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Report of the Bills Committee on
Ozone Layer Protection (Amendment) Bill 2024

Purpose

This paper reports on the deliberations of the Bills Committee on Ozone Layer Protection (Amendment) Bill 2024 ("the Bills Committee").

Background

2. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer ("Protocol") was extended to Hong Kong in 1988 and is implemented locally by the Ozone Layer Protection Ordinance (Cap. 403) ("OLPO"), which, among others, imposes controls on the manufacture, import and export of the ozone-depleting substances listed in the Schedule to OLPO ("scheduled substances"). In October 2016, the Protocol was further amended by the Kigali Amendment to phase down the production and consumption of 18 hydrofluorocarbons ("HFCs") with high global warming potential ("GWP") listed in Annex F to the Protocol ("scheduled HFCs").

3. HFCs are mainly used in (i) refrigerants of air-conditioning and refrigeration equipment, and (ii) fire suppressants. The GWP of some HFCs can be as high as 14 800 times that of carbon dioxide (the higher the GWP of a gas, the greater its adverse impact on the climate). These scheduled HFCs significantly aggravate global warming and cause serious problems such as extreme weather. There has been an international consensus to ban the use of scheduled HFCs, which provides the foundation for the Kigali Amendment.

4. The Central People's Government accepted the Kigali Amendment in June 2021, which came into effect in the Mainland of China in September of the same year. To prepare for the application of the Kigali Amendment and meet its ultimate target of phasing down by 85% from the baseline the

consumption of scheduled HFCs in 2036, Hong Kong must start to phase down the production and consumption of scheduled HFCs the soonest practicable. The main purpose of the Ozone Layer Protection (Amendment) Bill 2024 ("the Bill") is to provide the legal basis for implementing the required phasedown, which, together with the new subsidiary legislation to be made under OLPO, aims to provide a clear timetable, enabling the trade to adjust its operations in a timely manner and reduce its reliance on scheduled HFCs.

Ozone Layer Protection (Amendment) Bill 2024

5. The Bill was published in the Gazette on 6 December 2024 and received its First Reading at the Legislative Council ("LegCo") meeting of 18 December 2024. The Bill seeks to amend OLPO and its subsidiary legislation to:

(a) implement the Kigali Amendment to the Protocol and to better implement the Protocol;

(b) provide for controls on scheduled HFCs and on products and equipment containing, made with or designed to operate on those HFCs;

(c) provide for the safe handling of hazardous refrigerants that may be used as substitutes for those HFCs;

(d) empower the Director of Electrical and Mechanical Services to exercise various powers and perform various functions under OLPO;

(e) empower the Secretary for Environment and Ecology ("Secretary") to make regulations for the above purposes; and

(f) provide for related matters.

Bills Committee

6. At its meeting on 3 January 2025, the House Committee agreed to form a Bills Committee to study the Bill. Under the chairmanship of Ir Hon CHAN Siu-hung, the Bills Committee held two meetings. The membership list of the Bills Committee is in **Appendix 1**. The Bills Committee also

invited written submissions from the public, but no written submission was received by the deadline of 7 February 2025.

Deliberations of the Bills Committee

Progress of amending the Ozone Layer Protection Ordinance (Cap. 403)

7. Members have pointed out that the Central People's Government implemented the Kigali Amendment in September 2021, but Hong Kong is only now seeking to amend OLPO. Questions have been raised as to whether this will affect Hong Kong's implementation of the Kigali Amendment. The Administration has explained that the Kigali Amendment is currently not applicable to Hong Kong, and that discussions on the Kigali Amendment began as early as 2019, with progress unfortunately delayed by the outbreak of COVID-19. Nevertheless, the overall progress of Hong Kong's implementation of the Kigali Amendment has not been significantly affected. In short, there will be no problem as long as the phasedown schedule for the production and use of scheduled HFCs as set out in the Kigali Amendment ("the phasedown schedule") is met. To this end, the Administration has proposed the following three control strategies to control the manufacture and use of HFCs:

Control Strategy	**Target**
Control Strategy 1 Implement a licensing and quota system on the import and export of scheduled HFCs and prohibit local manufacture	To be implemented in Q4 2025 to comply with the Kigali Amendment
Control Strategy 2 Regulate the import and supply of products and equipment using high GWP HFCs	To be implemented progressively from mid-2026
Control Strategy 3 Mandate the recovery of refrigerants and fire suppressants and formulate handling guidelines	To be implemented in Q4 2026

Strategy 1 is to implement an import and export licensing and quota system through legislative amendments for a gradual phasedown of the production and consumption of scheduled HFCs. As regards Strategies 2 and 3, the Administration plans to regulate the supply of products and equipment using high GWP HFCs at source through a "soft-landing" approach. It will gradually promote industry adoption of mature low GWP alternatives,

thereby accelerating the fading out of high GWP HFC products and equipment in the local market.

8. Members note that due to the impact of the epidemic, the legislative amendment exercise and related consultation have been delayed. Corresponding subsidiary legislation will be amended or added after OLPO is amended. The Administration has pointed out that during the consultation process, all of the three strategies were discussed together. At the same time, it has explored with the trade solutions to achieve full compliance with the phasedown schedule, as well as reducing the use of high GWP HFC products and equipment. The Administration has further advised that the Bill aims to provide the legal basis for the necessary phasedown arrangements, and therefore, OLPO must first be amended to empower the Secretary to make regulations. Upon the passage of the Bill by LegCo, two pieces of subsidiary legislation will be separately made to effect Control Strategies 2 and 3 to regulate the supply of products and equipment using high GWP HFCs and mandate the recovery of refrigerants and fire suppressants. The two pieces of subsidiary legislation are to be introduced to LegCo for positive vetting.

Low global warming potential alternatives

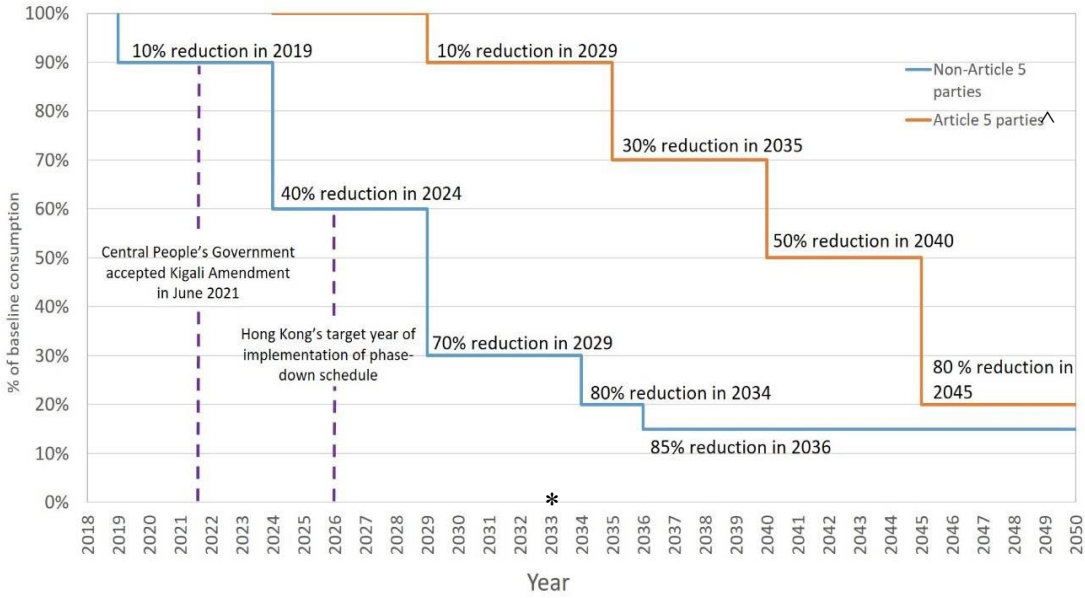
9. Members support regulating or prohibiting products and equipment using high GWP HFCs to reduce local HFC consumption at source and help combat global warming. Concerns have been raised as to whether the Administration has considered consumers' views if alternatives with varying performance and price advantages are to be introduced after the implementation of the proposed regulations.

10. The Administration has explained that sufficient consultation and market information collection have been conducted. Currently, there should be sufficient alternatives available for refrigeration equipment on the market. As far as prices are concerned, there are no significant price differences for household electrical appliances. While different models and features may lead to some price differences, in general, the price of household electrical appliances using low GWP refrigerants should not increase substantially given their growing popularity. As regards refrigeration or air-conditioning equipment for commercial use, the price difference may be greater, but the Administration has consulted the trade and believes that such equipment will have limited impact on the overall cost and is relatively more environmentally friendly.

Phasedown schedules for scheduled hydrofluorocarbons

11. The Kigali Amendment sets out separate phasedown schedules for developing parties (i.e. Article 5 parties, including the Mainland of China) and developed parties (i.e. non-Article 5 parties, including Hong Kong), as detailed below:

Phasedown Schedule under the Kigali Amendment



Members note that the Mainland of China is an Article 5 party, and its phasedown schedule is different from that for Hong Kong, which is a non-Article 5 party. While recognizing the need to balance environmental and economic benefits, members are concerned about the potential impact of the proposed control strategies on Hong Kong's overall import, export, and re-export trade with the rest of the world (in particular with Mainland manufacturers), and how Hong Kong can achieve the goal of alignment with the Mainland under a more aggressive phasedown schedule.

12. The Administration has advised that Hong Kong, as a developed economy, has to follow a more aggressive phasedown schedule than the Mainland of China. Nevertheless, many Mainland manufacturers sell their products not only in Hong Kong but also worldwide. To meet the different regulatory requirements around the world and gain access to local markets, Mainland manufacturers have started to introduce various low GWP products. Hence, the proposed control strategies should not adversely affect import, export and re-export trade.

Import control of scheduled hydrofluorocarbons

13. To control the quantity of scheduled HFCs imported for local use, the Administration has proposed covering scheduled HFCs under the

existing import and export licensing and import quota arrangements of OLPO and setting a ceiling on such importation volume. Quotas will be divided into normal quota and free quota in a 7:3 ratio. The former will be allocated on a pro rata basis to existing importers based on their market shares, while the latter will be reserved for new entrants or existing importers who have exhausted their normal quotas in that year. Members have enquired about the difficulties anticipated in the implementation of the quota system for new scheduled substances, based on past experience, and how the use of scheduled HFCs can be phased down through the quota system.

14. The Administration has explained that a quota system is already in place for certain scheduled substances, and that the trade has become accustomed to such a system. If new substances are to be scheduled, the system to which the trade is already accustomed will normally be followed. Following the phasedown schedule, a stepwise decreasing quota system will be implemented, covering the proposed 18 HFCs. Quotas will be calculated in accordance with the Kigali Amendment to ensure that the carbon dioxide equivalent phasedown targets are met. The allocation of quotas will take into account importers' past usage and will allow free market transfers to ensure fair competition and market flexibility. Publicity and discussion with the trade will be stepped up in the future.

15. Members note that importation of HFCs with extremely high GWP, i.e. HFC-23, will be fully banned, save for maintenance of ultra-low temperature refrigeration system and laboratory research. Members are concerned about whether this exemption will undermine the effectiveness of Control Strategy 1. The Administration has explained that the use of HFC-23 is minimal, only about one to two kilograms. Notwithstanding the exemption, importers will still be required to comply with control requirements by reporting to the Environmental Protection Department ("EPD") at the time of import and justifying the lack of alternatives.

Producer responsibility scheme

16. During the public consultation exercise on the legislative proposal in 2023, the Environment and Ecology Bureau proposed to introduce a transitional producer responsibility scheme ("PRS") on the refrigerant before commencement of the proposed control measures. Specifically, any product or equipment with scheduled HFCs imported to Hong Kong would be charged a levy so that there would not be a dumping of outdated equipment in Hong Kong. Members have asked why PRS is not mentioned again in both the Administration's paper and the Bill. The Administration has explained that the trade expressed divergent views on PRS during the consultation. However, the Administration has planned to incorporate the relevant concepts under Control Strategy 3 in the parts concerning recycling

and reusing substances. As such, the implementation of PRS will not be considered for the time being.

17. Members have enquired whether the dumping of outdated equipment in Hong Kong can still be prevented during the transition period if PRS is not implemented. The Administration has responded that Control Strategy 2 proposes to progressively regulate the supply of products and equipment using high GWP HFCs from mid-2026 onwards to tackle the dumping of outdated equipment. After consultation with the trade, the Administration will not prohibit the sale of existing products on the market, so as to avoid economic implications on the trade.

Effective date for prohibition of supply of regulated hydrofluorocarbon products

18. Members have pointed out that the effective dates for prohibition of supply of three categories of products among those set out in Annex E to the LegCo Brief, i.e. household air-conditioners, household refrigerators or household freezers (or a combination of both) and commercial stand-alone refrigeration equipment, are indicated as "Not Applicable". They have enquired whether the Administration will set a time for the prohibition of supply of these products. According to the Administration, Annex E proposes to prohibit the import or manufacture of these three categories of products from 1 July 2026, and these products are expected to be phased out from the market in the long run. The Administration expects that discussions will be held with the trade in mid-2025 on the timetable for prohibition of supply of these products.

Mandatory recovery of refrigerants

19. Members have enquired about the Administration's specific measures to promote the recovery and recycling of refrigerants, including the effectiveness of and challenges of recovery, whether there are sufficient qualified contractors to handle the recovery work, and whether the related storage cost will add to the burden on the trade. The Administration has pointed out that refrigerants normally circulate in closed systems, except where there are leaks or maintenance needs. In general, the trade will use specific equipment for recovery and return the refrigerants to the original system after maintenance. However, in special cases where the refrigerants are contaminated, recovery may not be possible and chemical waste disposal will be the only option. With the gradual tightening of import controls on refrigerants, the rising market demand for refrigerants will provide incentives for the trade to recover refrigerants. Following the implementation of the Kigali Amendment, recovery of refrigerants will be

regarded as a business opportunity and some organizations have plans to set up refrigerant recovery facilities in Hong Kong or the Greater Bay Area.

Prohibition of manufacture of scheduled hydrofluorocarbons

20. The proposed new section 3(5) provides that a scheduled substance shall not be regarded as being manufactured if "the substance is collected from any equipment, product or container during the servicing of the equipment, product or container or before the equipment, product or container is scrapped; and the substance is subsequently recycled by way of purification or distillation, or by any other way, so as to make it suitable for reuse". Members have suggested replacing "by way of purification or distillation" in the proposed new section 3(5)(b) with "recycled by any way" to better reflect the actual needs and development trends.

21. The Administration has explained that the manner in which the proposed new section 3(5)(b) is drafted is intended to make it clear that it is permissible to recycle a scheduled substance "by way of purification or distillation, or by any other way" for reuse. Such a process will not be regarded as manufacture of scheduled substances under section 3(1) of OLPO and therefore does not constitute an offence. The reason for specifying "by way of purification or distillation" is to facilitate the trade's understanding, as these two methods are the mainstream "recycling" methods currently used by the trade. As for the addition of "by any other way", this is to prepare for any other methods of "recycling" (other than purification and distillation) that may emerge due to technological advancement in the future.

22. The Administration has further pointed out that the existing Ozone Layer Protection (Controlled Refrigerants) Regulation (Cap. 403B) also defines "recycle" in a similar manner. Under this subsidiary legislation, "recycle" is defined as "means, in relation to a controlled refrigerant, to purify or distil it, or to treat it in any other way so as to make it suitable for reuse". In order to facilitate understanding by the trade and to align with the definition under this subsidiary legislation, the Administration has considered that the manner in which the proposed new section 3(5)(b) is drafted should be retained.

Definitions of "hazardous refrigerant", "specified refrigerant" and "controlled refrigerant"

23. The Bill proposes to introduce two new categories of refrigerant, i.e. "hazardous refrigerant" and "specified refrigerant". Under clause 4(6) of the Bill, "hazardous refrigerant" is proposed to mean a refrigerant prescribed by regulations made under section 16(1) of OLPO to be a

refrigerant that constitutes a safety hazard; and "specified refrigerant" is proposed to mean a refrigerant that contains one or more scheduled substances, but does not include a controlled refrigerant as defined by section 2 of the Ozone Layer Protection (Controlled Refrigerants) Regulation (Cap. 403B). Members have pointed out that both the trade and the public are not familiar with the definitions of "specified" and "controlled". They have suggested that the Administration step up efforts in publicity and education, and formulate codes of practice and guidelines after the passage of the Bill to clearly explain the definitions of "hazardous refrigerant", "specified refrigerant" and "controlled refrigerant", and whether these refrigerants are mutually exclusive as well as the applicable regulatory legislation. Taking on Bills Committee members' suggestions, the Administration has set out in Appendix 1 to LC Paper No. CB(1)219/2025(02) the definitions of various categories of refrigerants, the applicable regulatory legislation and whether they are mutually exclusive. Such information will also be set out in the code of practice in the future.

Registration of importers or exporters

24. The proposed new section 5(1)(ab) provides that the Director of Environmental Protection ("Director of EP") may register a person under section 5 of OLPO if the Director of EP is satisfied that the person was, before 1 December 2025, an importer or exporter of scheduled substances listed in Part 10 of the Schedule. Members have pointed out that the word "was" has a wide scope and could refer to a person who is no longer engaged in the relevant activities for years even though he or she was a registered importer 10 years ago. Under the amended OLPO, the person concerned may apply for a review of his eligibility. However, the Bill does not expressly provide for the assessment of eligibility. Members have suggested that the definition of "was" should be provided for in the Bill or in a code of practice to enable the trade or stakeholders to understand the precise definition of "was" in order to avoid difficulties or disputes in the enforcement of the regulation in the future.

25. The Administration has advised that in the proposed new section 5(1)(ab), the phrase "was, before 1 December 2025, an importer or exporter of scheduled substances listed in Part 10 of the Schedule" has been added to provide that the Director of EP may pursuant to section 5 of OLPO register a person if the Director of EP is satisfied that the person was, before 1 December 2025, an importer or exporter of scheduled HFCs listed in Part 10 of the Schedule. Specifically, the term "was" means that any importer or exporter who has engaged in the import and export of HFCs listed in Part 10 of the Schedule before 1 December 2025 is eligible for registration.

26. The Administration has further explained that since the implementation of OLPO in 1989, the types of refrigerants used in refrigeration and cooling systems have switched from ozone depleting substances ("ODSs") such as chlorofluorocarbons ("CFCs") and hydrochlorofluorocarbons in the early days to the use of HFCs as substitutes since the 2000s. According to the official statistics kept by EPD, there are about 50 registered importers of ODSs. To avoid difficulties or disputes in enforcing the regulations in the future, the Administration has accepted the Bills Committee's proposal and arranged for EPD to set out in codes of practice or guidelines the criteria for an importer or exporter of the scheduled substances to be eligible for registration under section 5 of OLPO. The Legal Adviser to the Bills Committee has asked the Administration to explain the criteria specified, and whether the codes of practice mentioned above are different from the codes of practice on non-registration matters covered by the proposed new section 16(1)(w) under clause 19 of the Bill. The Administration has advised that the codes of practice referred to in the proposed new section 16(1)(w) are codes of practice issued by the Director of Electrical and Mechanical Services on the control of refrigerants, while the codes of practice and criteria on registration are administrative arrangements. The Administration will, in due course, step up publicity and education for the trade so that they will have a clear understanding of the relevant arrangements.

Composition of the Administrative Appeals Board

27. The Administrative Appeals Board ("AAB") referred to in the proposed new section 8(1)(b) is responsible for handling complaints against the decisions made by the Director of EP under sections 5 (registration), 6 (licence to import or export scheduled substances) or 7 (cancellation of registration or licence) of OLPO. Members have enquired about the composition of AAB. The Administration has explained that AAB is formed under the Administrative Appeals Board Ordinance (Cap. 442), with members appointed by the Chief Executive. In addition to one Chairman and eight Deputy Chairmen, AAB has 46 members, including representatives from the Government and the trade.

Powers of authorized officers

28. Members have enquired about the justification for adding "in routine inspection" after "authorized officers" in the heading of the proposed revised section 10, and whether there are other arrangements for non-routine inspections. The Administration has advised that the proposed amendments to sections 10 and 11 are intended to clarify the distinction between "routine inspection" and "issuance of a warrant for the investigation of suspected offences". In short, section 10 expressly provides that routine

inspections do not require a warrant, whereas the proposed new section 11(2) provides that a magistrate may issue a warrant authorizing an authorized officer to enter and search any premises for the purpose of investigating a suspected offence if satisfied that there are reasonable grounds to suspect the existence in the premises of any of the circumstances described in section 11(2)(a) or (b)[1].

29. In response to members' enquiry about whether there are any regulatory gaps in the proposed revised sections 10 and 11 regarding the handling of non-routine inspections and investigations not involving suspected offences, the Administration has advised that the proposed revised section 10 deals primarily with day-to-day circumstances encountered during routine inspections, whereas section 11 deals with circumstances where offences are suspected or believed to have been committed. The difference lies mainly in the scope of the powers and the application contexts. In addition, members have expressed concern about whether the provisions primarily target registered premises, noting that domestic premises cannot be registered premises. The Administration has pointed out that according to the provision, the premises referred to in section 10(1)(a)(i) are not limited to a particular type of premises. Rather, it means any premises occupied by persons lawfully licensed or registered. The power of routine inspection will be exercised with due respect to privacy. The phrase "other than domestic premises" is therefore retained. Domestic premises will not be entered for inspection unless authorized by a special warrant.

Recovery of storage charges for seized goods

30. Under the proposed revised section 14(2), "the Director may at any time release the thing seized, on payment of reasonable storage charges, to the person who appears to the Director to be the owner of the thing seized…" Members have suggested that the Administration provide guidelines to deal with difficulties in recovering storage charges, and provide the number of past cases in which storage charges could not be successfully recovered.

31. The Administration has responded that in general, if the quantity of seized goods is small, such goods would be temporarily stored in the evidence room. If the quantity is substantial and necessitates transfer to another warehouse for temporary storage, Director of EP may, upon payment of the reasonable storage fees and retrospective issuance of the import licence, return the goods to the owner. In the event of overdue payment of

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[1] Section 11(2)(a) refers to circumstances where an offence under OLPO has been, is being or is about to be committed in the premises; or section 11(2)(b) refers to circumstances where there is in the premises any specified evidence.

the relevant fees, the Government has existing guidelines for recovering the arrears. EPD will undertake appropriate recovery actions according to the guidelines, and refer the case to the Department of Justice for follow-up and legal action, such as lodging a claim with the Small Claims Tribunal. Where goods owners cannot be identified, EPD will forfeit the seized goods in accordance with the legislative provision and arrange for disposal at the Chemical Waste Treatment Centre. As for cases with owner identified, according to the records of the past 10 years, no difficulty has been encountered in recovering storage charges from owners, and there was no unsuccessful case of storage charge recovery.

Regulations on the control of scheduled substances and their related products

32. Members have pointed out that the inclusion of the term "supply" under the proposed revised section 16(1)(a) has allowed for a more complete coverage of the whole industrial chain, encompassing the regulation of the sale, distribution, storage, recycling and disposal of scheduled substances and their related products. Nevertheless, as sections 16(1)(b) and 16(1)(ba) also deal with scheduled substances and their related products, members have enquired why sections 16(1)(b) and 16(1)(ba) have not been amended at the same time to include the term "supply". They have also requested that the Administration provide relevant practical examples for illustrative purposes.

33. The Administration has explained that the objective of amending section 16(1)(a) (with the inclusion of the term "supply") is to provide powers to the Secretary to make new regulations to implement the regulation of the supply of products that use high GWP HFCs (such as refrigeration equipment and fire extinguishing installations) under the proposed Control Strategy 2. As for section 16(1)(b), it is related to the control of "products made with a scheduled substance". Examples of this type of products include insulation panels. As the use of these products does not require replenishment of scheduled substances, "supplying" and using these products will not increase the consumption of scheduled substances in Hong Kong or affect Hong Kong's compliance with the HFCs phasedown schedule of the Kigali Amendment. Hence, these products are not covered in the proposed control strategies and there is no need to amend this provision. As for section 16(1)(ba), it is related to the control of "scheduled substances", that is, the substances listed in the Schedule to OLPO. Their import and export are regulated by the import and export licensing system under OLPO. The proposed control strategies do not propose to control the "supply" of scheduled substances. If it is considered necessary to control the supply of these substances in the future, relevant conditions can still be imposed on the licences. Hence there is no need to amend section 16(1)(ba).

Exception and reasonable excuse

34. Under clause 5(3) of the Bill, the burden of establishing the exception to the offence under section 3(1) of OLPO (i.e. manufacturing scheduled substances) would lie on the person charged with the offence and the burden would be an evidential burden. And under clause 15(3) of the Bill, an evidential burden of proof would be placed on the person charged with an offence under section 13(1)(b) of OLPO (i.e. failing to comply with any requirement made by an authorized officer under section 10, 11 or 12 of OLPO) if that person wishes to plead that he or she had a reasonable excuse ("reasonable excuse"). In this regard, the Legal Adviser to the Bills Committee has sought clarification from the Administration on:

(a) whether it is the Administration's intention that each of the offences mentioned above is a strict liability offence and that the prosecution needs not prove the existence of *mens rea* (i.e. the mental element) of committing the offence;

(b) if the Administration's answer in (a) above is in the affirmative, whether the legislative intent is that, apart from the exception and reasonable excuse mentioned above, the implied common law defence of "honest and reasonable mistaken belief" is available to a person charged with each of these offences, and if so, whether the defendant only bears an evidential burden (i.e. the second alternative referred to in *Kulemesin v HKSAR*(2013) 16 HKCFAR 195("*Kulemesin*")), or is required to discharge a persuasive burden (i.e. the third alternative referred to in *Kulemesin*), as to the defendant's belief; and

(c) if it is the Administration's intent that the third alternative referred to in *Kulemesin* applies, how the derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd v Town Planning Board*[2016] 6 HKC 58.

35. The Administration has responded that:

(a) the intent is that the offences under section 3(1) (i.e. manufacturing scheduled substances) and section 13(1)(b) of OLPO (i.e. failing to comply with any requirement made by an authorized officer under section 10, 11 or 12 of OLPO) are

strict liability offence and that the prosecution needs not prove the existence of *mens rea* of committing the offence;

(b) regarding the offence under section 3(1) of OLPO, the implied common law defence of "honest and reasonable mistaken belief" would be available to the defendant, and the defendant would have to prove such "honest and reasonable mistaken belief" on balance of probabilities. Regarding the offence under section 13(1)(b) of OLPO, no such common law defence will be made available, instead the defendant could only rely on the statutory defence set out in section 13(2) (i.e. reasonable excuse) of OLPO; and

(c) since clause 5(3) and clause 15(3) of the Bill only seek to impose an evidential burden on the accused to prove those matters thereunder, there is no question of derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights.

36. Regarding the Administration's response in paragraph 35(b) above, the Legal Adviser to the Bills Committee has sought further clarification from the Administration on the justification(s) for imposing a persuasive burden (i.e. the third alternative referred to in *Kulemesin*, rather than an evidential burden to produce evidence capable of raising an issue as to the defendant's belief (i.e. the second alternative referred to in *Kulemesin*), on the person charged with the offence under section 3(1) of OLPO.

37. The Administration has explained that the offence under section 3(1) of OLPO is an existing offence that serves to prohibit the manufacture of scheduled substances, which is essential for implementing the requirements of the Protocol. The Protocol was further amended by the Kigali Amendment aiming at scheduled HFCs. There is currently no local manufacture of scheduled substances (including HFCs that are newly added by the Bill). The legislative intent is that the offence under section 3(1) is a strict liability offence and the implied common law defence of honest and reasonable mistaken belief is not to be disallowed. Given that the offence under section 3(1) is regulatory in nature rather than a crime in the ordinary sense and the penalty imposed is arguably not severe (a maximum of 2 years' imprisonment as compared with a maximum of 4 years' imprisonment for the indictable offence in the case of *Kulemesin*), according to paragraphs 87 and 88 of *Kulemesin*, the appropriate mental requirement of the offence is most likely to be the third alternative, i.e. the prosecution needs not prove *mens rea* but that the accused had a good defence if he could prove, on the balance of probabilities, that he acted or omitted to act in the honest and

reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence.

38. The Administration has further explained that if the defendant claims to have honest and reasonable mistaken belief that he was not manufacturing a scheduled substance, this is something peculiar to his own knowledge and it is particularly difficult for the prosecution to disprove beyond reasonable doubt. As such, in the present context of a regulatory offence, by placing the burden on the defendant to prove on the balance of probabilities that he did in fact act under an exculpatory honest and reasonable mistaken belief will represent the most appropriate balance to be struck between (a) the legitimate aim pursued by the regulatory offence (i.e. compliance with the Protocol as amended by the Kigali Amendment) on the one hand, and (b) avoiding a snaring of the blameless, on the other. In summary, given that the offence under section 3(1) is a regulatory offence that attracts penalties not at the severe end, applying the Court of Final Appeal's reasoning in the case of *Kulemesin*, the Administration considers that the third alternative is most likely to be applicable.

39. Given that it is the Administration's intent that the third alternative referred to in *Kulemesin* applies, the Legal Adviser to the Bills Committee has enquired how the derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd v Town Planning Board*[2016]6 HKC 58.

40. The Administration has explained that regarding the offence under section 3(1) of OLPO, the implied common law defence of "honest and reasonable mistaken belief" would be available to the defendant. In paragraph 11 of *Hin Lin Yee & Anor v HKSAR* (2010) 3 HKC 403 ("*Hin Lin Yee*"), the Court of Final Appeal observed that in appropriate cases "the shifting of burden to the accused to prove on the balance of probabilities something which is peculiar to his own knowledge and which the prosecution is unable to disprove beyond reasonable doubt is not unusual; nor is this any more unfair or inconsistent with human rights provisions than imposing absolute liability on him". More importantly, placing the burden on the prosecution to prove beyond reasonable doubt the absence of an honest belief or the absence of reasonable grounds for such belief on the part of the defendant who was found manufacturing a scheduled substance, is likely to make enforcement ineffective and unworkable. To sum up, the offence under section 3(1) of OLPO is regulatory in nature and arguably does not carry severe penalties, and that the implied common law defence of "honest and mistaken belief" is available for the defendant to demonstrate something peculiar to his knowledge. The Administration is of the view

that there are compelling reasons justifying abrogating the presumption of innocence in this situation.

41. As it is the Administration's intent that the common law defence of "honest and reasonable mistaken belief" would not be made available to the person charged with the offence under section 13(1)(b) of OLPO, and the defendant could only rely on the statutory defence set out in section 13(2) (i.e. reasonable excuse) of OLPO, the Legal Adviser to the Bills Committee has sought clarification from the Administration on why the common law defence of "honest and reasonable mistaken belief" is replaced or excluded by the statutory defence of having a reasonable excuse (i.e. the fourth alternative referred to in *Kulemesin*).

42. The Administration has explained that the provision of section 13(l)(b) of OLPO, when read in conjunction with the proposed section 13(2), avails a defendant of the statutory defence of "reasonable excuse", with the evidential burden to establish the same to be borne by the defendant. As a matter of principle, where a statutory defence, properly construed, is inconsistent with the concurrent availability of the common law defence of honest and reasonable mistaken belief, then only the statutory defence could be relied on by a defendant (*Hin Lin Yee*, paragraphs 89-95 and 164). As pointed out by the Court of Final Appeal in *HKSAR v Ho Loy* (2016) 19 HKCFAR 110, decided in the context of the offence under regulations 50(2) and 61(2) of the Road Traffic (Traffic Control) Regulations (Cap. 374G), the statutory defence of "reasonable excuse" is potentially wider than the halfway house defence of honest and reasonable mistaken belief, since a person may have a reasonable excuse for failing to comply with a statutory requirement, even though he deliberately intends that non-compliance. Accordingly, the Court held that the appropriate alternative mental requirement of the offence concerned is the fourth alternative in the case of *Kulemesin*, supra, i.e. only the statutory defence of reasonable excuse could be relied upon.

43. The Administration has further pointed out that regarding section 13(1)(b) of OLPO, given the language used in the provision are similar to those in *Ho Loy*, supra, it is considered that the statutory defence of reasonable excuse in section 13(1)(b) is wider than the common law defence of honest and reasonable mistaken belief, such that the common law defence is unlikely to coexist with the statutory defence. On such basis, the common law defence of honest and reasonable mistaken belief will not be available to a person charged with an offence under section 13(1)(b) of OLPO.

Penalties for the offences under the Ozone Layer Protection (Controlled Refrigerants) Regulation

44. Clauses 26 to 29 of the Bill propose to increase the maximum penalties for the offences under the Ozone Layer Protection (Controlled Refrigerants) Regulation (Cap. 403B) from the existing level of a fine at level 6 (i.e. $100,000) to a fine of $200,000 and imprisonment for 6 months, and in the case of a continuing offence to a further fine of $10,000 for each day during which the offence continues. These offences relate to the requirements under the existing sections 5, 6, 7 and 8 of Cap. 403B.[2] Members have requested the Administration to explain the rationale for increasing the penalties, compare them with relevant penalties in different places and Hong Kong to ensure consistency, and review the effectiveness of the new penalties, in particular whether adjusting the penalties can enhance deterrence.

45. The Administration has explained that as the international community pays increasing attention to the issues of ozone layer protection and global warming, it is necessary to review the penalties to demonstrate HKSAR Government's determination to comply with international environmental treaty and to tell the international community that Hong Kong will handle the matter seriously. In setting the proposed penalties, it has made reference to the relevant penalties of other environmental regulations in Hong Kong. The proposed penalties are proportionate to the seriousness of the relevant offences and can achieve their deterrent effect. A comparison between the relevant penalties in various places and those in Hong Kong is set out in **Appendix 2**.

46. Members have suggested that the Administration adequately consider the impact of the offences on the community, and review whether the penalties for contravention of the record-keeping requirements under sections 7(3) and 8(2) should be aligned with those for the offences under sections 5(1) and 6(2).

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[2] Cap. 403B:

Section 5: Prohibiting the releasing of the three CFCs-containing refrigerants from refrigeration equipment in which the refrigerant charge is over 50kg ("large refrigeration equipment") or motor vehicle air-conditioners.

Section 6: Controlling the type of equipment and the manner of using the equipment during recycling works of the three CFCs-containing refrigerants.

Section 7: Requiring the keeping of records regarding the three CFCs-containing refrigerants in relation to large refrigeration equipment in the premises.

Section 8: Requiring the keeping of records regarding the three CFCs-containing refrigerants in relation to any business that includes servicing, repairing or decommissioning motor vehicle air-conditioners.

47. The Administration considers that the penalties for the contravention of the record-keeping (i.e. the records of removal and addition of controlled refrigerant in relation to the equipment) requirement under sections 7(3) and 8(2) should be aligned with the penalties for prohibition on releasing controlled refrigerant under section 5(1) and the control of recycling of controlled refrigerant under section 6(2). The reason is that the records kept by the relevant persons are important proof of whether there has been any release of controlled refrigerant to the atmosphere, and are crucial for law enforcement and evidence collection for the offences in question. If the penalty for the contravention of record-keeping requirement is lighter than that for releasing controlled refrigerant to the atmosphere, the offender may choose not to keep a record in order to evade the criminal liability for releasing controlled refrigerant. The impact of both penalties on the environment is therefore equally important.

48. Members have pointed out that for the purposes of the contravention of the record-keeping requirements (i.e. the records of removal and addition of controlled refrigerant in relation to the equipment) under the proposed revised sections 7(3) and 8(2), it is necessary to clarify the meaning of "continuing offence" as well as its scope and criteria.

49. In response to the members' suggestions and concerns, the Administration considers that the proposed "continuing offence" may incriminate a person who genuinely seeks to rectify his or her fault but fails to do so due to practical difficulties in retrieving the lost past records, which is contrary to the Administration's legislative intent. Considering that sufficient deterrence has already been achieved through increasing the penalties from the maximum fine of $100,000 to $200,000 and imprisonment for 6 months in the proposed revised sections 7(3) and 8(2), the Administration has proposed to make amendments to take out the "continuing offence" referred to in the proposed revised sections 7(3) and 8(2).

Technical training

50. Expressing grave concern at the repeated occurrence of accidents during the execution of technical works, members consider that technicians should be required to complete training courses and obtain certification before handling refrigerants, fire suppressants and other related scheduled substances. To this end, during the transition period before the proposed control comes into force, the Administration must ensure the availability of sufficient training bodies and courses to enable technicians to take up relevant work on completion of the courses. Concerns have also been raised about whether technicians are required to undertake continuing

education and development. If they fail to complete the courses or pass the examinations, the Administration should provide support to enable them to retake the courses and pass the examinations.

51. The Administration has indicated that it has worked with the industry to establish the Provisional Refrigerant Technical Advisory Committee ("Advisory Committee") in September 2024. The Advisory Committee has already recognized the courses offered by the Vocational Training Council ("VTC") and the Construction Industry Council ("CIC"), and courses from three other training bodies are expected to receive recognition in March 2025. The Advisory Committee will consider applications from other institutions to run courses. Courses offered by VTC and CIC are scheduled for launch in the second quarter of 2025, and those offered by other institutions will also be launched in due course, commencing during the transition period. It is believed that the existing and forthcoming courses will be able to meet the needs of the industry.

52. The Administration has further advised that given the safety concerns associated with highly toxic or flammable substances, appropriate course assessment standards would need to be established. However, it is believed that technicians with relevant qualifications will be able to complete the courses and pass the assessments to obtain the relevant qualifications. Moreover, the Administration has pointed out that technicians will be required to undertake continuing education and development. A five-year licence renewal arrangement is anticipated to be put in place, with associated continuing education and development requirements to be implemented during this period. Regarding members' enquiry about the procedures for revising the content of the relevant recognized courses, the Administration has explained that the Advisory Committee has established course recognition standards, and that the specific details will be further worked out when the subsidiary legislation is amended.

53. Regarding members' concern about whether the Bill explicitly stipulates the liability of technicians, the Administration has advised that the Advisory Committee will develop a code of practice for compliance by technicians. Both equipment owners and refrigerant handlers have relevant responsibilities. Equipment owners are required to provide a safe environment and equipment and to employ qualified handlers to carry out the work, while handlers are required to employ trained technicians to undertake the related tasks.

Proposed amendments to the Bill

54. The Bills Committee has examined and raised no objection to the amendments to the Bill proposed by the Administration as set out in paragraphs 48 and 49 above. The Bills Committee will not move any amendments to the Bill.

Consultation with the House Committee

55. The Bills Committee reported its deliberations to the House Committee on 21 March 2025.

Council Business Divisions
Legislative Council Secretariat
24 March 2025

Appendix 1

Bills Committee on Ozone Layer Protection (Amendment) Bill 2024

Membership list

Chairman	Ir Hon CHAN Siu-hung, JP
Members	Hon KWOK Wai-keung, BBS, JP Hon LAU Kwok-fan, MH, JP Hon Tony TSE Wai-chuen, BBS, JP Hon Stanley LI Sai-wing, MH, JP Dr Hon Hoey Simon LEE, MH, JP Hon LAM Chun-sing Hon CHAN Yung, SBS, JP Hon Judy CHAN Kapui, MH, JP (Total: 9 members)
Clerk	Ms Joyce KAN
Legal Adviser	Mr Alvin CHUI

Appendix 2

Comparison of Relevant Penalties of Cap. 403B with other Legislations in Hong Kong

Offence under Cap. 403	Proposed New Penalties	Relevant Penalties of other Legislations in Hong Kong
Section 5(1) – Prohibition on releasing controlled refrigerant	Maximum fine of $200,000 and imprisonment for 6 months. For continuing offence, a further fine of $10,000 for each day.	Air Pollution Control Ordinance (Cap. 311), Section 12(2) Contravention of section 12(1) "The owner of any premises used for the conduct of any specified process shall use the best practicable means for preventing the emission of noxious or offensive emissions from such premises, and for preventing the discharge, whether directly or indirectly, of such emissions into the atmosphere, and for rendering such emissions where discharged harmless and inoffensive." Maximum fine of $200,000 and imprisonment for 6 months. For continuing offence, a further fine of $20,000 for each day.
Section 6(2) – Control on recycling of controlled refrigerant	Maximum fine of $200,000 and imprisonment for 6 months. For continuing offence, a further fine of $10,000 for each day.	Air Pollution Control Ordinance (Cap. 311), Section 12(2) Contravention of section 12(1) "The owner of any premises used for the conduct of any specified process shall use the best practicable means for preventing the emission of noxious or offensive emissions from such premises, and for preventing the discharge, whether directly or indirectly, of such emissions into the atmosphere, and for rendering such emissions where discharged harmless and inoffensive." Maximum fine of $200,000 and imprisonment for 6 months. For continuing offence, a further fine of $20,000 for each day.
Sections 7(3) and 8(2) – Record-keeping	Maximum fine of $200,000 and imprisonment for 6 months.	Waste Disposal (Chemical Waste) (General) Regulation (Cap. 354C), Sections 28(2) and 38 Contravention of section 28(1) "Any…shall each retain such copy of the trip ticket and the original of the trip ticket respectively, at least for a period of 12 months

Offence under Cap. 403	Proposed New Penalties	Relevant Penalties of other Legislations in Hong Kong
	For continuing offence[3], a further fine of $10,000 for each day.	from the date it is handed over or completed, as the case may be, and shall make it available to the Director if so required." Maximum fine of $50,000 and imprisonment for 6 months. For continuing offence, a further fine of $10,000 for each day. Water Pollution Control (General) Regulations (Cap. 358D), Section 17B(1) Contravention of section 17B(2)(c) "requiring or specifying the desludging of a septic tank or the keeping of records of sludge removed in any desludging" and section 17B(2)(e) "requiring or specifying the keeping of records of sludge or screenings removed from a domestic sewage treatment plant or a wastewater treatment facility…" Maximum fine of $200,000 and imprisonment for 6 months.

<u>Comparison of Relevant Penalties of Cap. 403B with Legislations in Various Places</u>

Offence under Cap. 403	Proposed New Penalties	United Kingdom[1]	Singapore[2]	Australia[3]
Section 5(1) – Prohibition on releasing controlled refrigerant	Maximum fine of HKD 200,000 and imprisonment for 6 months. For continuing offence, a further fine of HKD 10,000 for each day.	Maximum fine of GBP 200,000.	Maximum fine of SGD 20,000. On a second and subsequent offence, maximum fine of SGD 50,000. For continuing offence, a further fine of SGD 2,000 for each day.	Maximum fine of AUD 18,780 for strict liability offence. Maximum fine of AUD 93,900 for fault-based offence.

[3] Please refer to the proposed amendments concerning "continuing offence" in paragraphs 48-49 above

Offence under Cap. 403	Proposed New Penalties	United Kingdom[1]	Singapore[2]	Australia[3]
Section 6(2) – Control on recycling of controlled refrigerant	Maximum fine of HKD 200,000 and imprisonment for 6 months. For continuing offence, a further fine of HKD 10,000 for each day.	No relevant control.	Maximum fine of SGD 20,000. On a second and subsequent offence, maximum fine of SGD 50,000. For continuing offence, a further fine of SGD 2,000 for each day.	No relevant control.
Sections 7(3) and 8(2) – Record-keeping	Maximum fine of HKD 200,000 and imprisonment for 6 months. For continuing offence[3], a further fine of HKD 10,000 for each day.	Maximum fine of GBP 50,000.	Maximum fine of SGD 20,000. On a second and subsequent offence, maximum fine of SGD 50,000. For continuing offence, a further fine of SGD 2,000 for each day.	Maximum fine of AUD 15,650 (strict liability offence).

Remark:
The above information is public information and obtained from documents or webpages listed below.
Relevant reference legislations:

1. United Kingdom - The Fluorinated Greenhouse Gases Regulations 2015 (https://www.legislation.gov.uk/uksi/2015/310/contents)
2. Singapore - Environmental Protection and Management Act 1999 (https://sso.agc.gov.sg/Act/EPMA1999?ProvIds=P11-#P11-)
3. Australia
   (i) Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (https://www.legislation.gov.au/C2004A03755/latest/downloads)
   (ii) Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995 (https://www.legislation.gov.au/F1996B02085/latest/downloads)
   (iii) Crimes (Amount of Penalty Unit) Instrument 2023 (https://www.legislation.gov.au/F2023N00196/latest/text)