

立法會 *Legislative Council*

LC Paper No. CB(1)1251/16-17

Ref : CB1/BC/1/16

Report of the Bills Committee on Stamp Duty (Amendment) Bill 2017 and Stamp Duty (Amendment) (No. 2) Bill 2017

Purpose

This paper reports on the deliberations of the Bills Committee on Stamp Duty (Amendment) Bill 2017 and Stamp Duty (Amendment) (No. 2) Bill 2017 in relation to the Stamp Duty (Amendment) Bill 2017 ("the Bill").

Background

2. According to the Administration, due to tight local housing demand-supply balance and exceptionally low interest rates in the global monetary environment, the local property market has been moving away from economic fundamentals, with heightened risks of a property market bubble. To address the demand-supply imbalance, the Administration has strived to increase land supply for new housing through short, medium and long-term means. The Administration has also introduced several rounds of demand-side management measures to combat short-term speculative activities, curb external demand and reduce investment demand, thereby stabilizing the property market, ensuring the healthy and stable development of the property market, and according priority to the home ownership needs of Hong Kong permanent residents ("HKPRs")¹ in the midst of the present tight housing demand-supply balance.

¹ Under Section 29A of the Stamp Duty Ordinance (Cap. 117) ("SDO"), a Hong Kong permanent resident ("HKPR") means -

- (a) a person who holds a valid permanent identity card ("PIC") issued under the Registration of Persons Ordinance (Cap.177); or
- (b) a person who is eligible to but exempted from applying for the issue of a PIC under regulation 25(e) of the Registration of Persons Regulation (Cap. 177 sub. leg. A).

3. The demand-side management measures as introduced since November 2010 include –

- (a) imposing a Special Stamp Duty ("SSD")² in November 2010 on transactions of residential properties acquired on or after 20 November 2010 and resold within 24 months after acquisition;
- (b) enhancing SSD in October 2012³ to adjust upward the duty rates and extending the property holding period in respect of SSD⁴;
- (c) imposing a 15% Buyer's Stamp Duty ("BSD")³ in October 2012 on all residential properties acquired by any person (including companies) except a HKPR acting on his/her own behalf in the acquisition of the property; and

² The Stamp Duty (Amendment) Ordinance 2011 was enacted in June 2011 to impose a Special Stamp Duty ("SSD") on transactions of residential properties acquired on or after 20 November 2010. SSD payable is calculated at the following regressive rates for different holding periods -

- (a) 15% of the amount or value of the consideration if the residential property has been held for six months or less;
- (b) 10% of the amount or value of the consideration if the residential property has been held for more than six months but for 12 months or less; and
- (c) 5% of the amount or value of the consideration if the residential property has been held for more than 12 months but for 24 months or less.

³ The Stamp Duty (Amendment) Ordinance 2014 was enacted in February 2014 to enhance SSD and to impose Buyer's Stamp Duty ("BSD") on non-HKPRs. Both measures apply to residential properties acquired on or after 27 October 2012.

⁴ The duty rates and the holding period in respect of SSD have been adjusted as follows -

- (a) 20% of the amount or value of the consideration if the residential property has been held for six months or less;
- (b) 15% of the amount or value of the consideration if the residential property has been held for more than six months but for 12 months or less; and
- (c) 10% of the amount or value of the consideration if the residential property has been held for more than 12 months but for 36 months or less.

- (d) imposing a Doubled Ad Valorem Stamp Duty ("DSD")⁵ in February 2013 on residential and non-residential properties acquired by any person (including companies) except acquisition of residential property by a HKPR acting on his/her own behalf and does not own any other residential property in Hong Kong at the time of acquisition.

4. Under the demand-side management measures, in acquiring a residential property, a HKPR buyer acting on his/her own behalf is exempted from paying BSD. He/she will also be exempted from paying DSD if he/she is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition.

5. In view of renewed signs of exuberance in the residential property market and reacceleration of investment demand since the third quarter of 2016, the Administration announced on 4 November 2016 the New Residential Stamp Duty ("NRSD") measure to help reduce investment demand and cool down the residential property market by introducing a new flat rate of 15% for AVD chargeable on residential property transactions, in lieu of the DSD rates, i.e. the existing AVD rates at Scale 1 in the First Schedule to the Stamp Duty Ordinance (Cap. 117) ("SDO").⁶ The NRSD measure came into effect on 5 November 2016. The Administration also proposed to maintain the existing exemption arrangements and the partial refund mechanism provided for under the

⁵ The Stamp Duty (Amendment) (No. 2) Ordinance 2014 was enacted in July 2014 to impose a higher rate of the ad valorem stamp duty ("AVD") on certain instruments dealing with residential and non-residential properties acquired on or after 23 February 2013, as follows -

Property consideration or market value (whichever is the higher)	DSD rate
Up to \$2,000,000	1.50%
\$2,000,001 to \$3,000,000	3.00%
\$3,000,001 to \$4,000,000	4.50%
\$4,000,001 to \$6,000,000	6.00%
\$6,000,001 to \$20,000,000	7.50%
\$20,000,001 and above	8.50%

⁶ Under the existing AVD regime, unless otherwise specified in SDO, transactions in respect of immovable properties (**both** residential and non-residential) acquired on or after 23 February 2013 are subject to AVD rates at Scale 1 (i.e. DSD). The major exception is where the subject property is a residential property and the buyer is a HKPR acting on his/her own behalf and is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition. For such exception or other exceptions/exemptions as specified in SDO, AVD rates at Scale 2 will be applicable.

DSD regime. Non-residential property transactions will continue to be subject to the existing DSD rates.

Stamp Duty (Amendment) Bill 2017

6. The Bill was published in the Gazette on 27 January 2017 and introduced into the Legislative Council ("LegCo") on 8 February 2017. The Bill seeks to amend SDO to –

- (a) impose a flat rate of 15% of AVD payable on certain instruments dealing with residential properties executed on or after 5 November 2016, in lieu of the existing DSD rates ranging from 1.5% to 8.5% at Scale 1 in the First Schedule to SDO (Clauses 5, 7 and 10 of the Bill); and
- (b) provide that certain instruments effecting the exchange between residential property and non-residential property would be chargeable with the existing DSD rates (Clauses 6 and 8 of the Bill).

The existing DSD rates and the NRSD rate are set out below –

<i>Property consideration or market value (whichever is the higher)</i>	<i>Existing DSD rates from 23 February 2013*</i>	<i>NRSD rate under the Bill applicable to residential property transactions as from 5 November 2016</i>
Up to \$2,000,000	1.50%	15%
\$2,000,001 to \$3,000,000	3.00%	
\$3,000,001 to \$4,000,000	4.50%	
\$4,000,001 to \$6,000,000	6.00%	
\$6,000,001 to \$20,000,000	7.50%	
\$20,000,001 and above	8.50%	
*remain applicable to non-residential property transactions as from 5 November 2016 and apply to equality money for the exchange between residential property and non-residential property paid by the person to whom the non-residential property is transferred.		

7. Given the price-sensitive nature of the property market, the Bill proposes that the NRSD measure be deemed to have taken effect on 5 November 2016, the day immediately following the announcement on 4 November 2016. Inland Revenue Department ("IRD") will record all the property transactions between 5 November 2016 and the date on which the Stamp Duty (Amendment) Ordinance is gazetted. Reminders

to demand for the stamp duty underpaid will be issued after the gazettal of the Stamp Duty (Amendment) Ordinance. The main provisions of the Bill are set out in **Appendix I**.

The Bills Committee

8. At the House Committee ("HC") meeting on 10 February 2017, members agreed to form a Bills Committee to study the Bill. The Bills Committee, under the chairmanship of Hon WONG Ting-kwong, held its first meeting on 28 February 2017. The Administration introduced the Stamp Duty (Amendment) (No. 2) Bill 2017 ("No. 2 Bill") into LegCo on 7 June 2017 to address the concerns from the public and the Bills Committee over the increasing trend where some HKPRs acquired multiple residential properties under a single instrument to avoid the payment of NRSD (details in paragraphs 22 to 28). As the Bills Committee did not object to the Administration's suggestion of having the same Bills Committee to study the No. 2 Bill, HC agreed on 9 June 2017 that the same Bills Committee should also study the No. 2 Bill. The membership of the then Bills Committee on the Bill was reopened and the name of the Bills Committee revised. The membership list of the Bills Committee is in **Appendix II**.

9. The Bills Committee has held six meetings between 28 February and 13 June 2017 to deliberate on the details of the Bill with the Administration, including one meeting to receive oral representations from deputations. A list of deputations which have submitted views on the Bill is in **Appendix III**.

Deliberations of the Bills Committee

10. In the course of scrutiny, the Bills Committee has discussed various issues, having regard to the concerns raised by deputations, in respect of the policy objectives of the Bill and effectiveness of demand-side management measures. The major issues discussed include –

- (a) effectiveness of the demand-side management measures;
- (b) exemption arrangements under the NRSD regime;
- (c) refund mechanism under the NRSD regime;
- (d) persons liable for the payment of NRSD;
- (e) date of execution of instrument; and
- (f) applicable AVD rates for exchange of properties.

Effectiveness of the demand-side management measures

11. In the face of the overheated residential property market, quite a number of members and a majority of deputations are of the view that the demand-side management measures, including DSD and the newly announced NRSD, are proven ineffective in cooling down the residential property market. Some members are not convinced by the Administration's justifications for introducing a new round of demand-side management measure, i.e. NRSD. They hold the view that such measures have instead contributed to the rapid increase in the residential property prices. It has become a common phenomenon that property owners are reluctant to acquire a new residential property to replace their original one due to high property prices, and hence the supply of residential properties in the second-hand market has sharply reduced, thereby further raising residential property prices and rents. These measures, coupled with the tightening of the loan-to-value ratios of property mortgages introduced by the Hong Kong Monetary Authority, have also rendered it more difficult for property owners to acquire a property of relatively larger size to replace their only other property, thus freezing the supply of small to medium-sized flats in the second-hand residential property market, which is not beneficial to potential first-time home buyers.

12. The Administration has explained that residential property prices are affected by a confluence of various local and external factors which closely interplay with one another, and hence there could never be one single measure that could address the soaring property prices. The demand-side management measures aim to redress the demand-supply imbalance by increasing the cost of property acquisition and curbing the demand of some groups of buyers (e.g. short-term speculators, non-local buyers and those who already owned residential property). The Administration has pointed out that the demand-side management measures will not reduce the actual housing supply, and exemption arrangements have been provided to cater for the home ownership needs of HKPRs who do not own any residential property in Hong Kong.

13. The Administration has advised that similar to the overall flat price and transaction volume, secondary residential property transaction volume is subject to influence of various factors, including property prices, supply of first-hand private residential properties, global and local economic outlook, the pace of the United States interest rate normalisation, international liquidity, demand-side management measures introduced in response to the overheated residential property market (e.g. the introduction and enhancement of SSD that aims to combat short-term speculative activities), etc. The Administration is of the view that local

buyers with genuine home ownership needs will eventually benefit from these measures when most speculators, investors and non-local buyers are driven out of the property market.

14. Hon Abraham SHEK has questioned that while the various demand-side management measures are ineffective in curbing the increases in residential property prices, these measures have merely benefitted property developers but not genuine home buyers. Some deputations are also concerned that the demand-side management measures and high property prices have encouraged developers to build more residential flats of smaller size, and in order to keep profits unaffected by such measures, developers offer stamp duty rebates to buyers while increasing the sale price of first-hand residential properties, and hence stamp duty hike will raise property prices.

15. The Administration has advised that the provision of stamp duty or cash rebates by certain developers is a commercial decision made in the light of the market situation. Such rebates are generally offered with additional conditions, say only for a certain type or number of flats, or buyers are required to join specified payment plan (e.g. cash payment plan). Some developers also offer other cash rebates / discounts to local buyers who only have to pay AVD at Scale 2 rates in a bid to lower the sale price in disguise. As far as the sizes of private residential units are concerned, the Administration holds the view that developers determine the sizes of private residential units to be built with reference to market needs. There is a time gap of several years between the sale of residential sites and the completion of residential units on such sites, with the market constantly changing in the intervening years. Currently, the Administration sees it appropriate to allow the market the flexibility to adjust based on market needs, and will closely monitor the market situation and consider taking appropriate measures as and when necessary.

16. Some members, including Dr Hon YIU Chung-yim and Hon Abraham SHEK, are of the view that various demand-side management measures rolled out since 2010 play a vital catalytic role in attracting buyers to acquire first-hand residential properties instead of second-hand residential properties. Such a phenomenon has been illustrated by the information provided by the Land Registry that the increasing proportion of primary sales to the annual total residential property transactions from 10% in 2010 to 31% in 2016, while that of secondary sales has decreased from 90% to 69% during the same period. Noting that the supply of first-hand residential properties in the market (less than 20 000 units per year) was much lower than the potential supply of second-hand residential properties (more than one million

units), these members consider that the increasing trend of primary sales, which has accounted for 31% of the total residential property transactions in 2016 and 29% in the first two months of 2017, is unusual.

17. The Administration has pointed out that changes in the number of second-hand residential property transactions are subject to various factors, including the asking prices put forward by property owners and their expectation on the future residential property market. The relevant statistics have illustrated that the number of second-hand residential property transactions remained stable between 2013 and 2016 after the introduction of the various demand-side management measures. The Administration has assured members that it has been striving to increase the supply of residential properties to address the issue of the housing demand-supply imbalance and tackle the problem of soaring flat prices at root.

18. Quite a number of members, including Hon Abraham SHEK, Hon WU Chi-wai and Hon Kenneth LEUNG, and some deputations have strongly suggested that to address the housing needs of members of the public, particularly, the needs of grassroots and the low-to-middle income families, the Administration should enhance the supply of public rental housing ("PRH") units and subsidized sale units under the Home Ownership Scheme ("HOS").

19. The Administration has advised that it has been striving to enhance the supply of private and public housing, including PRH, HOS, Green Form Subsidised Home Ownership Pilot Scheme, and subsidized sale flats provided by the Hong Kong Housing Society ("HKHS"). Under the Long Term Housing Strategy ("LTHS"), the latest housing supply target of private flats, PRH units and subsidized sale flats for the ten-year period from 2017-2018 to 2026-2027 are 180 000 units, 200 000 units and 80 000 units respectively (i.e. a public/private split of 60:40).

20. The Administration has further explained that one of the strategic directions under LTHS promulgated by the Administration in December 2014 is to provide more subsidized sale flats, including HOS flats, to address the home ownership aspirations of low-to-middle income families. The estimation as at September 2016 has indicated that over the five-year period from 2016-2017 to 2020-2021, the Hong Kong Housing Authority ("HA") and HKHS will build a total of about 22 600 subsidized sale flats.⁷ Among them, 2 160 flats under HA scheduled for completion in 2016-2017 were put up for pre-sale in December 2014 and

⁷ Flats include those of the Green Form Subsidised Home Ownership Pilot Scheme of HA and the Subsidised Sale Flats Project of HKHS.

were sold out. A total of about 3 700 flats under HA and HKHS were also put up for pre-sale in February 2016 and were sold out. In 2017, HA put up about 2 100 flats for pre-sale in March and HKHS will put up about 600 flats for pre-sale.

Exemption arrangements under the New Residential Stamp Duty regime

21. The Bills Committee notes that when announcing the NRSD measure on 4 November 2016, the Administration proposed to maintain the prevailing exemption arrangements under the DSD regime. The major exemption is the acquisition of residential property by a HKPR who is acting on his/her own behalf and is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition. Such acquisitions are exempted from the NRSD rate of 15% and are only subject to the lower AVD rates at Scale 2.⁸ There is no restriction on the number of residential properties acquired under a single instrument. Members also note that the other exemptions provided for under the existing DSD regime will be maintained under the NRSD regime. As explained by the Administration, since the existing exemptions provided for under the DSD regime will continue to be adopted in the implementation of NRSD, no amendment to SDO in this regard is necessary under the Bill.

Acquisition of multiple properties under a single instrument

22. The Administration has explained that SDO is designed to enable stamp duty to be collected on instruments recording transactions in property and stocks. Under the established AVD regime, for a single instrument involving multiple residential properties, IRD will determine the AVD payable at the applicable rate based on the total consideration of the instrument. Therefore, acquisition of multiple residential properties under a single instrument by a HKPR acting on his/her own behalf and is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition will be exempted from the NRSD rate of 15%, and will only be subject to the lower AVD rates at Scale 2.

⁸ The lower AVD rates at Scale 2 are set out below -

Property consideration or market value (whichever is the higher)	AVD rates at Scale 2
Up to \$2,000,000	\$100
\$2,000,001 to \$3,000,000	1.50%
\$3,000,001 to \$4,000,000	2.25%
\$4,000,001 to \$6,000,000	3.00%
\$6,000,001 to \$20,000,000	3.75%
\$20,000,001 and above	4.25%

23. The Chairman and members including Hon James TO, Hon Paul TSE, Hon KWOK Wai-keung, Hon Holden CHOW and Dr Hon YIU Chung-yim and some deputations are gravely concerned about the trend where some HKPR-buyers acquire multiple residential properties under a single instrument to avoid payment of NRSD, thereby undermining the intended effect of the NRSD measure. The Bills Committee notes the IRD's statistics that the ratio of such cases to the total residential property transactions increased from around 0.5% before the introduction of NRSD to 1.3% in February 2017, and further to 2.4% in March 2017. Members feel strongly that such acquisitions demonstrate clear investment intent and should not be exempted from NRSD, and they have urged the Administration to consider introducing measures to plug this loophole under the NRSD regime. The Administration has responded that it had been closely monitoring the implementation of NRSD, including transactions involving acquisition of multiple residential properties under a single instrument.

24. The Administration announced on 11 April 2017 the tightening of the exemption arrangement for HKPRs under the NRSD regime to prevent local buyers from making use of the exemption arrangement to evade payment of NRSD. Under the tightened exemption arrangement, acquisition of a single residential property (with or without a car parking space) under a single instrument by a HKPR who is acting on his/her own behalf and is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition will continue to be subject to the lower AVD rates at Scale 2. However, if the buyer concerned acquires more than one residential property under a single instrument, the transaction will no longer be exempted, and will be subject to the NRSD rate of 15%.

25. As explained by the Administration, IRD will consider the circumstances of individual cases and take into account relevant documents, including building plan, deed of mutual covenant, occupation permit, etc., when deciding whether properties concerned constitute a "single" residential property. The Administration has also proposed to set out in the legislative amendments some examples which would be regarded as a "single" residential property. These include a unit and a roof situated immediately above the unit; a unit and an adjacent garden; and a unit that became a single unit following the demolition of the walls, or any part of the walls, separating two adjoining units as shown by an approved building plan. Taking into account the scope of the Bill, the Administration subsequently decided to introduce another bill (i.e. the No. 2 Bill) into LegCo to amend SDO to implement the tightened exemption arrangement.

26. While raising no objection to the Administration's announcement of the tightening of the exemption arrangement, members including Hon James TO, Hon Abraham SHEK, Hon WU Chi-wai, Hon Alice MAK and Dr Hon YIU Chung-yim are keen to ensure that genuine users will not be affected by the tightened exemption arrangement, and the definition of a "single" residential property should be carefully defined to avoid possible abuse of the exemption arrangement. Some members have expressed concern about the Administration's suggestion to provide in the relevant Practice Note of IRD the handling of doubtful cases to consider whether the property concerned fell inside the definition of "single" residential property. They consider that such a suggestion will give IRD's officers discretionary power in dealing with individual cases, thereby giving rise to disputes. The Administration is also urged to consult the relevant scholars, professionals and industries on how to define a "single" residential property given its complexity.

27. As regards the proposed definition of a "single" residential property, Hon James TO has suggested that the Administration should consider relaxing the said proposed definition to include the following scenarios given the low chances of the definition being abused –

- (a) a residential property acquired together with two car parking spaces as long as they were located within the same residential estate; and
- (b) a residential property acquired together with a roof which was not situated immediately above the unit as long as the roof and the residential unit in question were located within the same residential estate.

28. The Administration has advised that a common sense approach should be adopted in considering the scenarios which will be regarded as a "single" residential property pursuant to the tightened exemption arrangement under the NRSD regime. It is questionable in common sense whether a residential property acquired together with a roof which is not situated immediately above the unit should be regarded as a "single" residential property, and the inclusion of which might render the scope of exemption too wide and subject to abuse. As car park spaces can be the subject of speculation, the exemption arrangement concerning car parking spaces should be handled with prudence. The Administration has further explained that under the current practice, if a residential property is acquired together with two car parking spaces, the parking spaces concerned are charged at the applicable AVD rates for "non-residential property", i.e. DSD rates.

Other cases for exemption

29. Given that young people who generally have low income find it difficult to secure mortgage loans from banks for acquisition of residential properties for self-use, parents who already held a residential property may help acquire another residential property under the joint name of their children, and are subject to payment of NRSD. As such, Hon James TO has urged the Administration to consider providing exemptions for cases involving the joint acquisition of residential properties by immediate family members (such as parents and children) where the property acquired is for self-use, which is not against the policy objectives of NRSD as opposed to speculation.

30. Hon Paul TSE notes that acquisition of an additional residential property as a long-term investment to earn rental income has been part of the retirement plan of many middle-class families which already owned one residential property for self-use. As these families will also have the need to replace their self-use property to improve the living environment, Mr TSE has proposed that the Administration should consider expanding the existing scope of exemption applicable under the NRSD regime to cater for such cases.

31. The Administration has reservation on both the suggestions by Hon James TO and Hon Paul TSE. As explained by the Administration, the demand-side management measures of BSD and DSD/NRSD are introduced to curb external demand and reduce investment demand respectively. While such measures may affect some local home-buyers who aspire to acquire an additional residential property for self-use, Mr TO's suggestion to further expand the existing scope of exemption to cover the scenario involving joint acquisition of a residential property by two immediate family members where one of them already held a residential property at the time of acquisition may create other loopholes, and is inconsistent with the policy objective of DSD/NRSD measure in managing demand from buyers who already owned a residential property. As regards Mr TSE's suggestion, the Administration has advised that it had been made clear that the refund mechanism introduced under the DSD regime was only applicable to cases where a HKPR-buyer acquired a new residential property to replace his/her only other residential property. The Administration is also of the view that priority should be accorded to address the home ownership needs of HKPRs who are not the beneficial owner of any residential property in Hong Kong at the time of acquisition of a residential property.

Refund mechanism under the New Residential Stamp Duty regime

32. The Bills Committee notes that if a HKPR replaces his/her only residential property by disposing of the original property before acquiring a new one, the acquisition of the new residential property will be subject to the lower AVD rates at Scale 2. As for those who replace their residential properties by acquiring a new property before disposing of the only original one, the NRSD measure maintains the refund mechanism provided for under the DSD regime. Under the existing mechanism, a HKPR who acquires a new residential property to replace his/her only original residential property will be subject to NRSD in the first instance, but he/she may apply to IRD within the statutory time limit⁹ for a partial refund of the AVD paid upon proof that his/her only original property has been disposed of within six months from the date of executing the assignment of the new residential property. The amount to be refunded is the stamp duty paid at the new rate of 15% in excess of that computed at Scale 2 rates. The Administration has gathered from the market that bridging loans are currently provided by local banks for customers replacing their properties to cater for their financial needs during property replacement, and the repayment period of these bridging loans is six months in general.

Payment of stamp duty with bank guarantee and extension of the statutory time limit for disposal of the original property under the existing refund mechanism

33. The Chairman and many members including Hon James TO, Hon Paul TSE, Hon Alice MAK, Hon CHUNG Kwok-pan, Hon Holden CHOW and Dr Hon YIU Chung-yim and some deputations have urged the Administration to seriously consider the following suggestions in respect of the refund mechanism under the NRSD regime -

- (a) to ease the cash flow problem of HKPR-buyers who intend to replace their only residential property, IRD should consider allowing buyers to pay AVD at Scale 2 rates rather than the NRSD rate of 15% when acquiring a new residential property in the first instance. Buyers are required to provide IRD with a bank guarantee of an amount equal to the difference between stamp duty payments calculated at the 15% new rate and the Scale 2 rates. If buyers fail to dispose of their only original property within the six-month

⁹ There is a general time limit for claiming refunds, which is within two years from the date of executing the agreement for sale and purchase for acquisition of the new residential property or not later than two months after the date of executing the assignment for the disposal of the original residential property, whichever is the later.

time limit, IRD may recover the difference from the guarantor bank; and

- (b) having regard to the practical difficulty for a property owner in disposing of his/her only other residential property within six months amid the sluggish property market upon the acquisition of a new property for replacement, the statutory time limit for disposal of the original property should be extended from six months to nine months or 12 months to allow more time for property replacement.

34. In response to the aforesaid suggestions of members, the Administration states that it has reviewed the existing refund mechanism and relevant statistics. On the suggestion of extending the six-month specified period for disposing the original property under the existing refund mechanism, the Administration has explained that the statutory time limit of six months had been thoroughly discussed by the relevant Bills Committee when it scrutinized the Stamp Duty (Amendment) Bill 2013 ("the 2013 Bill") that implements the DSD measure. Taking into account the views of the then Bills Committee, the Administration revised the original arrangement by moving Committee stage amendments ("CSAs") to adjust the six-month time limit to commence from the date of conveyance on sale instead of the agreement for sale and purchase of the newly acquired property. The CSAs were passed. According to IRD's statistics, about 90% of persons who applied for refund executed the agreement for sale and purchase for disposal of the original residential property either before, or within three month after, they had executed the assignment of the new residential property. The Administration considers that setting the statutory time limit for disposal of the original property at six months after the date of executing the assignment of the new residential property is a practicable and appropriate arrangement.

35. While the Administration appreciates that members' suggestions aim to facilitate genuine users in replacing their residential properties, it has explained that in considering whether certain requirements under the existing refund mechanism should be relaxed, it has to take into account impacts of such suggestions on the property market as a whole, and to strike a right balance between taking care of the needs of HKPRs in replacing their properties and safeguarding the effectiveness of the demand-side management measures. Since it is difficult to identify who are those genuine buyers who wish to replace their original properties, allowing persons replacing their properties to pay stamp duty with bank guarantee may invite some owners without genuine intention to dispose of their original properties to, under the guise of property replacement, defer payment of stamp duty (for as long as three years under some

circumstances¹⁰) or profit from holding more than one residential property for a longer period of time. This goes against the policy intent of introducing NRSD and may create loopholes, thereby undermining the effectiveness of the new measure in reducing investment demand. If the statutory time limit for disposing the original property is extended from six months to nine months or even 12 months, it may result in a situation where more property owners may delay the disposal of their original residential property under the guise of property replacement, which in effect allows them to hold more than one residential property for a long period of time. This is also inconsistent with the policy objective of implementing the NRSD measure and may also reduce the supply of residential properties in the secondary market.

36. The Administration cautions that past experiences indicate that any move to relax the prevailing exemption arrangements or refund mechanism may be speculated by the market as a signal from the Government to "water down" the demand-side management measures, thereby resulting in a more exuberant market. In view of the current buoyancy in the property market, the Administration considers that it has to act prudently and to avoid sending a wrong message to the market. Hence, after careful consideration, the Administration considers that it is not an appropriate timing to adjust the refund mechanism, lest this will undermine the effectiveness of NRSD and further aggravate the risk of a bubble.

37. Hon James TO does not agree with the Administration's explanation, and maintains the view that the NRSD regime has imposed heavy financial burden on genuine users in replacing their residential properties and that the six-month specified period is not enough for them to dispose of their only other residential property in the market at a reasonable price. Mr TO has submitted to the Bills Committee for discussion three sets of draft CSAs to amend clauses 5 and 7 of the Bill which he intends to move, to the effects as stated in paragraphs 33(a) and (b).

38. Apart from the policy considerations as stated in paragraphs 34 to 36 above, the Administration considers that Hon James TO's draft CSAs are outside the scope of the Bill. As evident from the long title, Explanatory Memorandum and provisions of the Bill, the related LegCo Brief and other relevant factors, the object of the Bill is to introduce a new flat rate for the AVD payable on certain instruments dealing with

¹⁰ The pre-sale period of some uncompleted residential properties can be as long as 30 months. Thus, under the existing refund mechanism, it is possible that persons replacing their properties may only dispose of their original properties 36 months after the date of executing the agreement for sale and purchase of the new property.

residential properties under SDO, and the NRSD measure will continue to adopt the exemption arrangements and maintain the refund mechanism under the DSD regime. Subject to the ruling of the President, the Administration considers that any CSA which seeks to change the prevailing exemption arrangements or refund mechanism would likely be considered as outside the scope of the Bill. This is also the reason why the Administration has to introduce a new bill, i.e. the No. 2 Bill, instead of moving CSAs to the Bill, to give effect to the tightened exemption arrangement for HKPRs to address the concerns over acquisition of multiple residential properties under a single instrument as announced on 11 April 2017.

39. In response to enquiry, the Legal Adviser of the Bills Committee is of the view that subject to the President's ruling on the admissibility of Hon James TO's proposed CSAs to the Bill under the Rules of Procedure, it is likely that Mr TO's proposed CSAs are outside the scope of the Bill which primarily deals with one subject matter, i.e. the imposition of a flat rate of 15% of AVD payable on certain instruments dealing with residential properties executed on or after 5 November 2016, in lieu of the existing DSD rates. As regards Hon James TO's CSAs to allow payers of AVD to apply for an extension of the sixth-month specified period for disposing the original property and give a power to the Collector of Stamp Revenue to extend the six-month specified period for either three months or six months, the Legal Adviser of the Bills Committee has advised that section 29DF of SDO does not provide a mechanism under which payers of AVD may apply for an extension of the six-month specified period nor does it provide any power to the Collector of Stamp Revenue to extend the six-month specified period. As the Collector will be required to consider applications for an extension of the six-month specified period, which is likely a new power, it may be regarded as "a new and distinct function" of the Collector, in which case the proposed CSAs may have a charging effect within the meaning of the Rules of Procedure.

Payment of the New Residential Stamp Duty

40. Hon Holden CHOW has proposed that in order to address the cash flow problem encountered by HKPR-buyers in acquiring a residential property to replace their only other property, the Administration should consider not requiring the payment of NRSD upfront and allowing the HKPR-buyer concerned to submit necessary information to IRD to prove that his/her only other property had been disposed of within six months from the date of assignment of the newly acquired property to apply for exemption from NRSD. The Chairman and some members including Hon Paul TSE and Hon Alice MAK have expressed support to

Mr CHOW's proposal. Some deputations have also proposed that HKPR-buyers should be allowed to pay NRSD in two payments or by instalments to ease their cash flow problem.

41. The Administration does not consider the suggestion feasible, and has pointed out that under SDO, both buyers and sellers shall, within 30 days after executing a chargeable instrument, present the instrument concerned to IRD for stamping and pay AVD at the applicable rate. Late payment of stamp duty is subject to a fine. Hon Holden CHOW's suggestion amounts to allowing deferred payment of partial stamp duty, and will have a fundamental impact on the levying system of stamp duty. Furthermore, from the administrative prospective, IRD has to deploy additional resources and manpower to continuously monitor if the buyer who claims to replace his/her property has disposed of his/her only original property within the six-month time limit in order to determine whether to recover the difference in stamp duty from the buyers concerned, which may not be an appropriate way to collect stamp duty.

42. Noting the Administration's explanation, the Chairman and Hon Paul TSE are disappointed that the Administration disagrees with the proposal of delayed NRSD payment simply on the ground that it would cause administrative inconvenience to IRD. They consider that to guard against default payment of NRSD, IRD might consider charging interest on the outstanding amount of unpaid AVD or imposing an encumbrance on the property concerned as a deterrence. The Administration should strive to help ease the cash flow problem of genuine users seeking property replacement in the market notwithstanding that the relevant measures might increase the administrative work of IRD.

Persons liable for the payment of New Residential Stamp Duty

43. The proposed amended Part 1(C) of Scale 1 of Head 1 (1) in the First Schedule to SDO (i.e. clause 10(4) of the Bill) provides that "[a]ll parties, and all other persons executing" the relevant instrument are liable for NRSD payment. Hon James TO has requested the Administration to consider deleting the phrase "and all other persons executing" from the proposed amended Part 1(C) of Scale 1 of Head 1(1) in the First Schedule to SDO, to the effect that parties other than buyers and sellers of the residential property concerned, e.g. estate agents, will not be liable for payment of NRSD.

44. The Administration has explained that Head 1(1) and Head 1(1A) in the First Schedule to SDO currently provide that all parties of the instrument (i.e. the chargeable agreement for sale and purchase and

conveyance on sale) and all other persons executing the instrument are liable for the payment of AVD. The Bill has not made any amendment thereto. Generally, an estate agent signing a provisional agreement for sale and purchase in the capacity of a witness will not be regarded as a liable person.

45. On the other hand, according to section 4(3) of SDO, any person who uses an instrument chargeable with stamp duty shall be liable for the payment of the stamp duty. Therefore, if an estate agent wishes to recover agent commission from the buyer or seller by submitting a provisional agreement for sale and purchase as evidence, the agent may be liable for the payment of stamp duty. However, the Administration gathers from the market that in general, estate agents will separately enter into an estate agency agreement with their clients on provision of services and relevant commission.

46. Noting the Administration's explanation, Hon James TO is worried that there will be situations where parties other than buyers and sellers, such as estate agents, and tenants in the case of transfer of properties subject to existing tenancy, may need to sign on the relevant instruments. In some cases, estate agents may be required to present such instruments in law suits to recover the agent commission in default. Hon James TO considers it unfair for parties other than buyer and seller of a residential property to bear the liability of stamp duty payment if they have used the relevant instrument for legitimate purposes. In this connection, Mr TO has indicated his intention to propose CSAs to clause 10(4) of the Bill to delete the phrase "and all other persons executing" in the proposed amended Part 1(C) of Scale 1 of Head 1(1) in the First Schedule to SDO, to the effect that parties other than buyers and sellers of the residential property concerned, such as estate agents and tenants, will bear no liability for payment of NRSD.

Date of execution of instrument

47. The proposed amended Part 1(C) of Scale 1 of Head 1(1A) in the First Schedule to SDO (clause 10(6) of the Bill) provides that "[a]ll parties except a party who on the relevant date (within the meaning of section 29B(3)) does not know that the agreement affects that party, and all other party executing" are liable to pay NRSD. In this connection, Hon James TO has enquired whether the purchaser, who had signed a provisional agreement for sales and purchase ("Provisional Agreement") on a property transaction unilaterally before 5 November 2016 in advance of the vendor's signing and the relevant Provisional Agreement was only subsequently signed by the vendor on or after 5 November 2016 (i.e. the effective date of NRSD) where the purchaser had not been notified of the

vendor's signing date of the Provisional Agreement by the estate agent concerned, would be liable to payment of NRSD pursuant to the proposed amended Part 1 (C) of Scale 1 of Head 1(1A) in the First Schedule to SDO.

48. The Administration has advised that in determining whether an instrument that transfers a residential property is chargeable with NRSD, IRD will refer to the date of the instrument executed by both buyer and seller. In the example quoted by Hon James TO, since the provisional agreement for sale and purchase was executed by both buyer and seller on or after 5 November 2016, unless an exemption arrangement applies to the transaction (for example, the buyer is a HKPR acting on his/her own behalf and is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition of the single residential property concerned), the instrument will be subject to NRSD rate at 15%.

Applicable ad valorem stamp duty rates for exchange of properties

49. The Bills Committee notes that the proposed new sections 29AIA and 29BAB to SDO under clauses 6 and 8 of the Bill provide that certain instruments and agreements effecting exchange between residential property and non-residential property are chargeable with AVD at Part 2 of Scale 1 rates (i.e. the existing DSD rates). According to the Administration, under the existing AVD regime, there is no limitation on the number of residential property or non-residential property in an exchange. According to IRD's current practice, the exchange between two parties involving a number of properties comprising both residential and non-residential properties owned respectively by the parties concerned under a single instrument would be taken as an exchange of residential properties. As such, Hon James TO is concerned whether there will be underpaid stamp duty in such cases and has enquired about the legal basis for treating these cases as an exchange of residential property.

50. The Administration has advised that according to section 29A(1) of SDO, non-residential property refers to immovable property which, under the existing conditions of certain documents specified in SDO (such as Government lease or agreement for a Government lease, deed of mutual covenant, etc.) may not be used wholly or partly for residential purposes, and residential property refers to any immovable property other than non-residential property. Hence, any immovable property which is not determined as non-residential property is regarded as residential property.

51. The Administration has further explained that when scrutinizing the 2013 Bill which implements the DSD measure, the then Bills Committee thoroughly discussed how IRD would handle instruments involving both residential and non-residential properties at the same time. Stamp duty has all along been charged on an instrument basis. Under the prevailing AVD regime, if an instrument covers both residential and non-residential properties and the two are inseparable for trade, IRD has all along treated such properties as residential property as a whole, and has charged AVD under the rates applicable to residential property transactions by making reference to the total consideration of the entire instrument. If two parties exchange several properties (comprising both residential and non-residential properties) for several other properties (comprising both residential and non-residential properties) under a single instrument, since part of the several properties can be used for residential purposes, IRD will regard such several properties as residential property as a whole, and will treat the transaction as an exchange of residential property for residential property, and charge AVD accordingly.

Committee stage amendments

CSAs proposed by the Administration

52. Some members including Hon James TO, Hon Holden CHOW and Hon Abraham SHEK concur with the Legal Adviser of the Bills Committee that as the Bill seeks to impose the new AVD rate on certain instruments dealing with residential properties while the scenarios in respect of exchange between residential and non-residential property are provided for under the proposed new sections 29AIA (in relation to a conveyance on sale) (clause 6 of the Bill) and 29BAB (in relation to an agreement for sale) (clause 8 of the Bill) respectively, the phrase "if the property concerned is residential property" instead of "in any other case" should be used in the proposed amended sections 29AI(b) (clause 5 of the Bill) and 29BA(b) (clause 7 of the Bill) to facilitate better comprehension of the said provisions.

53. Having regard to the views of the Bills Committee, the Administration has proposed to move CSAs to the Bill to amend the proposed sections 29AI and 29BA where the AVD rates applicable to residential property transactions and non-residential property transactions will be clearly set out, and the reference to "in any other cases" will be deleted. The Administration has also proposed to move CSAs to the Bill to amend the proposed new sections 29AIA and 29BAB to prescribe the applicable AVD rates under different scenarios of exchange between residential property and non-residential property.

54. The Bills Committee has examined all the proposed CSAs from the Administration and raised no objection thereto. The Bills Committee will not propose any CSAs to the Bill.

CSAs proposed by individual Member

55. The Bills Committee takes note that Hon James TO intends to move CSAs to the Bill as detailed in paragraphs 33 to 39 and 43 to 46 above.

Resumption of Second Reading debate

56. The Bills Committee has no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 12 July 2017.

Consultation with the House Committee

57. The Bills Committee reported its deliberations to the House Committee on 23 June 2017.

Council Business Division 1
Legislative Council Secretariat
5 July 2017

Main provisions of the Stamp Duty (Amendment) Bill 2017

- (a) *Clause 1* sets out the short title and provides that the Bill, when enacted, is deemed to have come into operation on 5 November 2016.
- (b) *Clauses 5 and 7* respectively amend sections 29AI and 29BA of the Ordinance to set out the applicable scales of AVD payable for conveyances on sale and agreements for sale after the introduction of the new flat rate.
- (c) *Clauses 6 and 8* add new sections 29AIA and 29BAB to the Ordinance to clearly set out the scales of AVD payable for certain instruments that deal with the exchange between residential property and non-residential property after the introduction of the new flat rate.
- (d) *Clause 9* adds a new section 72 to the Ordinance to deal with transitional matters, including those necessitated by the retrospective operation of the Bill.
- (e) *Clause 10* amends the First Schedule to the Ordinance to introduce the new flat rate for the AVD payable on the conveyances on sale, and agreements for sale, of residential property.

Source: LegCo Brief (File Ref: HDCR4-3/PH/1-10/0-1) issued by the Transport and Housing Bureau in January 2017.

**Bills Committee on Stamp Duty (Amendment) Bill 2017 and
Stamp Duty (Amendment) (No. 2) Bill 2017**

Membership List

Chairman	Hon WONG Ting-kwong, GBS, JP
Members	Hon James TO Kun-sun Hon Abraham SHEK Lai-him, GBS, JP Hon Jeffrey LAM Kin-fung, GBS, JP Hon Paul TSE Wai-chun, JP Hon WU Chi-wai, MH Hon Kenneth LEUNG Hon Alice MAK Mei-kuen, BBS, JP Hon KWOK Wai-keung, JP Hon CHUNG Kwok-pan (up to 15 June 2017) Hon Alvin YEUNG Hon CHU Hoi-dick (since 19 June 2017) Dr Hon Junius HO Kwan-yiu, JP (since 19 June 2017) Hon Holden CHOW Ho-ding Hon Wilson OR Chong-shing, MH Dr Hon YIU Chung-yim (Total : 15 members)
Clerk	Mr Desmond LAM
Legal Adviser	Miss Winnie LO

**Bills Committee on Stamp Duty (Amendment) Bill 2017 and
Stamp Duty (Amendment) (No. 2) Bill 2017**

**List of organizations/individual which have submitted views on
the Stamp Duty (Amendment) Bill 2017**

1. Federation of International SME Ltd
2. Democratic Alliance for the Betterment and Progress of Hong Kong
3. The Civic Party
4. The Hong Kong Japanese Chamber of Commerce
5. The Hong Kong Institute of Surveyors
6. Economy Panel of The Liberal Party
7. 自由黨發展及建造業關注組
8. Mr HO Wang
9. Hong Kong Chamber of Professional Property Consultants Limited
10. Hong Kong Real Estate Agencies General Association
11. Estate Agent Association
12. Hong Kong Property Agencies Association
- * 13. The Law Society of Hong Kong
- * 14. The Hong Kong Conveyancing and Property Law Association Limited
- * 15. Joint Council of Estate Agents Associations
- * 16. The Real Estate Developers Association of Hong Kong

* submitted written views only