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Panel on Information Technology and Broadcasting

Meeting on 12 November 2012

Background brief on regulatory matters to be undertaken by the enforcement agencies arising from the implementation of the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

Purpose

This paper provides a summary of views and concerns raised by members of the Bills Committee on Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 ("the Bills Committee") on the regulatory matters to be undertaken by the enforcement agencies, namely the Customs and Excise Department ("C&ED") and the Office of the Communications Authority.

Background

2. The Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 ("the Bill") was introduced to the Legislative Council on 29 February 2012. The Bill sought to amend the Trade Descriptions Ordinance ("TDO") to extend its coverage to services, to prohibit certain unfair trade practices and to enhance enforcement effectiveness through the introduction of a civil compliance-based mechanism. The Bill also sought to facilitate consumer redress. The practices to be prohibited under the Bill included: false trade descriptions of services¹; misleading omissions²; aggressive commercial practices³; bait advertising⁴; bait and switch⁵; and wrongly accepting payment⁶.

¹ False descriptions of services refer to the practices of suppliers who have failed to provide truthful information on their services.

² Commercial practices are considered as "misleading omissions" if, in their factual contexts, they omit or hide "material information", provide material information in an unclear or ambiguous manner, and as a result, they cause the average consumers to take transactional decisions they would not have taken otherwise.

³ Aggressive commercial practices refer to practices where consumers' freedom of choice is likely to be

3. In order to capitalize on the respective enforcement experience and expertise of the C&ED, the Bill proposed that C&ED be tasked to enforce the proposed offences, with concurrent enforcement powers to be conferred on the Communications Authority ("CA") in respect of the telecommunications and broadcasting services.

4. The Bill also sought to establish a compliance-based enforcement mechanism with the main objectives of encouraging compliance and facilitating quicker settlement. Under the mechanism, the enforcement agencies would be empowered to accept undertakings from traders suspected of deploying any unfair trade practices to stop and not to repeat an offending act, and where necessary, to seek injunctions from the court for the purpose. This mechanism was expected to be able to deliver quicker and better outcomes for consumers, and would be adopted as far as possible depending on the nature and circumstances of the case.

5. A Bills Committee was formed to study the Bill which was passed by the Legislative Council on 17 July 2012. The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 will come into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

Deliberations of the Bills Committee

6. During the Bills Committee's deliberation on regulatory and enforcement-related matters, the Chairman of the Bills Committee expressed concern that officers of the enforcement agencies might be given too much discretion under the compliance-based mechanism. The Administration advised that under the Bill, the Commissioner of C&ED and the CA were empowered to issue guidelines on matters related to enforcement of the TDO by authorized officers. The Bill also provided that the Commissioner and the CA must consult any persons that they considered appropriate before issuing any

undermined when they are under undue pressure.

⁴ Bait advertising refers to the advertising by a trader of products for supply at a specified price without any reasonable grounds for believing that the trader will be able to offer for supply those products at that price, or when the trader fails to offer those products for supply at that price, for a period that is, and in quantities that are, reasonable.

⁵ Bait-and-switch refers to the practice of traders advertising or promoting products at bargain prices or on very favourable terms without having reasonable quantities or capacity to meet the demand that should have been foreseen. The promoted item is in fact used as a bait to attract consumers into shop premises, so that the trader has the opportunity to switch them to more expensive products in various guises.

⁶ Wrongly accepting payment refers to a practice where the trader intends not to supply the product or a materially different product at the time of accepting payment for the product.

guidelines or amendments of the guidelines. Furthermore, the enforcement agencies' decision to prosecute or to resort to the compliance-based mechanism would be subject to the consent of the Secretary for Justice.

7. The Administration subsequently provided for members' information a draft framework of the guidelines to be issued under the Bill (LC Paper No. CB(1)2007/11-12(03), Annex A). The draft contained a statement of enforcement policy, and chapters on the scope of application of the fair trade provisions, the interpretation of important terms, the operation of an offence provision and the sanctions available. The draft reflected the Administration's preliminary views on the operation of the relevant provisions of the TDO and was subject to further deliberation within the Administration and, if necessary, to refinements, before it was formally put to stakeholders for consultation.

8. Some members of the Bills Committee opined that the enforcement guidelines to be issued under the Bill should provide useful reference, with more concrete examples, for the trades and the frontline staff. They urged the Administration to consult the trades on the formulation of the guidelines. They also urged the Administration to stipulate clearly in the guidelines what would constitute an offence under the TDO. This would enhance traders' understanding on how the law would be enforced to avoid inadvertent contravention. At the request of the Bills Committee, the Administration agreed to consult the relevant Panel on the draft enforcement guidelines during the consultation.

9. The Administration advised that it would launch a widespread education campaign for both traders and consumers after the passage of the Bill. The enforcement agencies would exercise due diligence and examine all the circumstances of each complaint, including meeting with the complainant to ascertain the facts of the case, before taking any enforcement decisions. According to the Bill, the guidelines would be made available to the public for inspection. The enforcement agencies would also upload the guidelines onto their websites.

Latest position

10. The Administration will brief the Panel on Information Technology and Broadcasting on the proposed creation of a permanent post of Chief Regulatory Affairs Manager to cope with the additional workload arising from the implementation of the Bill in 2013-2014.

Relevant papers

11. A list of the relevant papers with their hyperlinks is at <http://www.legco.gov.hk/yr11-12/english/bc/bc02/general/bc02.htm>

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