be subject to the PSB charge, the Administration has advised that as such bags involve no retail sales of goods, they will not be subject to regulation under the Bill.

Retention of the PSB charge by retailers

29. At present, the Levy Scheme adopts a "remittance" approach, under which retailers are required to submit to the Government quarterly the levy income collected from distribution of PSBs. The Administration proposes to adopt a "retention" approach for the extended Scheme under which retailers may retain the PSB charge without the need of remitting it to the Government. The existing administrative requirements comprising registration of retailers and retail outlets, keeping of records as well as submission of quarterly returns to the Government will be removed.

30. The Bills Committee has expressed reservation about the "retention" approach and the removal of the record keeping requirements. It is concerned that there will not be any means to assess the effectiveness and monitor the compliance of the extended Scheme. There will also be practical difficulties in enforcing the extended Scheme which applies to all retailers.

31. The Administration has explained that as opposed to the Levy Scheme which covers only some 3 500 retail outlets, the extended Scheme would cover around 100 000 business outlets, not to mention the fact that over 99% of the retail establishments in Hong Kong are SMEs. With the proposed extension to cover all retailers, the "remittance" approach with its elaborated compliance system will be too burdensome and the compliance costs too high for SMEs. Besides, the Levy Scheme aims at changing consumers' behaviour in using PSB rather than putting high compliance costs on retailers. During the consultation

on the extended Scheme, the public was specifically consulted on the proposal that the PSB charge collected by retailers need not be remitted to the Government. The consultation outcome indicates general support for the "retention" approach. Besides, EPD will continue to conduct compliance checks after the implementation of the extended Scheme.

"Dual" system

32. Some members, particularly Hon Cyd HO, Hon WU Chi-wai and Dr Hon Helena WONG, do not support the removal of the existing compliance requirements involving the keeping of records for quarterly return to the Government across the board as this would render assessments to the effectiveness of the extended Scheme difficult and may lead to a reversion of the behavioral change away from BYOB which has been successfully inculcated. They have suggested that the "remittance" approach should continue to apply to those retailers which have the ability to comply with the relevant requirements, i.e. the chain operator or "large retailer". The dividing line for adopting the "remittance" approach can be the retailer's business turnover and the retail floor area of the retail outlet that the retailer operates, or whether the retailer operates three or more business outlets in Hong Kong.

33. On the other hand, some other members, including Hon Vincent FANG, Ir Dr Hon LO Wai-kwok and Hon Tony TSE, do not support a "dual" system. They are of the view that differential treatment will be unfair and stress the importance of maintaining a level playing field in the retail sector. They also consider it difficult to draw the dividing line and object to using a retailers' scale of operation as the criterion for differential treatment.

34. The Administration has responded that the record keeping and reporting requirements of the first phase of the Levy Scheme are in essence measures to protect the Government's revenue as the relevant records can be used for assessing the levy receivable in case of doubts or non-compliance. The requirements are proposed to be removed under the extended Scheme on account of operational feasibility and equality to all retailers. Removal of the above requirements will not undermine the policy objective of the Bill to inculcate behavioral change of consumers on using less PSBs.

35. On the suggestion of applying the "remittance" approach to certain retailers, the Administration has pointed out that in general, any proposal leading to some retailers being subject to the "remittance" approach and the rest to the "retention" approach will involve a "dual" system which will give rise to differential treatment. The Administration has assessed members' proposals by

the "justification test"³ which is relevant in considering the right to equality and non-discrimination protected by Article 22 of the Hong Kong Bill of Rights ("HKBOR") and Article 25 of the Basic Law ("BL"). The Administration opines that the members' proposals will involve differential treatment for different groups of retailers and may not fully satisfy the "justification test".

36. As requested by the Bills Committee, the Legal Adviser has provided comments on the Administration's views on the application of the "justification test" for assessing the differential treatment proposed by members (LC Paper No. LS17/13-14 refers). According to the Legal Adviser's analysis, "business turnover", "retail floor area of retail establishments" and "three or more business outlets in Hong Kong" as grounds for the proposed differential treatment are not personal characteristics of the retailers that would engage the "justification test". In response, the Administration has pointed out that as advised by the Department of Justice, there have been conflicting authorities on whether the difference in treatment needs to be based on an innate and immutable "personal characteristic", or whether it is sufficient that the different treatment is based on any sort of distinguishing characteristic.

37. Some members including Dr Hon Kenneth CHAN and Hon Cyd HO have expressed the view that it will be more helpful for the Administration to consider the "dual" system proposed by members from the policy perspective instead of focusing on the constitutionality of the system, as the analyses of both the Department of Justice and the Legal Adviser have suggested that the issue is unsettled in Hong Kong. The Administration has responded that it is important to ensure that government policies are not in breach of the provisions under BL and HKBOR. It is only prudent for the Administration to consider whether the differential treatment is justifiable. Besides, according to the landfill survey conducted in 2012, the PSB disposed of by the retail categories covered by the current phase only contributed to some 3% of the total PSBs disposed of at the landfill. Hence, focusing on the PSBs distributed by the registered retail outlets covered by the current phase of the Levy Scheme would not be a representative means in assessing the effectiveness of the extended Scheme.

38. The Administration has further advised on the practical issues involved in the members' proposals of adopting the "dual" system. According to the Administration, it is difficult to define who may be a chain operator or "large retailer". If it refers to past business turnover, it will be mandating a group of chain operators or business to report to the EPD certain commercially sensitive

³ In paragraph 6 of the Administration's Note for the Bills Committee (LC Paper No. CB(1)112/13-14(01)), the "justification test" is stated as follows –

"..... in order for differential treatment to be justified, the difference in treatment must (i) pursue a legitimate aim. This would require that there be a genuine need for the difference in treatment; (ii) be rationally connected to the legitimate aim; and (iii) be no more than is necessary to achieve the legitimate aim."

information on a recurrent basis. Part of such information (e.g. whether a retailer's business turnover exceeds the threshold) will have to be publicized. There will also be enforcement actions inquiring into such information of retailers who have not applied for registration. That will add compliance burden on the retail trade and the community as a whole. Defining a chain operator as a person who operates at least three retail outlets may also encounter practical difficulties. A chain operator, whatever defined, might not necessarily mean that he/she has the ability to comply with the remittance requirements.

39. Hon WU Chi-wai does not agree that the differential treatment proposed by members is unjustifiable. He considers it important to require those retailers with the administrative capability, such as chain fashion and bakery retailers, to submit information or returns on the distribution of PSBs to the Government with a view to facilitating the assessment of the effectiveness of the extended Scheme. He has therefore prepared a set of draft CSAs to require a retailer which has three or more retail outlets in Hong Kong, or has at least one retail outlet in Hong Kong with a retail floor area of not less than 100 square metres, to submit to the Government quarterly returns setting out the number of PSBs distributed by all of the retailer's registered retail outlets. However, the retailers are not required to remit the PSB charge to the Government.

40. The Administration has responded that it has been the Government's intention to foster a level playing field in the retail sector. The CSAs, if approved, will require different retailers to follow different compliance systems and that will go against the level playing field principle. The Administration has to be prudent in considering whether the differential treatment is justifiable.

41. The Administration has also advised that to address the Bills Committee's concerns about the measures for monitoring the usage of PSBs after implementation of the extended Scheme, it has explored with the Hong Kong Retail Management Association ("HKRMA") the feasibility of the retail trade to publish the aggregate distribution figures of PSBs on an annual basis, and the latter's feedback is positive. HKRMA has suggested that a voluntary reporting system can be implemented by encouraging the registered retailers covered by the current phase of the Levy Scheme to provide their PSBs usage to it on a yearly basis if the statutory reporting requirements are abandoned in the extended phase. HKRMA would then act as a single platform to collate figures provided by those retailers and help release the aggregate figures to EPD, and EPD will release the collated figures on an annual basis. HKRMA has approached those members who are also registered retailers currently covered by the Levy Scheme for their feedback to the proposed voluntary measures. So far 11 registered retailers operating some 2 960 registered retail outlets, representing about 85% of the total number of retail outlets covered by the current Levy Scheme, have rendered their support to the proposed reporting system.

42. The Bills Committee welcomes the voluntary measures as agreed by HKRMA. Hon WU Chi-wai has indicated that as the proposed voluntary reporting system has to a certain extent achieved the intended purpose of his CSAs, i.e. to make available data to help monitor the situation of PSB distribution upon the extension of the Levy Scheme, he will not pursue his CSAs. He and other members have also urged the Administration to work with HKRMA to encourage more retailers to participate in the voluntary reporting system and to monitor the effectiveness of the extended Scheme through different means, including increasing the frequency of landfill surveys to obtain more accurate and up-to-date data on PSB disposal.

43. Hon Cyd HO has suggested that the Administration should discuss with HKRMA possible ways to discourage the use of laminated paper bags by retailers. Hon Vincent FANG is concerned that as revealed by the findings of the landfill surveys on the disposal of PSBs, in 2012, as much as 80.94% of the PSBs disposed belong to the "Others" category and their sources cannot be identified. He has therefore urged the Administration to try to identify the sources of those PSBs and target its promotion and publicity efforts at the relevant categories of retailers.

Other measures to monitor the effectiveness and ensure the compliance of the extended Scheme

44. The Bills Committee has suggested that the Administration should monitor the usage of PSBs by collecting statistics on the import of PSBs. The Administration has advised that it will explore how other statistics sources may be relevant in monitoring the effectiveness of the extended Scheme. At present, the Census and Statistics Department ("C&SD") collates trade statistics on domestic import and export of Hong Kong using the information collected from the import/export declarations lodged by importers and exporters. The figures are compiled in accordance with international practice mainly for statistical purpose⁴. While there is no specific merchandise classification code as "plastic shopping bags", the two classification codes (83199 and 89311) which may be more relevant to packing bags, sacks, and shopping bags made of plastic, or similar bag items with plastic outer surface or plastic sheeting, include a wide range of bag products (e.g. rucksacks, cosmetic bags) and some items capture only the value of the goods. Hence, the data collated from such import/export declaration do not serve the objective of monitoring the local usage of PSBs.

⁴ The Hong Kong Merchandise Trade Statistics is published by C&SD and the publication is compiled based on the Standard International Trade Classification Revision 4 ("SITC Rev. 4") recommended by the United Nations for classifying trade statistics for economic analysis. C&SD collates the information contained in import/export declarations, and converts them into those nearly 3 000 SITC classification codes, and compile the trade statistics. At present, there is no specific merchandise code for PSBs.

45. The Administration has further advised that it will continue to conduct landfill surveys in assessing the disposal situation of PSBs which will help to monitor the effectiveness of the Levy Scheme upon its extension. It will also consider tracking behavioural changes of consumers through dedicated surveys.

46. The Bills Committee is concerned that as the entire retail sector will be covered under the extended Scheme, the Administration may not have sufficient manpower to enforce the scheme or to deal with complaints. The Administration has advised that it will step up enforcement against non-compliance. With the proposed fixed penalty system, it envisages that enforcement efficiency under the extended Scheme will be enhanced thus upholding the deterrent effect. It will critically review and deploy adequate staffing resources for implementation and enforcement of the extended Scheme. Publicity and public education will be enhanced to maximize the benefits. Besides, it will also conduct surprise checks and covert operations to help monitor compliance.

47. Hon WONG Ting-kwong is of the strong view that the Levy Scheme and its extension should target importers of PSBs rather than retailers and supports the imposition of the PSB charge at the import level. Such arrangement will be easier to implement and can avoid the problems encountered by retailers, irrespective of their scale. The Administration has responded that the Levy Scheme is meant to induce behavioural changes on the part of consumers to avoid excessive use of PSBs and the imposition of PSB charges on importers cannot serve the intended purpose.

Using the PSB charge for environmental purposes

48. The Bills Committee supports that the PSB charge should be used for environmental purposes. Views have been expressed that the Administration should encourage both large-scale retailers and SMEs to voluntarily donate the PSB charge to support environmental causes. There is also a suggestion that major supermarkets and chain stores should be requested to sign an undertaking to the effect that the PSB charge collected by them would be used for environment purposes.

49. As advised by the Administration, the Secretary for the Environment ("SEN") has mentioned in moving the Second Reading of the Bill on 8 May 2013 that retailers are encouraged to favourably consider designating revenue raised from the PSB charge for environmental protection or other charitable causes. So far, the feedback from the trade is positive. The Administration is open to the views of the trades and other stakeholders as to whether there is general support for more visible voluntary actions by the

retailers to designate the PSB charge for specific purposes, such as environmental education.

Fixed penalty system

50. The Bills Committee notes that the Bill provides for a fixed penalty system. If a person commits an offence for failing to charge for PSBs provided at the time of sale, the person concerned may be given a fixed penalty notice offering him/her an opportunity to discharge the liability for the offence by paying a fixed penalty of \$2,000. Meanwhile, the option to institute criminal proceedings will be retained to tackle breaches of serious nature such as repeated or systemic contraventions.

51. Noting that the proposed fixed penalty level of \$2,000 for a specified offence under the proposed section 28A(4) is based on the level of penalty in the convictions under the current phase of the Levy Scheme where the offenders were retailers of larger scale, the Bills Committee is concerned that the same level of penalty would be too high for SMEs under the extended Scheme. Some small retailers may omit the collection of the PSB charge only inadvertently. Hence, the Bills Committee has requested the Administration to consider lowering the penalty level.

52. The Administration has responded that having considered the Bills Committee's views, it will maintain the original proposal and set the fixed penalty at \$2,000. This is because the proposed penalty level indeed corresponds to the penalty for similar offences committed during the current phase of the Levy Scheme, which is mostly \$2,000 per conviction. As a matter of principle, the penalty level should reflect the seriousness of the offence rather than the offender's readiness to pay.

53. The Administration has also advised that a fixed penalty system gives an offender an opportunity to discharge liability by paying a fixed fine rather than attending a court hearing, provided that the offender accepts guilt. As far as businesses are concerned, the expenses and opportunity costs for going through court hearings can be considerable. The fixed penalty system would help reduce the time and legal costs of retailers in dealing with undisputed non-compliance cases. A low penalty level may however undermine the deterrent effect against non-compliance.

54. The Bills Committee is concerned about the defence available to an employer in the event that a staff member of the employer has neglected the employer's verbal instruction to charge the customer for every PSB provided, and that the employer is subsequently charged with an offence under the proposed section 18A. The Bills Committee has also sought clarification as to whether a sales person will be liable under the PERO in such circumstances.

The Administration has responded that under the proposed section 18A, a "seller" refers to the retailer as a legal entity and not a sales person, and the proposed section 18B(3) provides that "it is a defence to prove that the person exercised due diligence to avoid committing the offence".

Implementation of the extended Scheme

Grace period

55. To facilitate compliance of the extended Scheme, the Bills Committee has requested the Administration to consider introducing a grace period upon the implementation of the extended Scheme, during which first-time offenders would only be given a warning instead of being issued with a fixed penalty notice.

56. The Administration has responded that a specific commencement date for the extended Scheme will be appointed by way of CSAs mentioned in paragraph 67 below. A specific commencement date known to the stakeholders and members of the public will give a clear message of imminence and certainty, and will facilitate the planning of necessary preparatory work by the retail trade, the Government and other relevant stakeholders. About 12 months counting from the enactment of the Bill will be needed before the extended Scheme can be brought into operation. During this period, the Administration will stage necessary publicity and public education programmes to get the retail trade prepared for the implementation of the extended Scheme. This public education period before the commencement of the ordinance can serve the purpose of a "grace period" as suggested by the Bills Committee. During this period, advice would be given to retail trade in helping them to prepare their internal guidelines and in ensuring that their mode of operation would conform to the legal requirements.

57. The Administration has further advised that the Bill does not provide for a statutory mechanism that requires prior warning before prosecution can be initiated after the commencement date. A prior warning may undermine the deterrent effect since a warning must be issued first even for breaches of serious nature, e.g. systemic contraventions. The Administration has also pointed out that there have only been seven convictions since the Levy Scheme was launched in July 2009, indicating that there has been no significant problem of non-compliance. In practice, "public education" is the most essential element that will lead to the success of the extended scheme. It will continue to promote the BYOB culture which will also facilitate compliance.

58. Views have been expressed that assistance should be provided to needy households and the elderly to help them understand the extended Scheme. Reaching out services should also be provided to identify those who need help

to facilitate their compliance with the extended Scheme. The Administration has responded that it will consider the suggestion as far as possible. It will launch extensive publicity and education and partner with green groups and other organizations to promote the extended Scheme.

Mandatory publicity measures

59. In order to ensure that the public would have knowledge of the details of the extended Scheme, the Administration has been requested to consider mandating the fixing of a label by retailers, say on the cash register in a retail outlet, to inform customers of the details of the scheme.

60. The Administration has responded that its experience also shows that it can help if a retailer can display relevant publicity materials within a retail outlet as a reminder to customers about the BYOB message or the statutory requirement under the Levy Scheme. However, it does not support making such publicity measures a mandatory requirement as it may cause unintended implications on some retailers particularly SMEs who may not operate in premises that are suitable for the display of the mandatory publicity materials.

Application of the extended Scheme to the Government

61. Noting that the Bill does not seem to cover any sales of goods by the Government, the Bills Committee has requested for an explanation on the policy considerations for non-application of the extended Scheme to the Government.

62. The Administration has responded that the PERO currently does not bind the Government. With the extension of the Levy Scheme, it will issue circulars to bureaux and departments regarding the requirements to cease the free provision of PSBs to customers if they are engaged in retail sales in line with the provisions in the Bill when enacted. The Administration has also stressed that retail sales of goods of limited scale by bureaux and departments are mainly incidental to the Government's services to the public and should not be regarded as part of the broader retail industry. Given the aforesaid arrangement, and that there are other mandatory PRSs in the pipeline, the Administration considers it more appropriate for the Bill not to affect the current binding effect of the PERO.

Potential circumvention by inclusive pricing

63. The Bills Committee has expressed concern that a seller may sell goods at prices inclusive of the PSB charge (i.e. the PSB charge is included in the marked price of every item of goods which is, say, above a certain price) and hence would provide PSBs for the goods in any event but without any refund even if the customer does not want the PSB provided.

64. The Administration has advised that if a seller provides a PSB to the customer but does not collect the PSB charge from the customer, the seller will be subject to prosecution under the new section 18A(2) as proposed under the Bill. In case the seller argues that the PSB charge is already included in the pricing of the goods concerned, it is relevant to consider the practical circumstances under which the PSB is provided. Nevertheless, the customer can always refuse to claim the PSB in the first place. The Administration will publicize to the retail industry that such attempt to circumvent the extended Scheme is not allowed. It will also step up enforcement and encourage community participation in reporting non-compliance cases. Moreover, it will step up publicity and public education to the general public as well as the retail industry so as to promote the BYOB culture.

65. Having regard to the Administration's response in the last paragraph, the Bills Committee has queried whether there is any legal basis for the customer to seek a refund if he refuses to claim the PSB, as it would appear that the customer only has the choice to proceed with the purchase on the seller's terms or to shop elsewhere. The Administration has explained that there are various scenarios that plastic bags could form an integral part of the goods for sale in reality. While excessive and unnecessary packaging is discouraged on environmental grounds, the ambit of the Levy Scheme cannot be extended to regulate such behaviour, which reflects the commercial decisions of individual sellers. The Administration has further clarified that the buyer may seek to negotiate with the seller if he does not want the PSB provided by the seller. It would appeal to consumers as well as shop operators to avoid excessive package. Indeed consumers could vote with their feet by choosing to purchase at shops without excessive packaging and such behaviour will influence the marketing strategies of the shops.

66. In response to the Bills Committee's request for clarification as to how the seller's refusal to provide the refund when so requested may serve as an evidence for contravening the new section 18A(2), the Administration has advised that a PSB that is provided on top of the goods sold is subject to the Levy Scheme. In considering whether and how prosecution actions could be initiated for contravening the new section 18A⁵ in individual cases, the decisions will be made having regard to the circumstances of the cases.

Savings and transitional arrangements and other amendments

67. The Bills Committee notes that under the Administration's original proposal, the amendment ordinance will come into operation on a day to be appointed by SEN by notice published in the Gazette. According to the

⁵ Under the new section 18A, a retail seller of any goods must charge a customer an amount not less than \$0.5 for each PSB provided by the seller directly or indirectly to the customer at the time of the sale, for promoting the goods or otherwise in connection with the sale.

Administration's latest proposal, it will include a specific commencement date as part of the Bill by way of CSAs, instead of leaving it open until the publication of a commencement notice in the Gazette by SEN. In this connection, the Administration will move two sets of CSAs to jointly provide for the savings and transitional arrangements for the extension of the Levy Scheme and other necessary amendments to the Product Eco-responsibility (Plastic Shopping Bags) Regulation (Cap. 603A) ("the PSB Regulation") after a specific commencement date.

68. Specifically, one set of CSAs will repeal the provisions under the PSB Regulation that are relevant only to the current phase (e.g. registration) and prescribe the statutory forms for the new fixed penalty system. The other set of CSAs will specify the commencement date and will include provisions to ensure that the levy collected in the final quarter (or part of a quarter) immediately before the commencement date can be remitted to the Government under the existing compliance system.

69. The Administration has explained that the latest approach can help expedite the legislative process by completing all necessary amendments in one go. Otherwise, another amendment bill/regulation would have to be submitted to LegCo separately to set out the commencement dates and other transitional and implementation details. A specific commencement date will also facilitate the relevant stakeholders to get prepared for the extended Scheme. Based on the experience in the current phase and noting the wider scope after the extension, it would need about 12 months counting from the enactment of the Bill before the extended Scheme can be brought into operation. This would allow sufficient lead time for enhancement of the internal computer system as well as publicity and public education programmes, and prepare the trade (especially SMEs) for the implementation of the extended Scheme.

70. The Bills Committee has requested the Administration to explain the relationship between the commencement date and the dates which would be specified in the relevant provisions of Schedule 5. According to the Administration, assuming that the resumption of the second reading debate of the Bill and proceedings of the third reading could be scheduled at a LegCo meeting before the end of March 2014 and given the need for 12 months for undertaking the preparatory and publicity work, it is estimated that the commencement date can be "1 April 2015". On this basis, other critical dates for the necessary savings and transitional arrangements will be as follows –

- (a) the final operating quarter for the Levy Scheme will be 1 January to 31 March 2015;
- (b) all returns and payment of levies should be made on or before 30 April 2015; and

- (c) records relevant to the returns and payment of levies should be kept until 31 March 2020.

71. The Administration has advised that the above dates are subject to changes if the resumption of the second and third reading is deferred to a meeting later than March 2014.

72. In the light of the proposed repeal of section 13(2)(a) and (b) of the PERO, which provides for appeals against rejections of applications on matters specified in sections 19 and 23 of the PERO (i.e. on "restrictions on provision of plastic shopping bags by, and registration of, prescribed retailers", and "duty of registered retailers to charge for plastic shopping bags") respectively, and the proposed repeal of Parts 2 and 3 of the PSB Regulation (i.e. on "registration and deregistration of retailers", and "exemption of part of the area of registered retail outlets"), the Bills Committee has requested the Administration to advise whether and how an application made under section 13(1) against a decision of any such rejection which is made on or after 1 April 2015 will be dealt with.

73. The Administration has advised that if the Director of Environmental Protection ("DEP") rejects an application for registration or deregistration under section 19 of the PERO, or an application for exemption under section 23 of the PERO before 1 April 2015 (i.e. the currently assumed commencement date of the extended phase), the applicant may appeal to the Appeal Board against the decision under section 13 of the PERO if he is aggrieved by the decision. The right to appeal, once accrued, will be preserved under section 23 of the Interpretation and General Clause Ordinance (Cap. 1) even if the provision conferring the right (i.e. section 13(2)(a) and (b) of the PERO) is repealed. In case DEP has not rejected the application before 1 April 2015, the extended phase will take effect on the scheduled commencement date. There will be no need for DEP to make any decision on the applications in this regard and therefore no appeal will arise. Further, in the light of the clear guidelines issued by the Administration to the relevant retailers, there has been no appeal on any decision made by DEP on any of the application made pursuant to section 19 or 23 of the PERO so far. In addition, a person who does not agree to the assessment of the levies payable as stated in the assessment notice issued by DEP may appeal according to the appeal mechanism which is provided under the proposed transitional and saving provisions.

74. Noting the proposed repeal of section 20 of the PERO which provides that DEP must maintain a register containing the information which is specified in section 20(1) of the PERO, the Bills Committee has requested the Administration to advise how it would keep the records of the information so specified during the period which Schedule 5 is applicable.

75. The Administration has pointed out that under the extended Scheme, the Levy Scheme will apply to the entire retail sector and the requirements in registering retail outlets as "registered outlets" will cease. The need for maintaining a statutory register will become obsolete. That said, it intends to maintain a full list of registered retailers, registered retail outlets and other compliance-related information based on the relevant records as at the day before the commencement of the amendment ordinance. It may do so through administrative means, for example, publishing the relevant information on the EPD website.

76. Some members, including Hon Vincent FANG, Hon WONG Ting-kwong and Hon Cyd HO, have expressed the view that displaying the records of registered retailers after the commencement of the extended Scheme is not necessary and may confuse the public. The Administration has responded that the information will be historical records by that time and there will be suitable remarks to avoid causing confusion.

Committee Stage amendments

77. Apart from the CSAs discussed in paragraphs 19 and 67 above, the Administration will also move a CSA to make a textual minor amendment in view of the commencement of the new Companies Ordinance (Cap. 622) on 3 March 2014. Clause 4 of the Bill contains a reference to "Cap. 32" which should be revised as "Cap. 622".

78. The Bills Committee agrees to the CSAs to be moved by the Administration and has not proposed any CSAs to the Bill.

Resumption of the Second Reading debate

79. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 19 March 2014.

Consultation with the House Committee

80. The Bills Committee reported its deliberations to the House Committee on 28 February 2014.

Bills Committee on Product Eco-responsibility (Amendment) Bill 2013

Membership list

Chairman Dr Hon Kenneth CHAN Ka-lok

Members Hon Vincent FANG Kang, SBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Cyd HO Sau-lan
Hon CHAN Hak-kan, JP
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (up to 28 November 2013)
Hon Paul TSE Wai-chun, JP
Hon WU Chi-wai, MH
Hon Gary FAN Kwok-wai
Hon CHAN Han-pan
Hon KWOK Wai-keung
Dr Hon Helena WONG Pik-wan
Ir Dr Hon LO Wai-kwok, BBS, MH, JP
Hon Tony TSE Wai-chuen

Clerk Ms Miranda HON

Legal Adviser Miss Evelyn LEE

Appendix II

Bills Committee on Product Eco-responsibility (Amendment) Bill 2013

List of deputations and individuals who have submitted views to the Bills Committee

1. Coalition of Hong Kong Newspaper Magazine Merchants
2. Green. Recycling
3. Greeners Action
4. Hong Kong Doctors Union
5. Hong Kong Environmental Protection Association
6. Hong Kong Plastic Bags Manufacturers' Association
7. Hong Kong Recycle Materials & Re-production Business General Association Ltd
8. Hong Kong Retail Management Association
9. Labour Party
10. Liberal Party
11. Momentum 107
12. Mr Anthony YIU
13. Ms Mabel LAU
14. New People's Party
15. The General Chamber of Hong Kong Ceramic Sanitary Wares Ltd
16. The Lion Rock Institute
17. 西九龍環保協會
- *18. Federation of Hong Kong Industries
- *19. Friends of the Earth (HK)
- *20. Hong Kong General Chamber of Commerce
- *21. Mr LI Ka-leung, Sai Kung District Council member
- *22. Ms Connor LAURIE
- *23. Plastic Free Seas
- *24. The Hong Kong Institution of Engineers
- *25. Wholesale and Retail Task Force of the Business Facilitation Advisory Committee

* submitted written views only