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Panel on Economic Development
Meeting on 11 December 2012

Background brief on
Draft enforcement guidelines and other enforcement matters
in respect of the fair trading provisions in the Trade Descriptions
Ordinance (Cap. 362)

Purpose

This paper sets out the background regarding the draft enforcement guidelines and other enforcement matters in respect of the fair trading provisions in the Trade Descriptions Ordinance (Cap. 362) ("TDO") and summarizes views and concerns expressed by Members on the issue at meetings of the Legislative Council, the Panel on Economic Development ("Panel") and the relevant Bills Committee.

Background

The Trade Descriptions (Unfair Trade Practices)(Amendment) Bill 2012

2. The TDO prohibits certain undesirable trade practices, including false trade descriptions, false trademarks and mis-statements in respect of goods provided in the course of trade. Previously there were no provisions in the TDO to deal with other types of unfair trade practices such as false trade descriptions of services, misleading omissions, aggressive commercial practices or bait advertising.

3. The emergence of certain unfair trade practices in recent years has called for a review of the regulatory regime. In February 2008, the Consumer Council published the review report entitled "Fairness in the Marketplace for Consumers and Business", which recommended, *inter alia*, the introduction of a comprehensive Trade Practices Statute in Hong Kong to prohibit unfair trade practices of all types of goods and services.

4. In July 2010, the Government issued a consultation paper, setting out the policy directions for strengthening consumer protection legislation and proposing a package of proposed legislative amendments to the TDO to tackle commonly seen unfair trade practices. In the light of the wide public support for these legislative proposals, the Government subsequently introduced the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 ("the Bill") into the Legislative Council on 29 February 2012.

5. The Bill sought to amend the 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 trade practices to be prohibited under the Bill are –

- (a) false trade descriptions of services;
- (b) misleading omissions;
- (c) aggressive commercial practices;
- (d) bait advertising;
- (e) bait and switch; and
- (f) wrongly accepting payment.

6. The Bill was eventually passed by the Legislative Council on 17 July 2012 and the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance ("the Amendment Ordinance") will be enacted in 2013.

Guidelines for enforcement

7. Based on the Amendment Ordinance, the enforcement agencies may issue guidelines on matters in relation to which an authorized officer may exercise power under the TDO. The enforcement agencies are required to consult stakeholders who they consider appropriate before issuing the guidelines or amendments to the guidelines. During the deliberation of the Bill by the Bills Committee, the Administration undertook to consult the Panel on the draft enforcement guidelines.

Council deliberations on unfair trade practices

8. Issues relating to unfair trade practices have all along been the subject of wide public concern. Legislative Council Members have raised questions in connection with unfair trade practices in various fields, including property transactions, pricing frauds of supermarkets, telecommunications, travel and body care services. Members urged the Government to consider, *inter alia*, requiring the contracts concerned to include a cooling-off period clause, and enacting specific legislation to regulate advertisements.

9. On 9 May and 4 July 2007, the Council passed the motions on "Combat unscrupulous shops" and "Strengthening the regulation of unscrupulous business practices in pay television, telecommunications and internet services" respectively. A motion on "establishing a comprehensive consumer protection regime" was passed by the Council at the meeting on 6 January 2010, urging the Government to, *inter alia*, establish a comprehensive consumer protection regime to enhance consumers' rights to knowledge, choice and protection.

Panel discussions on the Trade Descriptions Ordinance

10. During meetings of the Panel on 25 June 2007, 22 June 2009, 24 May 2010, 25 October 2010 and 24 January 2011, members raised concerns on issues related to the TDO, such as the proposed provision of a mandatory cooling-off period, the need to enhance the power of the Consumer Council and wider use of the Consumer Legal Action Fund.

11. On 24 May 2010, the Administration briefed the Panel on the broad policy directions to strengthen consumer protection legislation. Members in general welcomed the Administration's initiative in improving consumer protection by expanding the coverage of the TDO. On 24 January 2011, the Administration briefed the Panel on the package of proposed legislative amendments to TDO. At these meetings, members deliberated the cooling-off arrangements in the original proposal which was subsequently taken out from the Bill. Members sought clarifications on the various proposals to amend TDO in respect of matters such as accepting payment without the intention or ability to supply the contracted goods or services, bait-and-switch, misleading omission, and enforcement, etc. to which they did not have strong views or disagreement.

12. Regarding enforcement, a member queried whether the traders would have any legal basis to defend against consumers' allegations, when conflicts arose between the traders and consumers. The Administration

advised that a civil, compliance-based enforcement mechanism would be introduced to complement the proposed criminal sanctions with the objective of resolving disputes and stopping unfair trade practices in a more expeditious manner.

Deliberations at the Bills Committee in respect of enforcement matters

13. Under the Amendment Ordinance, the Commissioner of Customs and Excise will be empowered to issue guidelines on matters related to the enforcement of the TDO by authorized officers. Guidelines are not subsidiary legislation and a person does not incur any civil or criminal liability through merely contravening them. During the deliberation of the Bill, members of the Bills Committee expressed concern on the appropriateness to empower the enforcement agencies to inspect and take copies of books and documents for the purpose of ascertaining an offence. The Administration advised that the enforcement agencies were only authorized to inspect and take copies of books or documents required to be kept under the TDO and its subsidiary legislation, but not other books and documents relating to a supplier's trade or business.

14. While specified unfair trade practices would attract criminal sanctions under the TDO, a compliance-based enforcement mechanism will be established under the Amendment Ordinance aiming to encourage compliance and facilitate quicker settlement. Under the compliance-based mechanism, the enforcement agency is empowered to accept undertakings from traders suspected of deploying unfair trade practices to stop and not to repeat an offending act, and where necessary, to seek injunctions from the Court for the purpose. The mechanism aims to enable delivery of quicker and better outcomes for consumers, and will be adopted as far as possible depending on the nature and circumstances of the case.

15. When deliberating the Bill, 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 the Commissioner of Customs and Excise would be empowered to issue guidelines on matters in relation to which authorized officers might exercise powers under the TDO, and the Commissioner might consult any persons he considered appropriate before issuing any guidelines or amendments of the guidelines. The enforcement agency's decision to prosecute or to resort to the compliance-based mechanism would also be subject to the consent of the Secretary for Justice.

16. The Administration subsequently provided a draft framework of the guidelines to the Bills Committee, which contained a statement of enforcement policy, 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. Some members of the Bills Committee opined that the guidelines should stipulate clearly what would constitute an offence under the TDO, and provide useful reference, with more concrete examples, for the trades and the frontline staff in order to enhance their understanding on how the law would be enforced to avoid inadvertent contravention. Members urged the Administration to consult the trades on the formulation of the guidelines.

Latest development

17. The Administration will consult the Panel on the draft enforcement guidelines and other enforcement matters in respect of the fair trading provisions in the TDO at the Panel meeting on 11 December 2012.

Relevant papers

18. The relevant papers are available at the following links –

Background Brief for Panel meeting on 24 January 2011 on legislative proposal to enhance consumer protection against unfair trade practices
<http://www.legco.gov.hk/yr10-11/english/panels/edev/papers/edev0124cb1-1090-4-e.pdf>

Minutes of Panel meeting on 24 January 2011
<http://www.legco.gov.hk/yr10-11/english/panels/edev/minutes/edev20110124.pdf>

Legislative Council Brief on Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012
http://www.legco.gov.hk/yr11-12/english/bills/brief/b30_brf.pdf

Background Brief on Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 issued on 20 March 2012
<http://www.legco.gov.hk/yr11-12/english/bc/bc02/papers/bc020321cb1-1321-2-e.pdf>

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

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

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