

CB(1) 2667/11-12(01)

For Information

## LEGISLATIVE COUNCIL PANEL ON ENVIRONMENTAL AFFAIRS

### The Environmental Levy Scheme on Plastic Shopping Bags: A Dual System

#### Introduction

At the meeting on 28 November 2011, the Government briefed the LegCo Panel on Environmental Affairs on the proposed way forward for the extension of the Environmental Levy Scheme on Plastic Shopping Bags ("Levy Scheme"), LegCo paper CB(1) 424/11-12(05) refers. This information note seeks to follow up the Panel's request raised at the meeting for an analysis of the legal concerns in adopting a "dual" system.

#### Background

2. The Levy Scheme was implemented on 7 July 2009 as the first mandatory producer responsibility scheme ("PRS") in Hong Kong under the Product Eco-responsibility Ordinance (Cap 603). By requiring registered retailers to charge their customers an environmental levy of 50 cents for each plastic shopping bag ("PSB") provided to them, the Levy Scheme aims to create a direct economic incentive to encourage consumers to reduce the excessive use of PSBs and to inculcate behavioural change towards Bring Your Own Bag ("BYOB").

3. It has been our clear policy intent from the outset that this PRS initiative is to be implemented by phases, with the first phase targeting at chain or large supermarkets, convenience stores and personal health and beauty stores which according to the landfill survey of 2005 were major sources of PSB disposal at landfills<sup>1</sup>. These stores jointly make up less than 4% of all retail outlets in Hong Kong. In adopting such an approach, the community has widely accepted that the initial phase of the Levy Scheme should be simple and easy to administer such that it could get off the ground smoothly. Adopting a phased approach was also important in allowing the Government to gain operational experience

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<sup>1</sup> The landfill survey of 2005 revealed that more than 20% of PSBs disposed of at landfills were distributed by supermarkets, convenience stores and personal health and beauty stores.

under the new policy initiative and facilitating the public to adapt to a behavioural change. These are legitimate policy objectives justifying, for the time being, the partial coverage of the Levy Scheme at the initial phase. At the same time, we remain conscious of the ultimate goal of extending the Levy Scheme to cover all retailers across the board and maintaining a level-playing field in the retail sector as far as possible.

4. The Government has committed to reviewing the Levy Scheme in one year after its implementation so as to evaluate its effectiveness in addressing the problem of excessive PSB use in Hong Kong and to consider if and how it could be extended to other retailers. In so doing, we note that while the phased approach of this PRS initiative and the currently selective coverage are justified for its initial phase, this fact does not automatically imply the justifiability of any differential treatment in the extended phase. Thus, we need to consider the policy rationale and justifications for applying a differential treatment among retailers in the extended phase. Indeed, in extending the coverage of the Levy Scheme, we seek not only to realize greater environmental benefits but to do so in a manner compatible with maintaining a level-playing field in the retail sector.

### **The Principle of Equal before the Law and Non-discrimination**

5. As advised by the Department of Justice (“DOJ”), the right to equality and non-discrimination is constitutionally protected under Article 22 of the Hong Kong Bill of Rights (“HKBOR”), which provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 25 of the Basic Law (“BL”)<sup>2</sup> also protects equality before the law.

6. The Court of Final Appeal in *SJ v Yau Yuk Lung Zigo*<sup>3</sup> explained that the principle of equality requires that “in general, the law should usually accord identical treatment to comparable situations”. The Court of Final Appeal cited with approval the dicta of Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 566C, that “[l]ike cases should be

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<sup>2</sup> BL 25 states that “[a]ll Hong Kong residents shall be equal before the law”.

<sup>3</sup> FACC 12/2006, per Li CJ, at para 19.

treated alike, unlike cases should not to be treated alike.”

7. That said, differences in legal treatment may be justified for good reason. However, 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.<sup>4</sup> This is the “justification test” for assessing the constitutionality of a differential treatment.

### Justification for the “Dual” System

8. At the Panel meeting on 28 November 2011, some Members expressed the view that if the extended Levy Scheme adopts a “retention” approach<sup>5</sup>, existing registered retailers (being mostly chain operators) could achieve savings and earn additional income which should otherwise be remitted to the Government under the current “remittance” approach. They also expressed the view that by implementing a “dual” system the Government could preserve the current levy income of some \$25 million annually while addressing the practical difficulties of small and medium enterprises (“SMEs”) to comply with the existing compliance system which comprises administrative requirements for registration of retailers and retail outlets, keeping of records as well as submission of quarterly returns to the Government.

9. If a “dual” system is implemented, after shoppers are charged 50 cents for each PSB, some retailers would be required to remit the PSB charge to the Government whereas others would be allowed to retain it. This would give rise to differential treatment among retailers<sup>6</sup>, and the legality of the difference in treatment needs to be considered in accordance with the “justification test” described in paragraph 7 above.

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<sup>4</sup> *Yau Yuk Lung*, supra, at para 20.

<sup>5</sup> i.e. the 50 cents charge collected by the retailers is to be retained by them without the need to remit to the Government, vis-à-vis the “remittance” approach adopted under the current scheme in which registered retailers have to remit the levy collected periodically to the Government.

<sup>6</sup> It is noteworthy that the nature of the differential treatment under a “dual” system is different from that under the initial phase of the Levy Scheme. The existing Levy Scheme imposes an environmental levy on *shoppers* depending on the types of stores they visit. On the one hand, since all shoppers are free to shop at different stores and they will receive the same treatment for the same kind of stores they visit, there is no differential treatment among shoppers on ground of “status” within the meaning of HKBOR 22 and BL25. On the other hand, even if there is any differential treatment, it is not directed against retailers as such but would be so under a “dual” system depending on whether a retailer is classified as a “chain operator”.

As noted above, one cannot automatically assume that the justifications for selective coverage of the PRS initiative at the initial phase can apply, or apply with equal force, to the difference in treatment among retailers under a “dual” system in the extended phase.

Whether “Preserving the Current Levy Income” is Sufficient as a Legitimate Aim

10. Our analysis is that in the present context, “preserving the current levy income” might not be sufficient to constitute the legitimate aim for justifying (in terms of the “justification test”) why some retailers have to remit the PSB charge to the Government periodically under a stringent compliance system whereas the other retailers could retain such charge. This is because –

- (a) as a matter of first principle, the PRS initiative (in its initial or extended phase) is an environmental initiative. It is the objective of Cap 603 (the enabling ordinance) to minimize the environmental impact of (amongst other things) PSBs and to that end, to introduce PRS on the basis of the “polluter pays” principle. It is also our well-professed policy intent that the PRS is not a revenue-generating measure; it seeks to create a direct economic incentive to encourage behavioral change towards BYOB thus reducing the excessive PSB use in Hong Kong. In fact, as we have always explained, the more successful the Levy Scheme is, the fewer PSBs would be used and the less revenue would be generated.
- (b) moreover, when implementing the initial phase of the Levy Scheme, we have duly considered whether the environmental levy should be associated with the funding of environment-related initiatives and have decided against it. This is because such association could risk generating public misconception that they are contributing towards environmental protection by paying the environmental levy, which would defeat the very purpose of the Levy Scheme i.e. to reduce excessive PSB use. By analogy, if the main justification for adopting a “remittance” approach for some or all retailers is to generate revenue for the Government, this could also risk generating public misconception that they are contributing towards public revenue by claiming PSBs

and paying the environmental levy. Such misconception would equally undermine the purpose of the PRS. In view of this, we consider that adopting a “dual” system in order to preserve revenue for the Government would be contradictory to the policy intent of the Levy Scheme.

### Practical Difficulty in Pursuing a “Dual” System

11. In addition to legal considerations, we have considered the administrative implications of adopting a “dual” system in line with the views as expressed in the Panel meeting that existing registered retailers should continue to stay with the “remittance” approach. If a “dual” system is to be pursued, it is important to have objective criteria in determining which retailers should be subject to the “remittance” approach and which the “retention” approach. As a part of the “justification test”, the criteria should not be arbitrarily drawn but should reasonably reflect a rational connection to the legitimate policy aim, and that the magnitude of the differential treatment must be proportionate to achieve the legitimate aim and be supported by objective facts.

12. At present, under the current legislation, the Levy Scheme applies to a retailer who carries on a retail business at (i) five or more qualified retail outlets<sup>7</sup>; or (ii) at least one qualified retail outlet that has a retail floor area of not less than 200 square metres. These criteria serve the initial phase well in facilitating the introduction of the PRS by phases, focusing first on a main source of PSB use (namely chain or large supermarkets, convenience stores and personal health and beauty stores) so that the Levy Scheme could get off the ground smoothly.

13. In our Consultation Document, we have presented the analysis as to why it is not practical to pursue a “dual” system on the basis of only the existing registered retailers should continue with the “remittance” approach. As set out in paragraph 5.9 and 5.10 of the document, it is open to the retailers to restructure their businesses to adapt to the changing regulatory environment through means including separate business registrations. Though not all chain operators or retailers currently covered in the first phase of the PRS would seek to pursue such an option, it is not feasible to prohibit any changes in the business operation either.

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<sup>7</sup> By “qualified retail outlet”, it refers to a retail outlet that offers all of the following three categories of goods for sale, namely (i) any food or drink; (ii) any medicine or first-aid item; and (iii) any personal hygiene or beauty product.

## Conclusion

14. On the basis of the analysis in paragraphs 8 to 13, we do not recommend a "dual" system as the way forward in extending the Levy Scheme. We are now preparing the legislative proposals along the direction of a "retention" approach and aim to introduce the amendments into the LegCo as soon as practicable in the new legislative session.

15. In parallel, there was suggestion at the Panel meeting in November 2011 for chain operators to use the PSB charge collected under the Levy Scheme for public purposes rather than proceeds of private businesses. We have conveyed the suggestion to the trades and their initial response is positive. We would step up publicity and public education to prepare the community for the extended Levy Scheme as soon as possible. We would also introduce a fixed penalty system to enhance the deterrent effect under the extended scheme.

**Environmental Protection Department**  
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