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**Subcommittee on Trade Descriptions (Powers Not Exercisable by
Communications Authority) Notice and Trade Descriptions (Unfair Trade
Practices) (Amendment) Ordinance 2012 (Commencement) Notice**

Meeting on 11 June 2012

Background brief

Purpose

This paper provides a summary of views and concerns expressed by Members during previous discussions on issues relating to the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 ("TD(A)O").

Background

2. The Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 was passed by the Legislative Council ("LegCo") on 17 July 2012 and the enacted TD(A)O was published in the Gazette on 27 July 2012. The TD(A)O amends the Trade Descriptions Ordinance (Cap. 362) ("TDO") to extend its coverage to prohibit specified unfair trade practices in the market, including false trade descriptions of services¹, misleading omissions², aggressive commercial practices³, bait advertising⁴, bait-and-switch⁵ and wrongly

1 False trade 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 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.

accepting payment⁶. It also introduces a civil compliance-based mechanism to enhance the effectiveness of enforcement of the provisions of the TDO.

3. Since the enactment of the TD(A)O, the Administration has proceeded with certain preparatory work, including making the draft enforcement guidelines, preparing a memorandum of understanding to be entered into by the Commissioner of Customs and Excise ("the Commissioner") and the Communications Authority ("CA") for the purpose of coordinating the performance of their respective functions as the law enforcement agencies under the TD(A)O, and making the Trade Descriptions (Powers Not Exercisable by Communications Authority) Notice ("the Notice") to specify the powers that are not exercisable by the CA in its enforcement in respect of commercial practices over which it has concurrent jurisdiction with the Customs and Excise Department ("C&ED").

The subsidiary legislation

4. The Notice and the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (Commencement) Notice were gazetted on 24 May 2013 and tabled at the Council meeting on 29 May 2013. Subject to the completion of the negative vetting process, the subsidiary legislation shall come into operation on 19 July 2013.

5. Under the Notice, the Chief Executive in Council specifies certain powers that are not exercisable by the CA. These powers include those relating to purchase, inspection, seizure, detention and removal of offending goods, use of force by an authorized officer under specified circumstances, locking or sealing of premises or containers, searching suspected vehicles and arrest of suspected persons. The power to enter non-domestic premises under section 15(1)(b) of the TDO may, however, be exercisable by an authorized officer of the CA for the purpose of ascertaining whether any offence under the TDO has been or is being committed in relation to telecommunications and broadcasting services.

6. Under section 1(2) of the TD(A)O, the Secretary for Commerce and Economic Development has appointed 19 July 2013 as the day on which the TD(A)O comes into operation.

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.

Previous discussions

Bills Committee on the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

7. 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 mechanism⁷. The Administration advised that under the Bill, the Commissioner and the CA were empowered to issue guidelines on matters related to the 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 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.

8. 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.

9. 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 Panel on Economic Development ("the Panel") on the draft enforcement guidelines during the consultation.

10. The Administration assured members of the Bills Committee that it would launch a widespread education campaign for both traders and consumers

⁷ 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.

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.

Panel on Economic Development

11. At the Panel meeting on 11 December 2012, the Administration briefed members on the progress of the preparatory work for the commencement of the TD(A)O, the public consultation exercise on the draft enforcement guidelines, and other enforcement matters in respect of the fair trading provisions in the TD(A)O.

12. The major views expressed by Panel members related to the delineation of work among the enforcement agencies (i.e. C&ED, and the Office of the Communications Authority) in dealing with complaint cases, the provision of training for enforcement staff, and publicity of the enforcement guidelines. In response to some members' concern about the absence of provisions on cooling-off period, the Administration advised that given the divergent views on the matter, further study was required before addressing it by legislation.

The Subcommittee

13. At the House Committee meeting on 31 May 2013, members agreed that a subcommittee should be formed to study the subsidiary legislation.

Relevant papers

14. A list of the relevant papers with their hyperlinks is at

<http://www.legco.gov.hk/yr11-12/english/bc/bc02/reports/bc020627cb1-2204-e.pdf>

<http://www.legco.gov.hk/yr12-13/english/panels/e/dev/agenda/e/dev20121211.htm>