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**Panel on Economic Development
Meeting on 22 June 2015**

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

Purpose

This paper sets out the background regarding the implementation of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 ("the Amendment Ordinance"), and summarizes views and concerns expressed by Members on related issues.

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. 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. In February 2012, the Administration introduced the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012. The Amendment Ordinance came into full implementation on 19 July 2013.

3. The TDO, as amended ("the amended TDO")¹, covers both goods and services. Unfair trade practices that are prohibited include false trade descriptions, misleading omissions, aggressive commercial practices, bait-and-switch, bait advertising and wrongly accepting payment. A civil compliance-based mechanism has been introduced to encourage compliance by traders and to stop prohibited unfair trade practices expeditiously, thereby enhancing enforcement efficiency. The enforcement agencies may, instead of initiating criminal prosecution, accept an undertaking from a trader whom the enforcement agencies believe has engaged in a prohibited unfair trade practice to stop and not to repeat that practice. Traders convicted of the "fair trading sections" may be liable to a maximum penalty of imprisonment for five years and a fine of \$500,000.

4. The Customs and Excise Department ("C&ED") is the principal agency responsible for enforcing the Ordinance, while the Communications Authority ("CA"), which is supported by the Office of the Communications Authority ("OFCA") has concurrent jurisdiction in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) and the Broadcasting Ordinance (Cap. 562) that are directly connected with the provision of a broadcasting service or telecommunications service under the respective Ordinances. To facilitate compliance and enhance transparency, C&ED and CA published the Enforcement Guidelines on 15 July 2013, which provide guidance on the operation of the relevant provisions of the amended TDO and state the manner in which the enforcement agencies exercise their powers. The Enforcement Guidelines have incorporated the views and suggestions put forward by traders and the public during the consultation on the draft Guidelines conducted between December 2012 and March 2013. C&ED and CA have also entered into a Memorandum of Understanding for the purpose of coordinating the performance of their functions.

Enforcement Strategy and Implementation Progress

5. The two enforcement agencies adopt a three-pronged approach in enforcing the fair trading sections of the amended TDO:

- (a) compliance promotion – the enforcement agencies conduct briefings for and proactive visits to different business sectors, and provide traders with advice and guidance on the legal requirements under the amended TDO as well as measures that should be taken for complying with it;

¹ The abbreviation of "the amended TDO" in this paper is equivalent to the abbreviation of "the Ordinance" in the Administration's paper (LC Paper No. CB(4)1165/14-15(06)).

- (b) enforcement – the enforcement agencies take necessary and timely enforcement actions to combat non-compliant conducts and thereby instill public confidence; and
- (c) public education and publicity – the enforcement agencies, in coordination with the Consumer Council ("CC"), have launched extensive publicity and education programmes (which include broadcasting Announcement in the Public Interest on television and radio, launching dedicated webpages, publicising posters and pamphlets, arranging roving exhibitions, conducting seminars, etc.) to raise awareness among consumers and traders.

6. The enforcement agencies have been actively handling relevant enquiries and complaints. As the amended TDO covers a wide range of goods and services, in order to facilitate compliance and optimize the use of enforcement resources, the enforcement agencies have adopted a risk-based approach under which priority is accorded to handling cases that may have significant implications on consumers, the trade or the community at large. Factors to be considered include public concerns, identified risks and intelligence, new or emerging market trends, and the existence of repeated or serious malpractices.

7. From 19 July 2013 to 28 February 2015, C&ED received a total of 9 174 complaints. A breakdown of the complaints according to the offences involved is set out below.

Nature of Complaint ^{Note}	Goods	Service	Total
False Trade Descriptions	4 175	1 021	5 196
Misleading Omissions	948	399	1 347
Aggressive Commercial Practices	30	225	255
Bait Advertising	106	57	163
Bait-and-switch	22	18	40
Wrongly Accepting Payment	1 656	395	2 051
Others (e.g. cases outside the scope of the amended TDO)	72	50	122
Total	7 009	2 165	9 174

Note: Including complaints referred to other departments/organizations for follow-up actions or those outside the scope of the amended TDO

8. C&ED has, upon preliminary examination of 3 964 complaints, found no contravention of the amended TDO and closed the cases. For another 820 complaints, although evidence of breaching amended TDO was not found, C&ED has reminded the traders of the need to comply with the relevant provisions of the amended TDO. Besides, C&ED has launched detailed investigation into 4 072 complaints. These 4 072 complaints, together with the cases proactively developed by C&ED, were consolidated into 1 252 detailed investigation cases (more than one complaint might be involved in certain cases). 1 159 of these investigation cases have been completed. Among them, C&ED has issued warning or advisory letters to the owners and sales staff concerned in 175 cases, urging them to comply with the statutory requirements. C&ED has applied to the court for the forfeiture of the goods seized in six other cases without instituting prosecution. Besides, C&ED has instituted prosecution of another 99 cases. With the written consent of the Secretary for Justice, C&ED has accepted the traders' written undertakings of ceasing the trade conduct concerned in 7 other cases.

9. From 19 July 2013 to 28 February 2015, OFCA has received 1 432 complaints. OFCA has, upon preliminary examination of 1 122 complaints, found no contravention of the amended TDO and closed the cases. For another 82 complaints, although evidence of breaching the amended TDO was not found, OFCA has reminded the traders to comply with the statutory requirements. OFCA is reviewing the remaining 228 complaints. OFCA has not initiated prosecution or accepted undertakings from traders so far.

Members' major deliberations on the amended TDO and related issues

10. 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, body care and bank services. Views and concerns expressed by members of the Panel on Economic Development ("the Panel") relating to the amended TDO at its meetings on 11 December 2012 and 24 March 2014 are summarized in the ensuing paragraphs.

Cooling-off period

11. Members have expressed concern about the absence of "cooling-off period" provisions in the amended TDO. They have, on various occasions, urged the Administration to introduce such provision for better protection of consumers, in particular those who had 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" would have far-reaching impacts and 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.

12. The Administration also pointed out that the amended TDO 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. Nevertheless, C&ED indicated that it would provide input as appropriate during the review on the justification for "cooling-off period".

Co-ordination of enforcement responsibilities

13. Members have expressed concerns about the exercise of powers by the different enforcement agencies and the arrangements on referral of cases among them. The Administration advised that C&ED and the Police would carry out joint operations as necessary. Apart from direct investigation based on prevailing facts, undercover operations on the basis of intelligence gathered would also be arranged. CC 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 CC and C&ED. Similarly, OFCA would take enforcement actions if the complaint involved any contravention of the amended TDO, or refer the case to the relevant service operator for follow-up with the complainant. It had worked with the telecommunications industry to set up a mediation mechanism in November 2012 to handle complaints involving billing disputes.

14. For complaints 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 the amended TDO. The Trade Descriptions (Powers Not Exercisable by CA) 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.

Enforcement resources

15. In respect of training for enforcement staff to prepare them for the implementation of the amended TDO, members noted 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 the amended TDO was also provided in collaboration with the Department of Justice.

16. On manpower resources, members noted that in 2014-2015 and 2015-2016, C&ED had deployed/would deploy 187 and 190 staff at a cost of \$87.6 million and \$90.87 million respectively to undertake enforcement duties under the amended TDO. It would accord priority to cases of landmark significance in order to raise general awareness among the public and to cultivate a compliance culture among traders.

Publicity

17. To combat unfair trade practices, the Administration advised that it would step up enforcement as well as publicity and public education efforts. In co-ordination with CC, the enforcement agencies have embarked on extensive publicity and education work through various channels, aiming to enhance the knowledge of traders and consumers, in particular vulnerable elderly groups, about their rights and obligations under the amended TDO as well as the awareness of the concept of "Smart Shopping". Following the launch of the 2013 promotional campaign the impact of which was fully demonstrated by the surge of complaints received, C&ED had since leveraged on precedent to enhance the understanding of consumers and traders of the amended TDO.

Latest development

18. The Administration will report on the progress of the implementation of the Amendment Ordinance at the Panel meeting to be held on 22 June 2015.

Relevant papers

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

Administration's paper on implementation of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012

<http://www.legco.gov.hk/yr13-14/english/panels/edev/papers/edev0324cb1-1093-5-e.pdf>

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

<http://www.legco.gov.hk/yr13-14/english/panels/edev/papers/edev0324cb1-1093-6-e.pdf>

Minutes of the Panel on Economic Development meeting held on 24 March 2014

<http://www.legco.gov.hk/yr13-14/english/panels/edev/minutes/edev20140324.pdf>

Secretary for Commerce and Economic Development's reply to the written question raised by Hon Paul TSE at the meeting of the Legislative Council on 22 April 2015

<http://www.info.gov.hk/gia/general/201504/22/P201504220371.htm>

Special meetings of the Finance Committee to examine the Estimates of Expenditure 2015-16 (Reply serial no. CEDB(CIT)130, 237 and 238)

http://www.legco.gov.hk/yr14-15/english/fc/fc/w_q/cedb-cit-e.pdf

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