

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

This note sets out the Administration's response to the follow-up issues arising from the fifth meeting of the Bills Committee on the Product Eco-responsibility (Amendment) Bill 2013 ("the Amendment Bill"), held on 8 October 2013.

(a) *having regard to members' view that the "remittance" approach should continue to apply to those retailers which have the ability to comply with the relevant requirements under such approach, to consider –*

(i) *Hon Cyd HO's proposal of using business turnover and retail floor area of retail establishments as the criteria for deciding which retailers should be required to comply with the relevant requirements, in particular the requirement on the keeping of records and submission of quarterly returns to the Government; and*

(ii) *Hon WU Chi-wai's proposal of applying the "remittance" approach to those chain operators with "three or more business outlets" in Hong Kong; and*

2. 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 that needs to be justified. We have explained our detailed analysis to the LegCo Panel on Environmental Affairs vide the information note LC Paper No. CB(1)2667/11-12(01) (the "Information Note") as enclosed at Annex A. In addition, there may also exist other practical issues that need to be considered.

3. In general, the proposals of Hon Cyd HO and Hon WU Chi-wai differ in several aspects –

Obligations of the Chain Operators

4. Hon WU Chi-wai's proposal will require chain operators to do all that prescribed retailers are required to under the current phase of the

Environmental Levy Scheme on Plastic Shopping Bags (the “PSB Levy Scheme”). More specifically, prescribed retailers have to –

- (a) register themselves with the Government under the Product Eco-responsibility (Plastic Shopping Bags) Regulation;
- (b) register each qualified retail outlet that they operate;
- (c) submit quarterly returns to the Government setting out the number of plastic shopping bags (“PSBs”) distributed to customers in the non-exempted areas in all of their registered retail outlets as well as the amount of levy collected for such bags;
- (d) pay to the Government their levy income as stated in their returns on a quarterly basis;
- (e) keep records, invoices, receipts, delivery notes or any other documents that contain sufficient details for the purpose of verification of the quarterly returns and levy payments for not less than 5 years; and
- (f) inform the Government of any changes in information furnished for registration, and put up application where circumstances requires deregistration.

5. As Hon Cyd HO explained during the Bills Committee meeting, her proposal would require the chain operators or those “large retailers” to perform only (e) above, and the information so submitted to the Government should be publicized.

6. Despite the difference, we consider that both proposals will involve differential treatment of different groups of retailers. Paragraph 7 of the Information Note has outlined the “justification test” for accessing the constitutionality of a differential treatment –

*“... 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.”*

## Objectives of the “Dual” System

7. According to the elaborations at the Bills Committee meeting, Hon Cyd HO wished to facilitate the assessment of the effectiveness of the PSB Levy Scheme after its extension by requesting prescribed retailers or retailers meeting certain criteria (e.g. business turnover, retail floor area) to provide more information and records to the Government about their PSB distribution. On the contrary, Hon WU Chi-wai intended to preserve the existing compliance system as far as possible by requiring chain operators to undertake all duties of a registered retailer, including remitting the fees collected to the Government.

8. There can be questions casting doubts on whether the two proposals may fully satisfy the “justification test”. For instance, under Hon Cyd HO’s proposal, the extended PSB Levy Scheme will cover all retailers including small and medium enterprises who form the majority of the retail trade (over 99%), but the record keeping and reporting requirement is only imposed on the “larger retailers”. The information so collected would not allow for a reliable assessment of the effectiveness of the entire scheme. As regards Hon WU Chi-wai’s proposal, the stated objective of the Amendment Bill is to extend the coverage of the PSB Levy Scheme to cover all retailers. It is also revealed during the public consultation that majority of the citizens supported a full extension of the PSB Levy Scheme. Preservation of the existing compliance system per se would not contribute to the extension of the PSB Levy Scheme.

## Criteria for Adopting the “Remittance” Approach

9. Some Hon Members contemplated that the “remittance” approach with all the registration and reporting procedures be determined by the retailer’s business turnover as well as the retail floor area of the retail outlet that he operates, or whether it operates three or more retail outlets.

10. Practical experience suggests that it is difficult to define who may be a chain operator or “large retailer”. If we refer to (past) business turnover, we will be mandating a group of chain operators or business to report to the Environmental Protection Department certain commercially sensitive 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 to the compliance burden on the retail trade and the community

as a whole.

### Ability to Comply

11. Defining a chain operator as a person who operates at least three retail outlets may also encounter practical difficulties. According to Hon WU Chi-wai, the business operation of these retailers must be computerized. In actual practice, however, a person may run three retail outlets selling different products. There may be family businesses where individual retail outlets are separately operated by different family members without forming any business network. Or the three retail outlets can all be newspaper stalls which operate in a cash-trade mode. A chain operator, whatever defined, might not necessary mean that they have the ability to comply with the remittance requirements.

*(b) to consider the need to remove the term “easily” from the new section 18A(4)(b).*

12. We do not find it appropriate to remove “easily” from the new section 18A(4)(b). A PSB is often made of polyethylene, polypropylene, polyvinyl chloride and nylon. These plastic materials may be used in a wide range of applications. For instance, polyethylene may also be used to produce plastic bottles or lunch boxes. Through suitable chemical processes, plastic bottles made from polyethylene can be turned into PSBs. If the word “easily” is removed, the new section 18A(4)(b) will have the effect of expanding the meaning of references to PSB to include plastic bottles or anything made of polyethylene. We also concur with Hon LO Wai-kwok who suggested at the last Bills Committee meeting the example of a balloon which is made of plastic may theoretically be turned into PSBs through certain complicated treatment processes. This is against our policy intent.

**Environmental Protection Department**  
**October 2013**

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**  
**September 2012**