

## **Panel on Economic Development**

### **Letter from Hon Luk Chung-hung dated 15 November 2017**

#### **Purpose**

This note sets out the Administration's response to a proposed Member's Bill put forward by Hon Luk Chung-hung vide his letter to the Chairman of the Panel on Economic Development dated 15 November 2017.

#### **The proposal and its rationale**

2. According to the explanatory memorandum attached to the letter, the proposal aims to amend the Electricity Ordinance ("EO") (Cap. 406) to (a) deter some landlords of sub-divided units ("SDUs") from "over-charging" (濫收) their tenants for electricity consumed so as to relieve the latter's financial pressure; and (b) prompt the two power companies and landlords to install separate meters for the tenants of SDUs.

3. The memorandum points out that tenants of SDUs are unable to obtain electricity through their own independent accounts, as some landlords, on renting out their SDUs, merely "sell"<sup>1</sup> (轉售) electricity to their tenants, instead of installing separate meters for individual units.

4. Hon Luk's suggestion is to introduce a new criminal offence under the EO to prohibit "[a]ny person who –

- (a) sells to another person electricity obtained from the electricity supplier without the supplier's consent ("the First Scenario");
- or

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<sup>1</sup> The English version of the Member's Bill uses the term "sell" for the Chinese term "轉售". It appears that there is a difference in meaning between "sell" and its Chinese rendition "轉售" in daily usage. However, to reflect Hon Luk's proposal, we will use "sell" or "sale" in the following paragraphs to correspond to the Chinese term "轉售".

(b) sells to another person electricity obtained from the electricity supplier at a price exceeding the amount fixed by such supplier”<sup>2</sup> (“the Second Scenario”).

## **Response**

### *Policy considerations*

5. The two power companies (CLP Power Hong Kong Limited (“CLP”) and The Hongkong Electric Company Limited (“HKE”)) implement a progressive tariff structure that is applicable to all residential customers. In 2017, the average residential net tariff of CLP and HKE is \$1.102/kWh and \$0.751/kWh respectively (for a typical three-member household with monthly consumption of 275kWh) while the maximum residential net tariff is \$2.01/kWh and \$1.619/kWh respectively.

6. For SDUs, as a number of tenants are living in one residential flat sharing the same electricity account and meter, the total electricity consumption of the SDUs in the same flat may be higher than that of an ordinary residential flat, and hence the net tariff payable may be higher than the average tariff of an ordinary residential flat owing to the progressive tariff structure. Whether landlords have “over-charged” tenants over the use of electricity depends on the total electricity consumption of the flats concerned, and cannot be determined by simply making comparison with the average tariff of an ordinary residential flat.

7. Arrangements for collection of electricity charges from tenants of SDUs by landlords involve not only charging for electricity, but also an array of issues including building structures and tenancy arrangements between landlords and tenants. We consider that regulating the collection of electricity charges by legislation and imposing penalties would not be a desirable means to meet the objectives Member’s Bill as set out in paragraph 2. Even with the legislation, individual landlords may still seek to circumvent the proposed restrictions in various ways, say, by introducing new fee items (e.g. management, cleaning, internet connection, etc.) or simply by increasing rent.

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<sup>2</sup> As the proposed offence is to be inserted under the existing section 56 of the EO, a person who commits this offence will be liable to a maximum fine of \$50,000 on a first conviction, and that of \$100,000 on a subsequent one. That person is also liable to imprisonment for six months.

8. The Member's Bill, as currently drafted, will also lead to many undesirable consequences as set out in the ensuing paragraphs.

### First Scenario

9. There are two key elements in the First Scenario of the proposed offence which we are concerned about: a "**person**" will attract criminal liability if he "**sells**" electricity to another person "without consent" of the power companies.

10. For the first element, there is no definition of a "person" in the Member's Bill. Under the Interpretation and General Clauses Ordinance (Cap. 1), "person" is defined to include "any public body and any body of persons, corporate or unincorporate". Therefore, the first element will have a wide coverage catching not only landlords of SDUs<sup>3</sup>, but everyone, including non-government organisations, hotels, shopping malls, sport facilities, hospitals, schools and alike.

11. The Member's Bill also does not seek to define "sell"<sup>4</sup>. Neither does the EO contain any definition of "sell". Consequently, there may be uncertainty as to whether a certain portion of the fee/rent collected by a person or organisation that supplies electricity as an incidental part of his/her/its activity or transaction (business or otherwise) will be regarded as an electricity charge in substance and whether the person or organisation may be liable for the proposed offence. For example, many landlords of residential and commercial premises in Hong Kong adopt an "all-inclusive amount" in their tenancy agreement to cover rents and all other services and incidental payments to be provided or made by the landlords, e.g. management fees, utility charges, rates, etc.. If the Member's Bill is passed, it may be incumbent upon these landlords to seek consent from the two power companies. This will place a significant compliance burden on many normal business transactions in Hong Kong. On the other hand, if the meaning of "sell" is confined to referring expressly and exclusively to a charge on electricity, it would be easy for landlords to circumvent the provision by embedding electricity charges into different types of fees (see also paragraph 7 above).

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<sup>3</sup> The term SDU is defined neither in the Member's Bill nor the EO.

<sup>4</sup> It is unclear from the current wording of the Member's Bill as to whether a person, with consent from a power company, is prohibited from "selling" electricity at a price higher than the tariff set by the power companies to cover necessary cost incurred by the person, e.g. administration cost. It appears that there is no provision in the Member's Bill to prohibit this.

12. Even if we are to confine ourselves to SDUs only, it is inevitable that additional operating expenditure will be incurred by the two power companies in handling the applications for consent. This increase in the operating expenditure will be absorbed by all ratepayers, not just landlords of SDUs, and will eventually lead to a rise in electricity tariff. Most ratepayers are unlikely to welcome an increase in tariff arising from a course of action which does not bring them any benefit. Besides, it is uncertain whether SDU tenants will pay less electricity charges as a result of the Member's Bill when the overall tariff rate increases.

### Second Scenario

13. Under the Second Scenario, there are two key issues: how to measure the amount of electricity consumed accurately by each SDU, and how to determine a correct price so that a landlord will not be accused of "over-charging".

14. While paragraph 6 of the memorandum explains that Hon Luk "expects" that the Member's Bill could "facilitate/promote" proactive installation of separate meters in SDUs by power companies and landlords, it is not apparent to us that under the Member's Bill, landlords are legally obliged to install separate meters for their units, and the Member's Bill does not seem to suggest imposing criminal liability (expressed or implied) on a landlord who, for various reasons, fails to install separate meters.

15. For the landlords and tenants of SDUs, apportioning an electricity bill will be extremely difficult if separate meters are not installed. Our analysis at paragraph 6 above already illustrates that it is not an easy matter to calibrate a "correct" average price for a unit of electricity consumed. Besides, the progressive tariff structure will make the apportionment even more complicated and difficult. If there is no way to determine the exact electricity usage of each SDU, it is very likely that a landlord will "over-charge" some of the tenants and undercharge others even if he/she/it apportions an electricity bill evenly. Choosing a "wrong" unit price may render a landlord criminally liable. Such uncertainty is not conducive to compliance and enforcement<sup>5</sup>.

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<sup>5</sup> From the criminal prosecution perspective, without separate meters installed for SDUs to ascertain the amount of electricity used by a particular SDU, it may be difficult to prove the case of "over-charging" in a safe and satisfactory manner and beyond reasonable doubt.

## *Article 74 of the Basic Law*

16. Under Article 74 of the Basic Law (“BL 74”), Members of the Legislative Council (“LegCo”) cannot introduce bills that have a substantive effect on (and hence “relate to”) “political structure”, “operation of the government” or “public expenditure”. Members’ bills relating to “government policies” may not be introduced except with the written consent of the Chief Executive (“CE”)<sup>6</sup>.

### Operation of the Government

17. The LegCo President has previously ruled that a bill relates to the “operation of the government” if its implementation would have an obvious effect on the structure or procedure of the executive authorities and that the effect would not be of a temporary nature.

18. Although the Member’s Bill does not specify which agency will be responsible for enforcing the proposed offence provisions, the Electrical and Mechanical Services Department (“EMSD”) is the enforcement agency under the current EO. Without further specification on an enforcement agency in the proposed Member’s Bill and despite the ambiguities regarding the scope of the proposed offence and how exactly it may be enforced (see paragraphs 9 to 15 above), we have attempted, with our best endeavour, a rough assessment of the possible effect of the Member’s Bill on operation of the Government and public expenditure under certain assumptions.

19. We consider that if EMSD were designated as the agent to enforce the proposed offence with regard to residential premises only, it would at least need to undertake the following additional tasks –

- (a) to enter premises to carry out duties under specified circumstances and arrangement (e.g. there is a reasonable suspicion a person has “over-charged” another person for the

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<sup>6</sup> BL74 provides: “Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.”

electricity used);

- (b) to carry out the necessary inspections, checking and testing work on the electricity meters and their associated fixed electrical installations;
- (c) to obtain relevant documents and records from the premises owners, tenants and electricity suppliers, etc.;
- (d) to assess whether there is any prima facie case of “over-charging”;
- (e) to investigate suspected breaches and complaints received from the public, and collect evidence (including witness statements) as necessary;
- (f) to lay charges against those who have breached the offence;
- (g) to prescribe the requirements and/or maintain an approved list of testing laboratories acceptable for carrying out calibration of electricity meters<sup>7</sup>; and
- (h) to carry out publicity to educate the landlords and tenants on the new offence.

Subject to the clarification regarding the intentions and scope of the proposed offence, there may be a need to provide additional statutory provisions and/or subsidiary legislation in order to ensure that EMSD’s officers are properly authorised to carry out the above tasks.

20. As the EO is concerned mainly with electrical safety, among other things (see also paragraph 25 below), EMSD’s current scope of work, structure and expertise are not related to inspection, investigation and prosecution of “over-charging” for electricity used. Hence, daily inspection and handling of suspicious “over-charging” cases cannot be dealt with by EMSD’s established work procedures and mechanisms. The complexity involved in implementing the proposed provisions will also bring about significant additional workload to and changes in to the operations of EMSD. New establishment, operational procedures, staff

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<sup>7</sup> For electricity meters installed by landlords, regular calibration of these meters should be required in order to ensure their accuracy in the charging of electricity tariff to their tenants.

with relevant skills and tools will be required for carrying out the tasks set out in paragraph 19, including site inspections, checking of accounts and rental agreements, and other enforcement and promotion work. The above additional work will **have a substantive and lasting effect on the operations of the Government.**

21. To provide a firmer basis for enforcing this offence, it may also be necessary to specify the responsibilities of a landlord of SDUs and those of the power companies. For example, a landlord should keep an accurate record of the amount of electricity used by each SDU in his/her/its premises, and has a responsibility to ensure that the electricity meters used are properly calibrated. For the power companies, they may be required to provide necessary information to assist EMSD in its investigation. Although the foregoing is not an exhaustive list, we are not certain if the Member's Bill needs be supplemented by other legal provisions and power in order to impose these responsibilities on the relevant parties. The scope of these responsibilities may have further impact on the enforcement of the offence and the possible additional workload of EMSD.

### Public Expenditure

22. According to the previous rulings of the LegCo President, a bill relates to "public expenditure" if its implementation would have effect on increasing or reducing public expenditure and the amount increased or reduced is so substantial that it cannot be ignored.

23. EMSD has preliminarily estimated that even for enforcement in respect of SDUs in residential premises only and carrying out the tasks set out in paragraph 19 above would require a new dedicated team led by a Senior Engineer with 20 staff members possessing relevant competence and skills. EMSD's existing staff have all been fully engaged in their duties and cannot be redeployed for or absorb the new tasks. In estimating the manpower requirements, EMSD has made reference to its experience in other enforcement work (e.g. inspections, handling enquiries and reported cases, etc.) for periodic testing of fixed electrical installations under the EO). The estimated additional recurrent expenditure <sup>8</sup>, including staff costs, associated overheads and

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<sup>8</sup> In addition to the recurrent expenditure, there may be one-off additional expenditure for drafting of new subsidiary legislation, recruitment of new staff and provision of training, etc..

administrative expenses, would be about \$20 million a year. If the Member's Bill is to cover commercial and industrial premises as well, further manpower and recurrent expenditure will be required. **The Member's Bill will therefore lead to a permanent and material increase in Government expenditure.**

### Government Policies

24. According to the LegCo President's previous rulings, "government policies" in BL 74 include those that have been decided by the CE or CE in Council under Articles 48(4) and 56 of the Basic Law, policies decided by authorised public officers, and policies promulgated by designated public officers in the LegCo or its committees. Policies reflected in legislation are also "government policies".

25. According to its long title, the EO is an Ordinance to repeal and replace the then Electricity Supply Ordinance to provide for the registration of electrical workers, contractors and generating facilities; to provide safety requirements for electricity supply, electrical wiring and products; to provide powers for electricity suppliers and the Government in respect of electrical accidents and enforcement of the EO; and to provide for measures designed to ensure that activities carried out in the vicinity of electricity supply lines do not prejudice safety or the continuity of the electricity supply.

26. Regulation of electricity charges and tenancy relationship is not within the regulatory scope of the EO<sup>9</sup>. As the Member's Bill is not related to enhancement of public safety or any safety issue, we consider that the Member's Bill does not fall within the scope of the EO. To change the scope of the EO to regulate the "sale" of electricity by "a person" to another person will involve a change in government policy. A member's bill that relates to government policies cannot be introduced except with the written consent of the CE.

### **Conclusion**

27. Given the undesirable consequences of the Member's Bill

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<sup>9</sup> As stated in the reply of the Secretary for the Environment to the LegCo question raised by Hon Luk Chung-hung on 7 December 2016, the collection of electricity charges involves arrangements between the two power companies and their customers and is not within the regulatory scope of the EO.



and the impact on operation of the Government and public expenditure as set out in paragraphs 5 to 15 above, we do not support the introduction of the Member's Bill as a matter of policy. It is also clear from paragraphs 17 to 26 above that the Member's Bill, if enacted, would have a substantive effect on "operation of the government", "public expenditure" and "government policies" within the meaning of BL 74.

**Environment Bureau**  
**December 2017**