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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 ("the Bills Committee") in relation to the Stamp Duty (Amendment) (No. 2) Bill 2017 ("the No. 2 Bill").

Background

2. To address the overheated property market, the Administration announced the doubled ad valorem stamp duty ("DSD") measure on 22 February 2013. Under the DSD regime, unless otherwise specified in the Stamp Duty Ordinance (Cap. 117) ("SDO"), transactions in respect of immovable properties (both residential and non-residential) acquired on or after 23 February 2013 are subject to ad valorem stamp duty ("AVD") rates at Scale 1 in the First Schedule to SDO (i.e. DSD rates). The major exception is where the subject property is a residential property and the buyer is a Hong Kong permanent resident ("HKPR")¹ 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 and other exceptions/exemptions as specified in SDO, the

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).

lower AVD rates at Scale 2² in the First Schedule to SDO will be applicable.

3. 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, i.e. to increase the AVD rates chargeable on residential property transactions to a flat rate of 15%, in lieu of the DSD rates,³ to help reduce investment demand and cool down the residential property market. The NRSD measure came into effect on 5 November 2016. The Administration proposed to maintain the prevailing exemption arrangements and the partial refund mechanism under the DSD regime, including the major exception concerning HKPR-buyers as mentioned in paragraph 2. Such acquisitions are exempted from the NRSD rate of 15% and are only subject to the lower AVD rates at Scale 2. There was no restriction on the number of

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<i>Property consideration or market value (whichever is the higher)</i>	<i>Ad valorem stamp duty ("AVD") rates at Scale 2</i>
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%

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<i>Property consideration or market value (whichever is the higher)</i>	<i>Existing Doubled Ad Valorem Stamp Duty ("DSD") rates from 23 February 2013*</i>	<i>The New Residential Stamp Duty ("NRSD") rate under the Stamp Duty (Amendment) Bill 2017 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.		

residential properties acquired under a single instrument. Non-residential property transactions continue to be subject to the existing DSD rates.

4. During the scrutiny of the Stamp Duty (Amendment) Bill 2017 ("the Bill"),⁴ which sought to implement the NRSD measure, members of the Bills Committee were gravely concerned about the increasing trend where some buyers eligible for the major exception provided for HKPRs as mentioned in paragraph 2 above acquired multiple residential properties under a single instrument to avoid payment of NRSD, thereby undermining the intended effect of the measure.⁵ Members considered that such acquisitions demonstrated clear investment intent and should not be exempted from NRSD, and urged the Administration to consider introducing measures to plug the loophole.

5. Against such background, the Administration saw the need to tighten the exemption arrangement for HKPRs to prevent local investors from making use of it to avoid the payment of NRSD, and decided to tighten the relevant exemption arrangement with effect from 12 April 2017. Taking into account the scope of the Bill, the Administration decided to introduce a separate bill, i.e. the No. 2 Bill, into the Legislative Council ("LegCo") to give effect to the tightened exemption arrangement.

Stamp Duty (Amendment) (No. 2) Bill 2017

6. The No. 2 Bill was published in the Gazette on 26 May 2017 and introduced into LegCo on 7 June 2017. The No. 2 Bill seeks to, among others:

- (a) amend sections 29AJ, 29AK, 29BB and 29BC of SDO that impose the lower AVD rates at Scale 2 on instruments dealing with residential properties, with or without one car

⁴ The Stamp Duty (Amendment) Bill 2017 was passed with amendments at the Council meeting of 10 January 2018. The amendments passed included Hon Holden CHOW Ho-ding's amendment to extend the statutory time limit for disposal of the original property in the case of property replacement by HKPRs under the prevailing exemption arrangement from six months to 12 months.

⁵ Statistics of the Inland Revenue Department ("IRD") showed that the ratio of such cases to the total residential property transactions increased from around 0.5% before the introduction of the NRSD measure to 1.3% in February 2017, and further to 2.4% in March 2017.

parking space, acquired by HKPRs, so that such provisions apply only to an instrument that deals with a single residential property, with or without one car parking space (i.e. clauses 4 to 7 of the No. 2 Bill);

- (b) amend section 29A(1) of SDO to define the expression "single residential property" by setting out some common examples which IRD has encountered and hitherto considered to be a single residential property in administering the partial refund mechanism for HKPR.⁶ 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 the documents specified in the No. 2 Bill such as a plan signed by an authorized person (as defined in the Buildings Ordinance (Cap. 123)) after the completion of the building works relating to the demolition (i.e. clause 3(1) of the No. 2 Bill); and
- (c) add a new subsection to section 29A of SDO to provide for the documents, including approved building plans, deed of mutual covenant ("DMC"), occupation permit ("OP") and any other document which IRD considers relevant when determining whether a residential property is a single residential property (i.e. clause 3(2) of the No. 2 Bill).

7. Given the price-sensitive nature of the property market, the No. 2 Bill proposes that the tightened exemption arrangement for HKPRs be deemed to have come into operation on 12 April 2017, the day immediately following the Administration's announcement on 11 April 2017. IRD will record all the property transactions between 12 April 2017 and the date on which the No. 2 Bill, if enacted as an

⁶ Under the NRSD regime, a HKPR who is acquiring a residential Property B to replace his/her only other residential Property A can apply for partial refund of AVD paid for acquiring Property B. He/she will be subject to NRSD in the first instance, but he/she may seek a refund of the stamp duty paid in excess of that computed under the lower AVD rates upon proof that Property A has been disposed of **within 12 months** from the date Property B was assigned to him. There is a general time limit for claiming refunds, which is within two years after the date of the chargeable instrument for acquisition of Property B or not later than two months after the date of the assignment for the disposal of Property A, whichever is the later.

Ordinance, is gazetted. Reminders to demand for the stamp duty underpaid will be issued after the gazettal. The main provisions of the No. 2 Bill are set out in **Appendix I**.

The Bills Committee

8. Under the chairmanship of Hon WONG Ting-kwong, the Bills Committee held six meetings between 28 February and 13 June 2017 to study the Bill. In the course of scrutiny of the Bill, the Administration introduced the No. 2 Bill into LegCo on 7 June 2017 to give effect to the tightened exemption arrangement for HKPRs under the NRSD regime. The House Committee ("HC") agreed on 9 June 2017 that the No. 2 Bill be scrutinized by the same Bills Committee. The membership of the then Bills Committee on the Bill was reopened and the name of the Bills Committee revised. The updated membership list of the Bills Committee is in **Appendix II**.

9. The Bills Committee has held four meetings between 20 June 2017 and 6 March 2018 to deliberate on the details of the No. 2 Bill with the Administration, including one meeting to receive oral representations from deputations. A list of the deputations which have submitted views on the No. 2 Bill is in **Appendix III**.

Deliberations of the Bills Committee

10. Members of the Bills Committee in general agree that the Government's measure to tighten the exemption arrangement for HKPRs under the NRSD regime as proposed under the No. 2 Bill should be able to plug the loophole by preventing some local buyers from avoiding the payment of NRSD through acquisition of multiple residential properties under a single instrument. The Bills Committee has discussed various issues relating to the tightened exemption arrangement for HKPRs under the NRSD regime. In the course of deliberations, members have also expressed concerns and views on the impact of the demand-side management measures on the residential property market.

Tightened exemption arrangement for HKPRs under the NRSD regime

11. The Bills Committee notes that under the tightened exemption arrangement, acquisition of a single residential property 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 exempted from the NRSD rate of 15%, and will only be subject to lower AVD rates at Scale 2. But if a HKPR-buyer acquires more than one residential property under a single instrument, the transaction concerned will no longer be exempted, and will be subject to the NRSD rate of 15%.

12. The Bills Committee also notes that to minimize the impact on genuine end-users and for the avoidance of doubt, the No. 2 Bill sets out some common examples which IRD has encountered and hitherto considered to be a "single" residential property in administering the partial refund mechanism for HKPRs replacing their only residential properties. In determining whether the property concerned is a "single residential property", IRD will consider individual circumstances and take into account relevant documents, including building plan, DMC and OP, etc.

Effect of the tightened exemption arrangement

13. Some members and deputations have strongly urged the Administration to closely monitor the effectiveness of the tightened exemption arrangement under the NRSD measure so as to avoid creating further loopholes which may undermine the intended effect of the measure. The Administration has advised that the ratio of transactions involving acquisition of multiple residential properties under a single instrument to the total transactions has fallen from about 2.5% and 2.7% in March and April 2017 respectively to 0.1% in December 2017. The figures clearly illustrate that the tightened exemption arrangement has effectively reduced such transactions.

Appeal

14. Some members including Hon Holden CHOW and the legal adviser to the Bills Committee are keen to ensure that there is a procedure to appeal against a determination by the Collector of Stamp Revenue that the residential properties concerned are not a single residential property.

15. The Administration has advised that pursuant to section 14 of SDO, if an applicant is dissatisfied with the assessment of the Collector of Stamp Revenue, he/she may, within one month from the date on which the assessment was made, lodge an appeal to the District Court on the ground that the amount of stamp duty so assessed is excessive. In other words, if an applicant is dissatisfied with the Collector's assessment of the stamp duty chargeable on an instrument, which is affected by the determination on whether the residential property concerned is a "single

residential property" under the proposed section 29A(1A), he/she may lodge an appeal to the District Court under SDO.

Change in circumstances after charging of stamp duty

16. Some members are concerned as to whether any mechanism would be in place under the NRSD regime to deal with the situation where the Collector of Stamp Revenue's decision on the charging of the relevant AVD for acquisition of a residential property is in contradiction with a subsequent court judgement.

17. The Administration has explained that stamp duty has all along been charged on an instrument basis. Under SDO, both the buyer and seller of a property shall, within 30 days after executing a chargeable instrument, present the instrument concerned to IRD for stamping and pay AVD at the applicable rate. Section 11(1) of SDO provides that all the facts and circumstances affecting the liability of any instrument to stamp duty or the amount of the stamp duty chargeable on instrument should be fully and truly set forth in the instrument presented for stamping. Hence, the liability of an instrument to stamp duty is dependent on the facts and circumstances at the time of the transaction. In general, a subsequent court judgment would not affect the stamp duty liability in respect of the instrument.

What constitutes a "single residential property"

18. The Bills Committee notes that as a matter of principle, when processing each stamping request, IRD determines the amount of stamp duty payable by taking into account all relevant facts and circumstances at the time of transaction, including whether the buyer is a HKPR, whether the buyer is a beneficial owner of any other residential property in Hong Kong, and the permitted uses of the property concerned as shown in the relevant documents, etc. Any change in circumstances subsequent to the transaction (e.g. how the property concerned is disposed of) would not affect the amount of stamp duty payable.

19. The Administration has pointed out that while it should be easy to determine in most cases what constitutes a "single residential property", there are cases which require detailed consideration based on their own facts. Given the distinctions in each and every case, the Administration considers it difficult to propose a precise and exhaustive definition for a "single residential property". Therefore, clause 3(2) of the No. 2 Bill proposes that in determining what constitutes a "single residential property", IRD may take into account various documents, including

approved building plans, DMC, OP and any other document that IRD considers relevant. IRD will have to take into account all relevant facts and circumstances at the time of transaction of each individual case in order to determine what constitutes a "single residential property" for the purpose of determining the applicable AVD rates. The Administration considers this a more appropriate approach and is in line with IRD's standing principle in processing stamping requests.

20. The Bills Committee also notes that to minimize the impact on genuine end-users and for the avoidance of doubt, clause 3(1) of the No. 2 Bill sets out some common examples which IRD has encountered and hitherto considered to be a "single residential property" in administering the partial refund mechanism for HKPRs replacing their only residential properties. These include:

- (a) a unit and a roof situated immediately above the unit;
- (b) a unit and an adjacent garden; and
- (c) a unit that became a single unit following the demolition of the walls, or any part of the walls, separating two adjoining units.⁷

Documents to be considered in determining whether a residential property is a "single residential property"

21. For the sake of legal certainty, the legal adviser to the Bills Committee has sought clarification from the Administration on the details of "other document" as referred to in the proposed section 29A(1A)(d) under clause 3(2) of the No. 2 Bill.

22. The Administration has advised that there may be cases which require more detailed consideration having regard to their unique facts and circumstances. In addition to the various documents which IRD may take into account as set out in the proposed sections 29A(1A)(a) to (c) under clause 3(2) of the No. 2 Bill in determining what constitutes a "single residential property" in each of such cases, the Administration has

⁷ The following document(s) should demonstrate such condition – (i) a building plan and a letter issued by the Building Authority acknowledging receipt of a certificate of completion of the building works relating to the demolition as required under the Building (Administration) Regulations (Cap.123A); or (ii) a plan signed by an authorised person after the completion of the building works relating to the demolition.

explained that depending on the facts and circumstances of the case, "other document" which IRD considers relevant as referred to in the proposed section 29A(1A)(d) may include, but is not limited to, a tenancy agreement of the residential property, records in respect of the residential property kept by the Land Registry, a sale brochure of the development or building of which the residential property forms part as issued by the developer, etc.

23. To improve the clarity of the provisions in the proposed section 29A(1A) under clause 3(2) of the No. 2 Bill, Hon James TO has indicated his intention to propose amendment to the proposed section 29A(1A) to the effect that in determining whether a residential property is a "single residential property", IRD may have regard to the relevant agreement for sale or conveyance on sale registered at the Land Registry.

24. The Administration is of the view that Hon James TO's proposed amendment is unnecessary. As clearly stated in clause 3(2) of the No. 2 Bill, in determining what constitutes a "single residential property", IRD may take into account various documents, including approved building plans, DMC, OP and any other document which IRD considers relevant. In the Administration's view, the proposed provisions of the No. 2 Bill have already allowed IRD, if required, to take into account any other relevant documents (i.e. including records in respect of the property registered at the Land Registry, deeds of past transactions in respect of the property, etc.) other than the several major documents as set out in the No. 2 Bill in determining what constitutes a "single residential property".

Clarification on whether properties under various scenarios are regarded as "single residential property"

25. The Bills Committee has deliberated in detail whether the three common examples (details in paragraph 20) which IRD has encountered and hitherto considered to be a "single residential property" in administering the partial refund mechanism for HKPR as set out in clause 3(1) of the No. 2 Bill are sufficient to facilitate the public's understanding of what constitutes a "single residential property". The Chairman and some members including Hon James TO, Hon Kenneth LEUNG and Hon Holden CHOW have cited a number of other examples and sought clarification on whether the property(ies) under such scenarios could be regarded as "single residential property". The various scenarios which have been discussed mainly involve (a) two adjoining residential properties or four sub-divided flats; and (b) a unit and a roof.

26. The Administration has advised that the following preliminary views on the various scenarios raised by members as detailed in paragraph 27 to 29 are provided with reference to IRD's general principles in dealing with stamping requests and the proposed provisions of the No. 2 Bill, and it should be cautioned that such preliminary views are based on the broad assumptions under each hypothetical case. The Administration has stressed that the preliminary views should by no means be taken to be the actual decision of IRD for similar cases in practice. In determining the applicable rates of AVD, IRD will have to take into account all relevant facts and circumstances of each real case at the time of transaction.

27. Referring to the various scenarios which involve two adjoining residential properties or four sub-divided flats, the Administration has advised that in principle, if at the time of transaction the internal wall between the two adjoining residential properties has already been demolished and properly reflected in the documents required under the No. 2 Bill, i.e. a building plan and a letter issued by the Building Authority acknowledging receipt of a certificate of completion of the building works relating to the demolition as required under the Building (Administration) Regulations (Cap. 123A); or a plan signed by an authorised person after the completion of the building works relating to the demolition, then the two adjoining flats could be regarded as a "single residential property". On the other hand, if at the time of acquisition of the four sub-divided flats the building plans or plans signed by an authorised person in respect of the flats show that they are four separate units, they could be regarded as multiple residential properties notwithstanding that the four flats are shown as one unit in the OP and that they will be reinstated back to one unit subsequent to the acquisition.

28. As for the various scenarios involving a unit and a roof, the Administration has advised that if the roof is not situated immediately above a residential unit and the DMC does not specify that the undivided shares of the residential unit and the roof are bundled, IRD may treat them as two separate properties. If the roof is a residential property, the instrument of purchasing the unit and the roof will be regarded as an instrument of acquiring more than one residential property; if the roof is a non-residential property, the instrument of purchasing the unit and the roof will be regarded as an instrument of acquiring a residential property and a non-residential property.

29. Another scenario involving a unit and a roof is that a buyer has acquired a residential unit and a roof situated immediately above the unit from different vendors yet under a single instrument. The

Administration has advised the Bills Committee that according to the proposed provisions of the No. 2 Bill, a unit and a roof situated immediately above the unit will be regarded as a "single residential property". Therefore, if the residential unit and the roof are purchased under a single instrument, IRD will regard the instrument as one that acquires a "single residential property", regardless of whether the unit and the roof were held by different vendors.

Amendments to the definition of a "single residential property"

30. Hon James TO has indicated his intention to propose amendments to clause 3(1) of the No. 2 Bill to add the following examples to the proposed definition of "single residential property" under section 29A(1) of SDO:

- (a) a unit and a roof situated above in the same building (details in paragraph 32);
- (b) a unit and a garden situated in the same building or in the same housing estate (details in paragraph 35(a));
- (c) a unit and an exterior wall (or any part of an exterior wall) of the same building (details in paragraph 35(c));
- (d) a unit and a car parking space in the same housing estate (details in paragraph 35(b));
- (e) a unit that became a single unit following the demolition of the walls or the floor, or any part of the walls or the floor, separating two units (details in paragraph 33); and
- (f) a unit and an adjacent flat roof (details in paragraph 34).

31. The Administration has reiterated that the definition of "single residential property" as proposed in the No. 2 Bill comprises common examples which IRD has encountered and hitherto considered to be a "single residential property" in administering the partial refund mechanism for HKPR. In considering whether more examples should be included under the definition of "single residential property", the Administration has stressed that an appropriate balance should be struck between safeguarding the effectiveness of demand-side management measures and minimizing impacts on genuine users. The Administration has to consider whether the examples proposed by Hon James TO conform to general understanding and whether they would result in

abuses.

32. Regarding the example of "a unit and a roof situated above in the same building", the Administration has pointed out that the existing No. 2 Bill has already proposed that a "single residential property" includes a unit and a roof situated immediately above the unit. However, as members, having noted the Administration's advice as set out in paragraph 28 above, have suggested that the relevant definition should be relaxed to include a unit and a roof situated in the same building, i.e. it is not necessary for the roof to be situated immediately above the unit, and inclusion of the example is unlikely to result in abuses, the Administration has agreed to propose amendment to the No. 2 Bill to include this example.

33. Regarding the example of "a unit that became a single unit following the demolition of the walls or the floor, or any part of the walls or the floor, separating two units", the Administration is of the view that if at the time of transaction the two vertically adjoining residential units have already become a single unit (e.g. there is an internal staircase between upper and lower levels) through building works and this is properly reflected in an approved plan or other relevant documents, the two units could be regarded as a "single residential property". The Administration has agreed that the example may further clarify circumstances covered by "single residential property" under the No. 2 Bill, and therefore agreed to propose amendment in this regard.

34. As members have considered that Hon James TO's proposed example of "a unit and an adjacent flat roof" is unlikely to result in abuses, the Administration has agreed to propose amendment to the No. 2 Bill in this regard.

35. The Administration, on the other hand, does not agree that the following examples proposed by Hon James TO be included under the definition of "single residential property":

- (a) a unit and a garden situated in the same building or in the same housing estate:
 - (i) noting that the area of a development could be rather extensive, the Administration has considered that regarding a unit and a garden situated in the same development as a "single residential property" does not align with the general understanding of the public with regard to a "single residential property", and thus it is

not suitable to include these cases as examples of a "single residential property"; and

- (ii) it is rare for a buyer to purchase a unit together with a garden which is situated in the same building but not adjacent to the unit. The Administration therefore considers it not suitable to include these cases as examples of a "single residential property". Instead, IRD should determine whether the properties concerned constitute a "single residential property" in accordance with the mechanism prescribed in the No. 2 Bill by taking into account various documents and all relevant facts and circumstances at the time of transaction of each individual case;

(b) a unit and a car parking space in the same housing estate:

- (i) the Administration has advised that SDO provides for an exemption mechanism for instruments of purchasing residential property and one car parking space at the same time. According to sections 29AK and 29BC of SDO, if a buyer is a HKPR acting on his own behalf and does not own any other residential property or car parking space in Hong Kong at the time of acquiring residential property together with one car parking space under a single instrument, the relevant instrument is chargeable with AVD at the lower Scale 2 rates. Under the No. 2 Bill, the buyer will be exempted from the payment of NRSD of 15% only if he/she acquires a "single residential property" and one car parking space under a single instrument. The Administration has pointed out that the prevailing legal provisions do not specify that the residential property and the car parking space must be situated in the same housing estate. In the Administration's view, the amendment proposed by Hon James TO overlaps with the prevailing exemption mechanism and is not necessary, lest this may cause confusion; and

(c) a unit and an exterior wall (or any part of an exterior wall) of the same building:

- (i) Hon James TO has informed the Bills Committee that property transactions involving a unit and an exterior

wall, or any part thereof, of the same building under a single instrument are not uncommon in some old residential buildings in West Kowloon. The reason for inclusion of such a scenario as an example under the definition of "single residential property" is that Mr TO is concerned about the situations where the DMC of the building permits that the unit and the exterior wall be traded separately, a buyer may tend not to buy the exterior wall which is allocated with undivided shares together with the residential unit in view of the substantial amount of AVD that will be charged on it in accordance with the prevailing AVD regime. As a result, the ownership of the exterior wall will continue to vest with the original property owner who may no longer wish to get involved in the management of the residential building concerned in view of the small number of undivided shares of the exterior wall owned by him/her. Such a situation would give rise to maintenance and management problems of the building in the long run. The Chairman, Hon Abraham SHEK and Hon Holden CHOW have expressed a similar view and urged the Administration to consult the Home Affairs Department in assessing the impact of such issue on management of old residential buildings and consider Hon James TO's proposed amendment, as they are convinced that the proposal would unlikely result in abuses;

- (ii) the Administration has explained that subject to the content of individual DMC, exterior walls of a building are usually common parts. Even if the exterior wall (or any part of it) is sold to the owner of a unit, the exterior wall is not allocated with undivided shares and is inseparable for trade from the unit in general. In line with its standing principle in charging stamp duty, IRD has all along treated residential and non-residential properties acquired under a single instrument which are inseparable for trade 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. According to records of IRD, there were not many transactions of a residential unit together with exterior wall, and the exterior walls involved in these

transactions did not have undivided shares. In other words, the residential unit and exterior wall concerned were inseparable for trade and hence were treated as residential property as a whole under IRD's standing principle. IRD has not come across transactions of purchasing residential unit and exterior wall with undivided shares under a single instrument;

- (iii) the Administration has further explained that according to IRD's record, some instruments involved only the trading of exterior wall with undivided shares, while no units were involved under the same transaction. The value of these exterior walls ranged from about \$220,000 to \$9 million. Under the prevailing AVD regime, an instrument acquiring exterior wall which is non-residential property is subject to the DSD rates. The Administration holds a view that if a unit and an exterior wall (or any part of it) of the same building is included as one of the examples under the definition of "single residential property", some HKPR-buyers who do not own any other residential property in Hong Kong at the time of acquisition may purchase a small residential unit together with an exterior wall with considerable value under the same instrument, such that the instrument concerned will meet the exemption requirement to pay AVD at the lower Scale 2 rates for the entire instrument, thereby avoiding the payment of DSD with respect to the exterior wall; and
- (iv) given that transactions of purchasing residential unit together with exterior wall are not common, and that including a unit and an exterior wall in the examples of "single residential property" may result in above abuses, the Administration considers it not appropriate to propose amendment to the No. 2 Bill in this regard. Instead, IRD should determine whether the properties concerned constitute a "single residential property" in accordance with the mechanism prescribed in the No. 2 Bill by taking into account various documents and all relevant facts and circumstances at the time of transaction of each individual case.

36. Hon James TO does not agree with the Administration's explanation, and maintains his intention to propose amendments to clause 3(1) of the No. 2 Bill to add the examples as set out in paragraph 35 above to the definition of "single residential property". Mr TO submits that his proposed examples should be able to pass the test of reasonableness, and be able to conform to general understanding and would not result in abuses.

Instruments involving both residential and non-residential properties at the same time

37. The Bills Committee notes that stamp duty has all along been charged on an instrument basis. When scrutinizing the Stamp Duty (Amendment) Bill 2013 which implements the DSD measure, the relevant Bills Committee has thoroughly discussed how IRD would handle instruments involving both residential and non-residential properties at the same time. 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 these 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.

38. The Bill Committee considers it important for the Administration to state clearly the considerations of IRD in determining whether the residential and non-residential properties concerned under an instrument would be regarded as inseparable for trade so as to enable practitioners involved in real estate-related businesses, such as property agents and solicitors providing property conveyancing services, to better comprehend the principle of "inseparable for trade" as they might need to tender advice to their clients on stamp duty-related matters.

39. The Administration has explained that under the prevailing AVD regime, in determining whether residential and non-residential properties under a single instrument are separable for trade, IRD may take into account various documents, including approved building plan, DMC, OP and any other document that IRD considers relevant. For example, for cases involving the acquisition of a village house and a car parking space(s) attached to it under a single instrument where the relevant title deed also specified that such properties could not be traded separately, the residential property (i.e. the village house) and non-residential property (i.e. the car parking space(s)) concerned would normally be considered inseparable for trade.

40. The Bills Committee has also inquired about the relevant AVD rates applicable in the following three scenarios which involve the acquisition of a residential unit and car parking space(s) in a residential development project where only buyers of residential units are eligible to procure the car parking spaces provided in the project, assuming that the buyer concerned is a HKPR acting on his/her own behalf and does not own any residential property or car parking space in Hong Kong at the time of acquisition:

- (a) procurement of one residential unit and one car parking space under a single conveyance on sale:
 - (i) the Administration has advised that the entire instrument would be subject to the lower AVD rates at Scale 2 in accordance with sections 29AK or 29BC of SDO;
- (b) procurement of one residential unit and two car parking spaces under a single conveyance on sale:
 - (i) the Administration has advised that the residential unit concerned would be subject to the lower AVD rates at Scale 2 while the two car parking spaces would be subject to the DSD rates applicable to non-residential properties. The applicable rates have all along been determined by reference to the total consideration of the entire instrument; and
- (c) procurement of one residential unit and the first car parking space under a single conveyance on sale, and a second car parking space is procured under another conveyance on sale later on:
 - (i) the Administration has advised that the instrument which covers the residential unit and the first car parking space ("the first instrument") would be subject to lower AVD rates at Scale 2 in accordance with sections 29AK or 29BC of SDO. The second car parking space covered by another instrument would be subject to DSD and the applicable rates would be dependent on whether the said transaction is part of a series of connected transactions with the first instrument.

41. As explained by the Administration, the Bills Committee notes that the condition imposed by the vendor that the residential units and car parking spaces concerned must be procured together by the buyer is not a factor to be considered by IRD in determining whether the residential and non-residential properties in question are inseparable for trade. If a buyer could sell the residential unit and car parking space(s) separately in the market upon acquiring them from the vendor, the residential unit and car parking space(s) concerned would be regarded as separable for trade.

Impact of demand-side management measures on the residential property market

42. Many members of the Bills Committee and deputations have expressed strong doubt on the effectiveness of the several rounds of demand-side management measures introduced by the Administration, including Special Stamp Duty ("SSD"), Buyer's Stamp Duty ("BSD"), DSD and NRSD, in addressing the problems of tight housing demand-supply imbalance and soaring residential property prices. The members and deputations consider that on the contrary, those measures have reduced the supply of secondary residential properties and pushed up flat prices and rents to a level beyond normal expectation, while substantially increased the transaction costs of residential properties.

43. Some members including Hon Paul TSE do not support the policy intention of NRSD which is to curb local investment demand as the measure tends to discourage hardworking Hong Kong people from using their savings to acquire an additional flat, apart from the one for self-occupation, for rental purpose in order to be self-reliant financially upon retirement. They are of the view that the market of residential property for self-use (including an additional flat for rental purpose) should be separated from that for speculation in the long term. The Administration should review the policy direction of the demand-side management measures given that such measures have benefitted property developers and not aspiring property owners at large.

44. Quite a number of members, including Hon James TO, Hon Abraham SHEK, Hon Paul TSE, Hon KWOK Wai-keung and Hon Holden CHOW, and some deputations hold a view that the demand-side management measures contributed to freezing the secondary market, and developers have thus started constructing nano-flats which are well sought after by buyers to profiteer from the situation.

45. The Administration has explained that Hong Kong, as a small externally-oriented economy, is easily affected by changes in the global markets nowadays. The Administration thus feel obliged to adopt demand-side management measures to alleviate the risk of a bubble in the asset market, stabilize Hong Kong's macro economy and financial system, and accord priority to the home ownership needs of HKPRs amidst the current housing demand-supply imbalance. In view of the continuous increase in property prices, the Administration has proactively adopted a supply-led strategy by continuing to increase land and housing supply to address the demand-supply imbalance at source in the long run.

46. The Administration has further explained that the various demand-side management measures aim to cool down the residential property market and are introduced to combat specific types of investment demands in a targeted manner in response to the different signs of exuberance of the property market. In brief, SSD aims to lower the incentive for short-term speculative activities; BSD aims to reduce the demand of non-HKPRs to purchase residential properties; DSD previously introduced and the NRSD measure currently rolled out aim to reduce the demand of residential property owners for purchasing more properties; whereas the series of supervisory measures on property mortgages introduced by the Hong Kong Monetary Authority ("HKMA") aim to strengthen the banks' risk management ability and resilience in order to reduce damage to the banks and the overall economy in case of significant adjustments to property prices.

47. The Administration's data show that the various demand-side management measures have achieved the intended objectives and effectively reduced speculative activities, external demand and investment demand. The market development will still depend on increase in supply in future and changes in many other external and local factors, including global and local economic outlook, the pace of the United States' interest rate normalization and international liquidity, etc. The Administration will continue to closely monitor the movement of the property market and the ever-changing external environment with reference to a series of indicators, such as property prices, home purchase affordability ratio, transaction volume, supply of private flats, changes in local and external economic factors, etc.

48. As to the criticism on the adverse impact of the demand-side management measures on the residential property market, such as carrying a high risk of an unabated upward spiral in residential property prices and freezing the supply of the secondary market, the Administration has pointed out that the major causes of soaring

residential property prices include long-term housing demand-supply imbalance, as well as ultra-low interest rate and over abundant liquidity worldwide due to loose monetary policy in the global environment. The Administration has strived to increase housing supply to address the housing demand-supply imbalance at source in the long run. The estimated completion of private residential properties in the next five years (2017-2021) will be about 20 000 units on average each year, showing an increase of 70% as compared with the past five years (2012-2016). Yet, as the housing demand-supply balance in the short-term will still be tight, the Administration is of the view that the demand-side management measures should be maintained to prevent the property market from overheating.

49. In addition, whilst admitting that the demand-side management measures have reduced the number of secondary residential property transactions, the Administration does not agree that such measures have frozen the secondary market. Just like the overall flat prices and transaction volume, secondary residential property transaction volume is subject to influence of various factors as mentioned in paragraph 47 above. In particular, SSD introduced by the Government aims to combat short-term speculative activities, and naturally reduces transaction volume when short-term speculators are driven out of the market. The number of secondary residential property transactions since 2013 (i.e. after introduction of BSD and enhanced SSD rates in October 2012 and DSD rates in February 2013) has approximately maintained at about 40 000 per year (i.e. 3 300 per month), and about 3 400 cases per month since the introduction of NRSD (i.e. from December 2016 to October 2017), clearly reflecting that the number of secondary residential property transactions before and after the introduction of NRSD are broadly the same.

50. Some members and deputations are gravely concerned that NRSD will increase the cost for owners to replace their properties, and make it more difficult for first-time home buyers to attain home ownership.

51. The Administration has advised that if a HKPR replaces his residential property by disposing of his only 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. For those who replace their residential properties by acquiring a new property before disposing of the only original one, the Administration has further advised that under the existing mechanism, a HKPR who acquires a new residential property to replace his only original residential property will be subject to NRSD in the first instance, but he/she may apply to IRD within the statutory

time limit⁸ for a partial refund of the AVD paid upon proof that his/her only original property has been disposed of within 12 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. To cater for their financial needs during property replacement, the Administration has advised that bridging loans are currently provided by local banks for customers replacing their properties, such as making down payments for the new property, paying renovation costs and stamp duties, etc.

52. Considering that the demand-side management measures are ineffective in reducing the residential property prices and will compromise the healthy development of Hong Kong's economy and property market in the long run, some members and deputations have urged the Administration to consider withdrawing demand-side management measures in phases at appropriate juncture. The Administration has advised that since the property prices remain at a high level and have shown no signs of downward adjustment, it is necessary for the Government to maintain various demand-side management measures in midst of the current demand-supply imbalance to guard against further increase in the risks of a housing bubble and to ensure healthy and steady development of the property market. Currently, the Administration has no intention to withdraw any demand-side management measure.

Other suggested exemption arrangements under the NRSD regime

53. In the face of the sharp reduction in the number of secondary residential property transactions, many members, including Hon James TO, Hon Paul TSE and Hon Holden CHOW, and the majority of deputations have suggested the Administration to consider ways to encourage property owners who hold more than one residential properties to undergo property replacement so as to enhance circulation of residential properties and boost supply in the secondary market. Their specific suggestions include:

⁸ 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.

- (a) relaxing the prevailing exemption arrangement for HKPRs in respect of property replacement under the DSD and NRSD regimes to include scenarios other than one-on-one replacement of the only existing property of the HKPRs concerned;
- (b) exempting HKPR-buyers who acquire more than one residential properties under a single instrument to replace their existing properties under certain conditions (such as the number of residential properties to be sold in parallel exceeds the number of properties acquired, or the total floor areas of the properties acquired do not exceed those of the properties being sold) from NRSD payment; and
- (c) encouraging property owners who hold more than one residential properties to put their flats on sale in the market by means of tax concessions.

54. The Administration has reiterated that the sole objective of the No. 2 Bill is to amend the relevant provisions in SDO to tighten the exemption arrangement under the NRSD regime in respect of acquisition of multiple residential properties under a single instrument by a HKPR acting on his/her own behalf who is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition to circumvent payment of NRSD. The Administration is of the view that the above suggestions would likely fall outside the scope of the No. 2 Bill, and thus the Administration has reservations about dealing with such suggestions in the context of the No. 2 Bill. The Administration is also of the view that such suggestions should be considered with caution as it might be perceived as the Government's intention to relax the demand-side management measures, thus stimulating a new round of demand for residential properties.

Proposed amendments to the No. 2 Bill

Amendments proposed by the Administration

55. The Bills Committee has examined the Administration's proposed amendments to the No. 2 Bill and raised no objection thereto. Details of the Administration's proposed amendments are in paragraphs 32 to 34. The Bills Committee will not propose any amendments to the No. 2 Bill.

Amendments proposed by individual Member

56. The Bills Committee notes that Hon James TO intends to propose amendments to the No. 2 Bill as detailed in paragraphs 23, 24, 30, 35 and 36.

Resumption of Second Reading debate

57. The Bills Committee has no objection to the resumption of the Second Reading debate on the No. 2 Bill at the Council meeting of 11 April 2018.

Consultation with the House Committee

58. The Bills Committee reported its deliberations to the House Committee on 16 March 2018.

Council Business Division 1
Legislative Council Secretariat
6 April 2018

Main provisions of the Stamp Duty (Amendment) (No. 2) 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 12 April 2017;
- (b) *Clause 3* adds to section 29A(1) of the Ordinance various definitions, including the definition of single residential property and adds a new subsection to section 29A of the Ordinance to set out the documents that may be taken into account when determining whether a residential property is a single residential property;
- (c) *Clauses 4, 5, 6 and 7* amend sections 29AJ, 29AK, 29BB and 29BC of the Ordinance respectively so that the residential property covered by the instruments referred to in those sections must be a single residential property; and
- (d) *Clause 8* adds a new section 73 to the Ordinance to deal with transitional matters, including those necessitated by the retrospective operation of the Bill.

Source: LegCo Brief (File Ref: HDCR4-3/PH/1-10/0-1) issued by the Transport and Housing Bureau in May 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 Alvin YEUNG Hon CHU Hoi-dick Dr Hon Junius HO Kwan-yiu, JP Hon Holden CHOW Ho-ding Hon Wilson OR Chong-shing, MH (Total : 14 members)
Clerk	Mr Desmond LAM
Legal Adviser	Mr Kelvin LEE

*Changes in membership are shown in Annex to Appendix II.

Annex to Appendix II

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

Changes in membership

Member	Relevant date
Hon CHUNG Kwok-pan	Up to 15 June 2017
Hon CHU Hoi-dick	Since 19 June 2017
Dr Hon Junius HO Kwan-yiu, JP	Since 19 June 2017

According to the Judgment of the Court of First Instance of the High Court on 14 July 2017, LEUNG Kwok-hung, Nathan LAW Kwun-chung, YIU Chung-yim and LAU Siu-lai have been disqualified from assuming the office of a member of the Legislative Council, and have vacated the same since 12 October 2016, and are not entitled to act as a member of the Legislative Council.

**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) (No. 2) Bill 2017**

1. Hong Kong Chamber of Professional Property Consultants Limited
2. Federation of International SME Ltd.
3. Hong Kong Real Estate Agencies General Association
4. Hong Kong Property Agencies Association
5. Liberal Party Youth Committee
6. Estate Agent Association
7. The Democratic Alliance for the Betterment and Progress of Hong Kong
- * 8. Consumer Council
- * 9. Hong Kong Institute of Real Estate Administrators
- * 10. The Real Estate Developers Association of Hong Kong
- * 11. The Hong Kong Institute of Surveyors
- * 12. Joint Council of Estate Agents Associations
- * 13. The Civic Party
- * 14. The Hong Kong Conveyancing and Property Law Association Limited

* submitted written views only