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**Panel on Economic Development
Meeting on 24 March 2014**

**Background brief on
Implementation of the Trade Descriptions
(Unfair Trade Practices)(Amendment) Ordinance 2012**

Purpose

1. This paper sets out the background regarding the implementation of the fair trading provisions in the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 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

Trade Descriptions (Unfair Trade Practices)(Amendment) Ordinance 2012

2. The Trade Descriptions Ordinance (Cap. 362) ("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 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 July 2010, the Administration issued a consultation paper, setting out the policy directions for strengthening consumer protection legislation and proposing a package of proposed legislative amendments to TDO to tackle commonly seen

unfair trade practices. The Administration subsequently introduced the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 ("the Bill") into the Legislative Council ("LegCo") on 29 February 2012.

4. The Bill sought to extend TDO's coverage to prohibit specified unfair trade practices deployed by traders against consumers, including false trade descriptions of services, misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepting payment. It also introduced a civil compliance-based mechanism to encourage compliance by traders and to stop identified non-compliant practices, under which the law enforcement agencies may, as an alternative to criminal prosecution, accept an undertaking from a trader whom the enforcement agencies believe has engaged in a prohibited unfair trade practice to stop that practice. The Bill was passed by LegCo on 17 July 2012.

5. Following the enactment of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 ("TD(AO)"), the Administration proceeded with the preparatory work for implementation of the Ordinance, including making the draft enforcement guidelines, preparing a memorandum of understanding to be entered into by the Customs and Excise Department ("C&ED") and the Communications Authority ("CA") to facilitate co-ordination of their respective law enforcement functions under TD(AO).

Guidelines for enforcement

6. Based on TD(AO), enforcement agencies may issue enforcement guidelines, which would state the manner in which enforcement agencies will exercise powers under the fair trading sections of TDO and would provide guidance on the operation of the sections. Enforcement agencies are required to consult stakeholders before issuing the guidelines or amendments to the guidelines. On 11 December 2012, the Administration briefed the Panel on the progress of the preparatory work for the commencement of TD(AO) and for the draft Enforcement Guidelines before the Guidelines were published by C&ED and CA on 15 July 2013.

Enhancing enforcement capability of the Office of the Communications Authority

7. Following the enactment of TD(AO), the Administration sought the recommendation of the Establishment Subcommittee on 4 January 2013, and the approval of the Finance Committee on 8 February 2013 for

the creation of a directorate post of Chief Regulatory Affairs Manager in the Office of CA ("OFCA") for overseeing the implementation, administration and enforcement of the new consumer protection regime under TD(A)O in respect of unfair trade practices relating to the provision of broadcasting and telecommunications services by licensees under the Broadcasting Ordinance ("BO") (Cap. 562) and the Telecommunications Ordinance ("TO") (Cap. 106).

Commencement of TD(A)O

8. On 29 May 2013, the Administration tabled the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (Commencement) Notice in the LegCo. At the House Committee meeting on 31 May 2013, Members agreed to form a subcommittee to study the Commencement Notice, and a meeting was subsequently held on 11 June 2013 to discuss pertinent issues with the Administration. TD(A)O came into operation on 19 July 2013.

Members' major deliberations on TD(A)O and related issues

9. Issues relating to unfair trade practices have all along been the subject of wide public concern. LegCo 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 have 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. Members have also expressed concerns on issues related to 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.

Cooling-off period

10. Members have expressed concern about the absence of "cooling-off period" provisions in TD(A)O. They have, on various occasions, queried whether the Administration would introduce such provisions for better protection of consumers, as members argued that most consumers would have difficulty in providing evidence to prove that they had been harassed or threatened when purchasing a product or service. The Administration advised that the introduction of a "cooling-off period arrangement" involved various difficult and controversial issues, such as the practical arrangements for consumers to cancel contracts, the refund

arrangements as well as possible transfer of the relevant costs to consumers.

11. The Administration indicated that as the proposed "cooling-off period arrangement" would have far-reaching impact on both traders and consumers, it could consider whether or not to make amendments to TDO to incorporate "cooling-off period arrangement" only after it has gained experience in implementing of TD(A)O. The Administration also pointed out that TD(A)O has provided for sanctions against "accepting payment without the intention or ability to supply the contracted goods or services" and "aggressive commercial practices", which would address the situations a "cooling-off period arrangement" is purported to tackle.

Co-ordination of enforcement responsibilities

12. C&ED is the principal agency for enforcing TDO. CA has concurrent jurisdiction to enforce the fair trading sections in relation to commercial practices of licensees under BO and TO that are directly connected with the provision of a broadcasting service or telecommunications service under the respective Ordinances. Members have expressed concerns about the exercise of powers by C&ED and CA and they queried about the arrangements on referral of cases among the different enforcement agencies involved.

13. The Administration advised that C&ED and the Police would carry out joint operations as necessary. The Consumer Council would mainly play the role of an arbitrator between traders and consumers and would refer cases which involved criminal offences to the Police or C&ED for follow-up. An electronic platform would also be established for referral of cases between the Consumer Council and C&ED.

14. Some Panel members considered the multiplicity of concurrent enforcement authorities undesirable and queried whether a single regulatory authority should be designated to enforce TD(A)O. The Administration advised that the delineation of enforcement responsibilities between C&ED and OFCA was quite clear. In cases where the undesirable trading practices under complaint were related to both the provision of a broadcasting service or telecommunications service under BO or TO as well as other goods or services, C&ED would lead the investigation, with the technical support from OFCA. Notwithstanding this, C&ED and OFCA would enter into a memorandum of understanding regarding the arrangements for enforcing TD(A)O. The Trade Descriptions (Powers Not Exercisable by Communications Authority) Notice also specifies the powers that are not exercisable by CA in its

enforcement in respect of commercial practices over which it has concurrent jurisdiction with C&ED.

Training for enforcement staff

15. Some members have enquired about the training for enforcement staff to prepare them for the implementation of TD(A)O. The Administration advised that arrangements had been made for enforcement officers to attend relevant overseas training programmes as well as local training activities to be conducted by overseas experts. Training in handling criminal proceedings against contravention of TD(A)O was also provided in collaboration with the Department of Justice.

Complaints handled and prosecution activities undertaken since the enactment of TD(A)O

16. A Member had raised a written question at LegCo meeting held on 22 January 2014 on the complaints received by the Consumer Council and C&ED regarding alleged unfair trade practices in contravention of TD(A)O, the follow-up actions taken and the Administration's plans to combat advertisements that contravened TD(A)O.

17. In response, Secretary for Commerce and Economic Development advised that from 19 July to 31 December 2013, C&ED, OFCA and the Consumer Council received 2 051, 188 and 716 complaints, respectively. Apart from cases where evidence of breaching TD(A)O was not found, the Administration had launched detailed investigation into 622 complains. Warning or advisory letters had been issued to the owners and sales staff concerned in 61 cases. Prosecution had been instituted in six cases among which three involved false trade descriptions of goods or services and three involved misleading omissions. In two of these cases, the traders concerned had submitted written undertakings of ceasing the trade conducts, and as a result, C&ED had not pursued prosecution proceedings further.

18. To combat unfair trade practices, the Administration advised that it would step up enforcement as well as publicity and public education efforts. Since the passage of TD(A)O, enforcement agencies have held about 80 seminars and 400 outreach briefings. In co-ordination with the Consumer Council, the enforcement agencies have embarked on extensive publicity and education work through various channels, aiming to enhance the knowledge of traders and consumers about their rights and obligations under TDO as well as the awareness of the concept of "Smart Shopping".

Latest development

19. The Administration will brief the Panel on the implementation of TD(A)O at the Panel meeting to be held on 24 March 2014.

Relevant papers

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

Administration's paper on Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 – Draft Enforcement Guidelines and Other Enforcement-related Matters

<http://www.legco.gov.hk/yr12-13/english/panels/eDEV/papers/eDEV1211cb1-260-4-e.pdf>

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

<http://www.legco.gov.hk/yr12-13/english/panels/eDEV/papers/eDEV1211cb1-260-5-e.pdf>

Minutes of meeting of the Panel on Economic Development held on 11 December 2012

<http://www.legco.gov.hk/yr12-13/english/panels/eDEV/minutes/eDEV20121211.pdf>

Minutes of the Establishment Subcommittee of the Finance Committee held on 4 January 2013

<http://www.legco.gov.hk/yr12-13/english/fc/esc/minutes/esc20130104.pdf>

Legislative Council Brief on Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (Commencement) Notice

http://www.legco.gov.hk/yr12-13/english/subleg/brief/72_brf.pdf

Legal Service Division Report on Subsidiary Legislation Gazetted on 24 May 2013

<http://www.legco.gov.hk/yr12-13/english/hc/papers/hc05311s-56-e.pdf>

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

<http://www.legco.gov.hk/yr12-13/english/hc/papers/hc0705cb4-841-e.pdf>

Secretary for Commerce and Economic Development's reply to the written question raised by Hon Ronny TONG at the meeting of the Legislative Council on 22 January 2014 (page 5084-5088)

<http://www.legco.gov.hk/yr13-14/english/counmtg/hansard/cm0122-translate-e.pdf>

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