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**Report of the Bills Committee on
Trade Descriptions (Amendment) Bill 2004**

Purpose

This paper reports on the deliberations of the Bills Committee on Trade Descriptions (Amendment) Bill 2004 (the Bill).

Background

Existing legislative provisions

2. At present, the origin marking of goods is regulated by the Trade Descriptions Ordinance (TDO) (Cap. 362). For the purpose of determining the origin of goods, section 2(2)(a) of TDO contains a general deeming provision which provides that goods are deemed to have been manufactured in the "country" in which they last underwent substantial transformation. Section 2(2)(b) and section 2(2A) of TDO empower the Commissioner of Customs and Excise (C,C&E) and the Director-General of Trade and Industry (DGTI) to make Orders and Notices respectively to specify other special origin-marking requirements. At present, the origin marking requirements for watches, piece-knitted garments and textile made-up articles are provided for in separate Orders and Notices made by C,C&E and DGTI.

3. The wording of the deeming provisions under section 2(2)(a) of TDO makes reference to "country" only. Likewise, the wording of section 2(2)(b) allows C,C&E to make Orders in respect of "countries" only. The Administration has pointed out that the reference to "country" or "countries" only in these sections is problematic because there may be circumstances in which the deeming provisions need to be applied to a "place" instead of a "country", or where C,C&E needs to specify the "places", instead of the "countries", of manufacture or production of goods in the Orders.

Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)

4. Pursuant to the CEPA signed between the Government of the Hong Kong Special Administrative Region and the Central People's Government on 29 June 2003, the Mainland has agreed, inter alia, to eliminate tariffs on goods imported from Hong Kong by phases starting from 1 January 2004 provided these goods meet the relevant origin requirements. To enable watches and piece-knitted garments for export under CEPA to bear a Hong Kong origin marking, C,C&E made the Trade Descriptions (Country of Origin)(Watches)(Amendment) Order 2003 (L.N. 233 of 2003) and DGTI made the Trade Descriptions (Place of Manufacture) (Piece-Knitted Garments) Notice (L.N. 234 of 2003) in October 2003.

5. In examining L.N. 233 of 2003, members of the relevant Subcommittee queried whether section 2(2)(a)(i) of TDO could apply to watches under CEPA because Hong Kong is a "place" and not a "country". The Administration's view was that according to the definition in section 2(1) of TDO, "trade description" also includes indication of the "place or date of manufacture, production, processing or re-conditioning". No offence relating to "false trade description" would be committed under TDO if these watches are marked as "made in Hong Kong" because Hong Kong is a place within China. Although members of the Subcommittee did not raise objection to the two pieces of subsidiary legislation, they urged the Administration to critically review the relevant statutory provisions to see whether any improvement was necessary. The Administration has accordingly conducted the review and introduced the Bill.

The Bill

6. The Bill seeks to amend section 2 of TDO and the Trade Descriptions (Country of Origin) (Watches) Order (Cap. 362 sub. leg. D) so that the origin of goods is expressed in those provisions by reference to a place, instead of a country. The Bill also proposes to repeal the reference to "or country" in relation to the manufacture of the goods in section 24A of TDO.

The Bills Committee

7. Members agreed at the House Committee meeting on 26 November 2004 to form a Bills Committee to study the Bill. Hon Margaret NG was elected chairman of the Bills Committee and the membership list of the Committee is at **Appendix I**. The Bills Committee has held two meetings with the Administration.

Deliberations of the Bills Committee

8. In principle, members of the Bills Committee do not dispute the policy intent of the Bill. Their main concern is on the legal and drafting aspects of substituting the reference to "country" by "place". Query has been raised as to whether the proposed amendments, as currently drafted, can effectively achieve the Administration's policy objective of providing greater flexibility in the application of the relevant provisions without giving rise to any unintended consequence. The Bills Committee also notes that the Textiles Advisory Board and the Trade and Industry Advisory Board have been consulted and are agreeable to the Administration's proposal.

Timing for enactment of the Bill

9. At the time when members considered the Bill in early December 2004, they were also aware of the gazettal on 19 November 2004 of the Trade Descriptions (Country of Manufacture) (Textile Made-up Articles) Order (L.N. 186 of 2004) and the Trade Descriptions (Place of Manufacture) (Textile Made-up Articles) Notice (L.N. 187 of 2004) which aim at aligning the origin marking requirements for textile made-up articles under TDO with the revised origin rules following the abolition of quotas and the CEPA origin rules for such articles. As these two items of subsidiary legislation would commence operation on 1 January 2005, members have expressed concern as to whether their commencement would be affected if the Bill was not enacted before 1 January 2005. Concern has also been raised about the implementation of the post-2004 textiles control system following the elimination of quota on textile products from 1 January 2005 onwards.

10. The Administration has confirmed that the timing for the enactment of the Bill does not affect the commencement of L.N.186 and L.N.187 of 2004. Although L.N.186 of 2004 has been made under section 2(2)(b)(ii) of the TDO, there is no impediment to its commencement because the existing section 2(2)(b)(ii) will still subsist even if the Bill has not been passed by 1 January 2005. L.N.187 of 2004 is also not affected as it has been made under section 2(2A) of the TDO which is not to be amended by the Bill.

11. Regarding the implementation of Hong Kong's post-2004 textiles control system, the Administration clarifies that the relevant legal framework is embodied in another piece of legislation, namely, the Import and Export Ordinance (Cap. 60) and its subsidiary legislation, not the TDO. The enactment or otherwise of the Bill does not therefore affect the arrangements effective from 1 January 2005. Members also note that to provide necessary guidance to textile traders, the Trade and Industry Department has published relevant trade circulars setting out the detailed arrangements for textiles import and export licensing, Production Notification and Certificate of Origin requirements for 2005.

Implication of the proposed amendment to section 24A of TDO

12. In general, members have no objection to the proposed amendments to replace references to "country" by references to "place" in section 2 of TDO and the related subsidiary legislation which deal with the origin marking of goods exported from Hong Kong to other territories. Nevertheless, concern has been raised about the implication of the proposed amendment to section 24A of TDO, which provides for the rule of evidence regarding imported goods with false trade description :

"In any prosecution for an offence under the Ordinance in respect of the import of goods to which a false trade description of the place or country of manufacture, production, processing or reconditioning is applied, evidence that the goods were imported from a place or country shall be prima facie evidence that the goods were manufactured, produced, processed or reconditioned, as the case may be, in such place or country."

13. The Bill proposes to delete "or country" from the expression "place or country" in the aforesaid section. In this connection, some members have pointed out that since section 24A deals with prima facie evidence in the prosecution of an offence in respect of the import of goods to which a false trade description of the place or country of origin is applied, what constitutes the prima facie evidence must be clearly spelt out. Concern has been raised as to whether any inconsistency in the degree of geographical detail applied to a piece of goods as trade description and the degree of geographical detail contained in the concerned evidence (such as shipping documents) will give rise to possible prosecution, even though the two geographical descriptions in the trade description and the evidence, when taken together, do not factually constitute a false trade description, e.g. while the goods were marked "made in Shenzhen", the evidence shows that the goods were imported from China.

14. Having considered the concern at length and with a view to clarifying the application of section 24A of TDO in the light of the amendments introduced by the Bill, the Administration will move CSAs to section 24A to specify that where two different "places" are mentioned in respect of the goods, an offence of false trade description will not arise if one of the places is located within the other place; or vice versa. In other words, the scenario mentioned in the preceding paragraph will not give rise to prima facie evidence for false trade description because Shenzhen is located within China.

Consequential amendments

15. The Bills Committee has noted that reference to "country" of origin or manufacture still appears in some other ordinances and in the following two Orders made under TDO :

- (a) Trade Descriptions (Country of Manufacture) (Piece-Knitted Garments) Order made on 15 October 2004 (L. N. 157 of 2004); and
- (b) Trade Descriptions (Country of Manufacture) (Textile Made-up Articles) Order made on 19 November 2004 (L.N. 186 of 2004)

16. The Administration has confirmed that it will introduce consequential amendments to the two Orders. As regards other ordinances, the view of the bureaux concerned is that the references to "country of origin" in the legislation under their policy purview are not relevant to the origin marking of goods governed by TDO, but serve specific purposes in the context of their respective legislative regimes. While the bureaux consider that similar amendments are not necessary at this stage, they will take them forward through separate exercises if such a need arises in future.

Drafting aspects

Definition for "place"

17. The Bills Committee is aware that the term "place" is not defined under TDO and in ordinary language, it may simply mean a space or an area. Given the imprecise nature of the word "place", some members have asked the Administration to consider the feasibility of providing a definition for "place" in TDO to reflect more clearly its scope, such as a formulation that "place" also includes "country".

18. In adopting the drafting approach of replacing references to "country/countries" by "place/places", the Administration's view is that the common meaning of "place" is capable of referring to any level of geographical description, including but not limited to "country". The Administration considers that the use of the term "place" can provide traders with flexibility in the application of origin marking to goods so long as such marking does not constitute a false trade description. The Bills Committee notes that according to the Administration, the current approach can best achieve the objective of the Bill while preserving the intended flexibility in governing the application of origin marking on goods under TDO.

Consistency with other legislation

19. On the use of the terms "place" and "country", some members have drawn the Administration's attention to the formulation of "country, territory or area" as used in the Trade Marks Ordinance (Cap. 559), Registered Designs Ordinance (Cap. 522) and Patents Ordinance (Cap. 514), and enquired on the need or otherwise to maintain consistency.

20. In this regard, the Administration highlights the different purposes served by different pieces of legislation. The fact that a different formulation is used in other ordinances is not indicative of any inconsistency because the three aforesaid ordinances aim to provide for an intellectual property protection regime in Hong Kong, while the purpose of TDO is, inter alia, to govern the application of trade descriptions on goods. On whether the use of the term "place" will give rise to any inconsistency with relevant provisions in international agreements, the Administration has advised that currently, there is no international agreement relating to trade descriptions.

Committee Stage Amendments

21. The Bills Committee supports the CSAs proposed to be moved by the Administration and will not move any CSAs in its name.

Recommendation

22. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 8 June 2005.

Consultation with the House Committee

23. The House Committee was consulted on 27 May 2005 and supported the recommendation of the Bills Committee in paragraph 22.

**Bills Committee on
Trade Descriptions (Amendment) Bill 2004**

Membership List

Chairman Hon Margaret NG

Members Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon SIN Chung-kai, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
Hon TONG Ka-wah, SC

(Total : 6 Members)

Clerk Miss Polly YEUNG

Legal Adviser Miss Anita HO

Date 1 December 2004