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**Bills Committee on
Public Health and Municipal Services (Amendment) Bill 2008**

Background Brief prepared by the Legislative Council Secretariat

Purpose

This paper gives an account of the past discussions by the Panel on Food Safety and Environmental Hygiene (the Panel) on the Government's proposal to empower the Director of Food and Environmental Hygiene (DFEH) under the Public Health and Municipal Services (Amendment) Bill 2008 (the Amendment Bill) to make orders administratively to prohibit the import and sale of problem food and recall of problem food for the protection of public health.

Background

2. The existing control of food safety is mainly provided in Part V of the Public Health and Municipal Services Ordinance (Cap. 132). Under section 52 of Cap. 132, no person shall sell to the prejudice of a purchaser any food which is not of the nature, or not of the substance or not of the quality of the food demanded by the purchaser. Section 54 of Cap. 132 further provides that no person shall sell any food which is intended for but unfit for human consumption.

Past discussions

3. The Administration briefed the Panel on 23 October 2008 on its plan to introduce the Amendment Bill into the Council on 5 November 2008. Members were in general supportive of the Amendment Bill and urged its early implementation. Major views/concerns expressed by members on the Amendment Bill and the Administration's responses are set out in the ensuing paragraphs.

Prohibition of import and supply of problem food and recall of problem food

4. Members noted that DFEH would take into consideration the following factors in exercising his power under new section 78B to make orders administratively to prohibit the import and supply of problem food and recall of problem food (section 78B orders) -

- (a) information or document provided by the food traders, if any, on the safety of the food;
- (b) results of food tests conducted by the Public Analyst, if available;
- (c) results of food tests conducted by food safety authorities of other countries or places;
- (d) food alerts issued by food safety authorities of other countries or places;
- (e) time required for conducting the food test;
- (f) the exposure of the general public and/or particular vulnerable groups to the food;
- (g) consumption pattern relating to the food;
- (h) statutory standard of the concerned substances in the food, if any;
- (i) availability of information on the contamination of a particular batch or consignment of the food;
- (j) availability of information on the contamination of a particular food factory or the whole region; and
- (k) any other relevant considerations.

5. In view of the wide range of factors that DFEH would take into consideration in making section 78B orders, Hon Andrew CHENG and Hon Alan LEONG considered it necessary for the Administration to draw up a code of practice (CoP) in this regard. Dr Hon LEUNG Ka-lau was of the view that the basis for determining the prohibition or recall period should be clearly laid down. The Administration agreed to provide the CoP for consideration by the Bills Committee that would be set up to scrutinise the Bill.

6. In response to the concern raised by Hon Cyd HO about the absence of oversight by the Food and Health Bureau (FHB) over the making of section 78B orders by DFEH, the Administration explained that DFEH would closely communicate with FHB in the making of section 78B orders.

Moreover, DFEH would be required under the Amendment Bill to state clearly the particulars of the food, the reason for making the order, the prohibition or action required of the traders, and the period within which the relevant act was prohibited or required.

7. Hon KAM Nai-wai suggested setting up a standing committee to endorse the making of orders by DFEH before implementation. The Administration pointed out that to do so would invariably delay any action that needed to be taken to protect public health. Moreover, before making the orders under new section 78B, DFEH would first obtain all necessary data, including expert advice from CFS and where necessary, from outside experts, such as those serving on the Expert Committee on Food Safety.

8. Some members, including Hon Fred LI, Hon WONG Yung-kan and Hon Cyd HO, asked how the Administration could ensure that fresh food, such as live fish, would not turn bad and become unmarketable after being seized for examination to test their fitness for human consumption.

9. The Administration assured members that every effort would be made to ensure that the food seized for examination would not perish or become not saleable as a result. Generally speaking, no great difficulties had been encountered in keeping live and fresh food, such as live poultry and meat, saleable after examination. For instance, in the case of a batch of raw oysters being seized for examination, discussion would be made with the importer concerned to keep these oysters in a cold storage for the duration of the examination. The Administration further advised that if any person considered himself/herself aggrieved by the seizure of food for examination, section 59(5) of Cap. 132 provided that he/she might, within 72 hours after such an act, complain to the court and the court might confirm or disallow the act, or order the Authority to pay by way of compensation such sum of money not exceeding the market value of such food at the time of doing such act.

10. On Hon Cyd HO's suggestion of devising separate prohibition and recall orders and compensation for food which had a very short saleable period, the Administration pointed out that the Amendment Bill was able to cater for food which had short saleable period. Overseas legislation also did not have separate legal provisions targeting at problem food which had short saleable period.

11. Hon Cyd HO also urged the Administration to enhance the capability of the Government Laboratory (GL) to speed up the time required for conducting the food test, so that food being seized for testing would not turn stale or perish after testing.

12. The Administration responded that the operation of GL was highly efficient and its expertise and facilities were well recognised internationally. It further advised that the time required for conducting the food test could be

within a day if the test was a routine and well-established one. This would, however, not be the case if the testing involved detection of chemical substances in food which had never been carried out and/or where no international testing standards had been or yet to be developed, or if the testing involved detection of bacteria/viruses in food.

13. Hon Vincent FANG urged the Administration not to issue a food alert based on mere information announced by overseas authorities without conducting any food test, as this would give rise to numerous lawsuits if the food alert turned out to be unfounded.

14. The Administration advised that the Centre for Food Safety (CFS) would first find out whether certain food products found to be problematic by an overseas jurisdiction had entered Hong Kong; if so, CFS would contact the importers or distributors concerned to trace the whereabouts of the food products. At the same time, CFS would request the overseas jurisdiction concerned to provide more information on the problem food, such as its source and batch number(s). If the food concerned was found to be widely available at retail outlets in Hong Kong, a food alert might be issued by DFEH in the first instance before taking samples for testing. If the food concerned did not come from the same production line and did not have the same batch number(s) as the food found to be problematic overseas and the results of the food tests were satisfactory, no further action might be taken. However, if no relevant information on the food found to be problematic outside Hong Kong could be obtained, and time would be required for conducting the food test and public concern over the food concerned was great, then the suppliers concerned might be asked to take the food concerned off the shelves for the time being. Upon the enactment of the Amendment Bill, a prohibition order might apply to those food products available in Hong Kong but were tested to be problematic by overseas authorities.

Appeals to Municipal Services Appeals Board

15. Hon Tommy CHEUNG pointed out that although persons bound by DFEH's orders made under new section 78B might appeal to the Municipal Services Appeals Board (MSAB), some members of the trade did not have resources to hire lawyers to defend their cases. The Administration advised that it was not uncommon for hawkers and small food businesses to make appeal to MSAB and legal cost, if any was to be incurred, had not been a problem.

Penalty level

16. Hon Andrew CHENG queried whether the setting of the fine at level 6, i.e. \$100,000, and imprisonment of 12 months for contravening a section 78B order had sufficient deterrent effect on large food importers and suppliers.

17. The Administration responded that the proposed penalty level for contravening a section 78B order was on par with that for other offences in Cap. 132. The proposed penalty level for the Bill was also on par with that for contravening the recall orders in other legislation, such as the Public Health (Animals and Birds) Ordinance (Cap. 139) and the Toys and Children's Products Safety Ordinance (Cap. 424).

Compensation

18. Members noted that the amount of compensation would not exceed the market value of the food concerned at the time of making the order.

19. Hon Alan LEONG and Hon Vincent FANG were of the view that compensation under the Amendment Bill should also include anticipated profits and any costs incurred for recalling food from the market, albeit a ceiling could be set on the amount that could be recovered from the Government. The Administration responded that the proposed compensation provision was similar to other compensation provisions under Cap. 132. Nevertheless, the Administration stood ready to hear more views on the compensation provision under the Amendment Bill before finalisation.

20. Hon Fred LI was also of the view that compensation should be provided to persons whose food products had become less fresh, albeit still saleable but at a reduced market value, as a result of the seizure by the Administration for testing of fitness for human consumption. The Administration pointed out that there was a need to strike a right balance between safeguarding public health at a reasonable price and safeguarding the interests of food importers/suppliers at all costs, as the provision of compensation for all food products adversely affected by the order could significantly increase the financial burden on Government.

Relevant papers

21. Members are invited to access the Legislative Council's website (<http://www.legco.gov.hk>) for details of the relevant paper and minutes of the meeting.