Annex

Government's Responses to Issues Raised in the Letter from LegCo's Legal Service Division dated 27 October 2004 on Undesirable Medical Advertisements (Amendment) (No. 2) Bill 2004 ("Bill")

Clause No.	Corresponding paragraph(s) in the Legal Service Division's Letter	Government's Responses
2.	2	To reflect more precisely the scope of the Undesirable Medical Advertisements Ordinance (UMAO) (if amended), we have proposed to amend the long title of the Ordinance. As for the short title of the Ordinance, which mainly serves to identify a particular piece of legislation, we do not consider amendment to it to be essential.
4.	3, 4	There is no universal definition for conventional food and the so-called health food in other jurisdictions. Neither is the term "health food" a universally adopted one. Terms like dietary supplements, complementary medicines, functional foods, with varying definitions, are used in different jurisdictions. Our policy intent is to regulate advertisements for the so-called "health foods", which are mostly presented in dosage form of pills, tablets, capsules, powders, sachets, liquid, etc. and to exclude from our regulation conventional foods or any other products which are generally considered and commonly consumed only as food or drink or to satisfy a desire for taste, texture or flavour. Thus, in the proposed definition of "orally consumed product" in the Bill, we have excluded the products which are customarily consumed to provide energy, nourishment or hydration, or to satisfy a desire for taste, texture or flavour. In coming up with this definition, the Administration has made reference to the definitions of 'food' in Hong Kong and other places. Examples of some of these definitions are enclosed at **Appendix**.

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		In accordance with the proposed definition, we consider oats and sweeteners as customarily consumed foods, and that they should fall outside our proposed regulatory framework. Nonetheless, the claims attached to these products, as with other customarily consumed foods or drinks, are subject to the regulation of the relevant provisions in the Public Health and Municipal Services Ordinance (Cap. 132). Moreover, false trade descriptions of goods including food products in aspects like quantity, composition, strength and performance etc. are prohibited under the Trade Descriptions Ordinance (Cap 362), for which the Customs and Excise Department (C&ED) is the enforcement agency. Consumers aggrieved by the false or misleading claims about a particular product may lodge their complaints to C&ED for appropriate follow-up actions. Along the principle of the existing UMAO, the making of claims specified in Schedule 4 would be prohibited or restricted in the manner as set out in that Schedule; the truthfulness of the claims is not a consideration. The intention is to ensure that people having the concerned bodily conditions will seek timely medical consultation and intervention, instead of resorting to self-medication.
5.	6	Column 1 of the existing Schedule 1 and Column 1 of the proposed Schedule 4 tackle claims of different nature. The former deals with claims relating to treatment of diseases, while the latter governs claims relating to regulation of bodily conditions. Our intention is for the exemption power as provided for under section 3(2) to remain intact. Nonetheless, we note the possible legal confusion that might be caused by the exercise of such exemption power when Schedule 4 comes into force; and we are considering how it should be best tackled.

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	7	The adaptation of military references such as "Her Majesty's Forces" will be taken forward by the Security Bureau under a separate adaptation exercise. In accordance with Article 10 of the Garrison Law, the Administration is required to consult the Garrison when formulating any policy or drafting any legislation which concerns them. The Administration is still in consultation with the Garrison. There is no timetable for the adaptation exercise.
	8, 9	The current UMAO prohibits people from publishing, or causing to be published, certain advertisement relating to medicine, surgical appliance or treatment. Advertisements, as defined in the current legislation, include any notice, poster, circular, label, wrapper or document, and any announcement made orally (like radio broadcast) or by means of producing or transmitting light or sound (like signboard and TV commercial), etc. Whether a particular person/company is subjected to the provisions will ultimately depend on the extent and nature of its involvement in publishing the advertisements. Although statutory defence is not expressly provided for in the UMAO, a warning system has been put in place in enforcing the legislation. Generally speaking, when an advertisement is considered to have contravened the UMAO, a warning letter will be issued to the distributor of the product and the publisher of the advertisement. A grace period is allowed for the relevant parties to withdraw or modify the advertisement. Only when the same or a very similar advertisement is made after the grace period will it be referred to the Police for investigation. This warning system ensures that those involved in the publishing of advertisements are forewarned on the advertisements which are potentially UMAO-infringing. The system has been working satisfactorily.

Clause No.	Corresponding paragraph(s) in the Legal Service Division's Letter	Government's Responses
	10	To ensure effective enforcement of the legislation when it is enacted, the Administration considers it to be inappropriate to cite examples of claims which would not be construed as "any similar claims". Schedule 4 of the Bill already outlines the scope of claims which we would prohibit or allow.
8.	11	At the moment, nearly all of the prosecution cases relating to UMAO are advertisements found in newspapers and magazines. Nonetheless, other than the printed media, there are a large number of advertisements made through other channels like product labels and signboards etc. Currently, officers of DH do not have the power to examine, enquire or take samples of products with labels for sale in retail premises which are considered to have contravened the Ordinance, nor are they empowered to examine and seize signboards and advertisements believed to be problematic. For all these cases, DH has to rely on Police's assistance. Yet, the Police do not have the professional expertise to recognize if the wording of a particular claim is UMAO-infringing. With the proposed new provisions, it is expected that the UMAO can be enforced more effectively. From January 2001 to October 2004, there were about 60 persons convicted under the Ordinance.

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	12	It is not our intention to add a provision like section 59(5) of Cap. 132 in this Ordinance. For food or drug which is found to be harmful to human, the product concerned may be seized, sometimes in a large quantity, for public health protection. With the UMAO, we are dealing with product labels or advertisements that may contravene the Ordinance. And for this reason, there is no need, in most cases, to seize goods in a quantity more than what is required for the evidence collection purpose. Moreover, unlike most of the conventional food products which have relatively short shelf lives, most of the orally consumed products we are targeting at would not be expired until a few years later. Although the current UMAO does not contain an express provision for a person aggrieved by an action made under UMAO to complain to the court for restoration or compensation, he can challenge the lawfulness of the action by way of judicial review. If the challenge is successful and the seizure or detention is declared by the court to be ultra vires and void, the goods seized or detained will have to be returned to the person concerned. Moreover, we also note that under the Criminal Procedure Ordinance (Cap. 221), if a property has come into the possession of a court, the court may upon application make an order for the delivery of the property to the persons entitled to it.
	13	As regards the issue mentioned in para. 13(a), we are considering whether a Committee Stage Amendment is necessary. For the issue mentioned in para. 13(b), since the proposed section s.8(2)(b) is intended to apply to a natural person found on the premises, the word "name" is therefore rendered in Chinese as "姓名" but not "姓名或名稱 ".

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Schedule 4	14	The application of pCm eligible for transitional registration closed in end June 2004. Over 16,000 applications were received so far. The Chinese Medicine Council, with the support from the Department of Health, is at the moment examining the applications. Given the size of the applications, the scrutinizing work is expected to take at least two years, after which section 119 and related penalty clauses in the Chinese Medicine Ordinance will come into operation and the necessary labelling requirements for pCm will apply. Upon the enactment of the new schedule of prohibited claims under Cap. 231, the "health food" industry would be given a grace period of appropriate duration (at least 18 months) to enable them to make changes and preparation (e.g. change in product label) in order to comply with the new requirements. The Administration will try to synchronize these arrangements and ensure there will be a smooth transition, and miminise inconvenience to the trade.

Definitions of food adopted by HKSAR and other places

Hong Kong

Under the Public Health and Municipal Services Ordinance (Cap. 132), 'food' includes -

(a) drink;
(b) chewing gum and other products of a like nature and use;
(c) smokeless tobacco products; and
(d) articles and substances used as ingredients in the preparation of food or drink or of such products,

but does not include

(i) live animals, live birds or live fish (excluding shell fish);
(ii) water, other than-
    (A) aerated water;
    (B) distilled water;
    (C) water from natural springs; either in its natural state or with added mineral substances; and
    (D) water placed in a sealed container for sale for human consumption;
(iii) fodder or feeding stuffs for animals, birds or fish; or
(iv) articles or substances used only as drugs.

Also under Cap. 132, 'drink' does not include water other than-

(a) aerated water;
(b) distilled water;
(c) water from natural springs, either in its natural state or with added mineral substances; and
(d) water placed in a sealed container for sale for human consumption.

The Mainland

Under Food Hygiene Law of the People's Republic of China (《中華人民共和國食品衛生法》), 'food' means any products supplied to people for eating or drinking and the raw materials of such products and include goods traditionally used as both food and medicine, but does not include goods for therapeutic purposes.

The United Kingdom

Under the Food Safety Act 1990 (c.16), 'food' includes-

(a) drink;
(b) articles and substances of no nutritional value which are used for human consumption;
(c) chewing gum and other products of a like nature and use; and
(d) articles and substances used as ingredients in the preparation of food or anything falling within this subsection;

but does not include-

(a) live animals or birds, or live fish which are not used for human consumption while they are alive;
(b) fodder or feeding stuffs for animals, birds or fish;
(c) controlled drugs within the meaning of the Misuse of Drugs Act 1971; or
(d) subject to such exceptions as may be specified in an order made by the Ministers-
    (i) medicinal products within the meaning of the Medicines Act 1968 in respect of which product licences within the meaning of that Act are for the time being in force; or
    (ii) other articles or substances in respect of which such licences are for the time being in force in pursuance of orders under section 104 or 105 of that Act (application of Act to other articles and substance).

United States of America (USA)

According to Federal Food, Drug, and Cosmetic Act, the term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gums, and (3) articles used for components of any such article.

Canada

According to the Provincial Model Act for Food Safety and Inspection, "food" means any product whether processed, semi-processed or raw, which, when used according to instructions or under such conditions as are customary or usual, is ingested by humans in order to provide nourishment, nutrition or hydration, or to satisfy hunger or thirst or a desire for taste, texture or flavour.