

For discussion on
24 May 2010

Paper for Economic Development Panel
Strengthening Consumer Protection Legislation
to Tackle Unfair Trade Practices:
Broad Policy Directions

PURPOSE

The Government plans to issue a consultation paper on proposals to tackle commonly seen unfair trade practices. To facilitate a broad-based consultation, Members' views are invited on the directions of improvement proposals set out in this paper.

BACKGROUND

2. Hong Kong is a renowned shoppers' paradise. The wide range of quality goods and services available at competitive prices not only benefit local residents, but also attract tourists to visit Hong Kong hence bolstering our economy. In order to maintain the competitive advantage and valued attributes of Hong Kong, we uphold free and open economic policies as well as an independent and trustworthy judiciary, thus enabling businesses to compete on a level-playing field on the basis of their inherent strength, price and quality. Protecting consumer rights and interests is also important. The great majority of traders in Hong Kong operate their businesses honestly, but there have been cases where consumer interests were prejudiced and undermined by unfair trade practices. The overall interests of Hong Kong would be adversely affected if such practices are not curbed.

3. The Consumer Council published a report¹ in 2008 recommending the enactment of an omnibus Ordinance to control and tackle unfair trade practices. Three main types of unfair trade practices are named: (1) misleading or deceptive practices (such as misrepresentations); (2) aggressive or high-pressure tactics (such as the application of undue pressure or influence); and (3) other miscellaneous

¹ The report was entitled "*Fairness in the Marketplace for Consumers and Business*".

unfair practices such as “bait-and-switch” and failure to honour contractual commitments after receiving pre-payments. The Council also suggests that the omnibus Ordinance should model on the UK Consumer Protection from Unfair Trading Regulations 2008² (“UK Regulations”).

4. In 2009, the Consumer Council received a total of 34,114 complaints, out of which 8,276 are concerned with unfair trade practices. Excluding complaints related to structured financial products arising primarily from the Lehman Brothers incident, there were 4,195 complaints concerning unfair trade practices. A breakdown of such complaints in 2008 and 2009 by the type of practices deployed is at the Annex.

POLICY CONSIDERATIONS

5. We have conducted a detailed review in the light of the Consumer Council’s recommendations and latest market situation which may have an impact on consumer interests. Our policy objective is to enhance protection for consumers against commonly seen unfair practices, preserve consumer confidence and maintain a level-playing field for businesses. While safeguarding the interests of consumers, we are mindful not to create unnecessary regulatory burden on honest businesses or fetter legitimate promotional activities.

6. The review has borne out that the safeguards under current legislation are inadequate in tackling certain unfair trade practices. In order to deal with such inadequacies in an expeditious and effective manner, we believe that a more pragmatic approach is to strengthen existing legislation and institutions. At the motion debate on “establishing a comprehensive consumer protection regime” at the full Council meeting held on 6 January this year, Members agreed that the problem of unfair trade practices should be dealt with as soon as possible. Having carefully considered Members’ views and further reviewed the policy considerations set out in our response in the motion debate, we are now in the process of formulating detailed legislative proposals which will be included in a consultation document to be issued later to solicit public views.

² “Consumer Protection from Unfair Trading Regulations 2008”, Statutory Instrument 2008/1277. The Regulations seek to implement the European Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices. The whole of the European Union implement the Directive.

POLICY DIRECTIONS

(a) False trade descriptions

7. False trade descriptions undermine consumers' ability to make informed choices and are therefore unacceptable. At present, the Trade Descriptions Ordinance ("TDO") (Cap. 362) prohibits false indications of any of the specified aspects of **goods** in the course of trade or business (either applied directly or indirectly, verbal or written, to the goods, during the sale process or in advertisements). The TDO does not apply to **services**. Separately, while codes of practice applicable to the broadcasting sector control advertisements on television and radio³, such regulation is over the carrier of advertisements and not on the traders who should have the onus of providing truthful information on their goods and services (collectively referred to as "products"). Furthermore, no criminal sanction is imposed in respect of false trade descriptions in respect of services.

8. We propose that **the TDO be amended to extend its coverage to include trade descriptions in respect of services** in consumer transactions. We are now working on the legal definition of "services" and the aspects of services (such as availability, price discounts), which should fall within the definition of "trade descriptions".

(b) Misleading omissions

9. The interests of consumers may be hampered if they cannot get hold of critical pieces of information and become misled, either because of outright omissions or unclear presentation by traders. Although consumers have the right and responsibility to seek such information relating to goods or services, they may not always know the goods or services well enough to raise all the pertinent questions.

10. At present, the TDO empowers the Chief Executive in Council to specify that any goods should be accompanied by any particular pieces of information relating to the goods. Five such orders have been made under this provision⁴. The merits of this "positive

³ The codes provide that advertisements should not contain any descriptions, claims or illustrations that depart from truth. TV and radio licensees found to be in breach of the codes may be subject to administrative sanctions as well as statutory sanctions under the Broadcasting Ordinance (Cap. 562) and Broadcasting Authority Ordinance (Cap. 391) where appropriate.

⁴ These orders impose information provision requirements in the sale of gold and gold alloy,

listing” approach include clarity and preciseness, and under this approach, it is easier for the prosecutor to collect evidence on whether any offence has been committed. However, given the astronomical number of products available in the market, it is simply infeasible to specify requirements for each and every product. The existing TDO cannot effectively deal with the problem of omission of material information which has the effect of misleading consumers.

11. “Misleading omissions” are prohibited in the UK. According to the UK Regulations, a commercial practice is a misleading omission if, in its factual context, it –

- (a) omits or hides material information;
- (b) provides material information in a manner which is unclear, unintelligible, ambiguous or untimely; or
- (c) fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise. The UK Regulations further define “material information” and “average consumer”⁵. The features and circumstances which should be taken into account in the determination of the factual context of a commercial practice are also specified⁶. It is for the enforcement agency and ultimately the court to decide in the light of the broad parameters stated in the legislation if a business has committed the offence of misleading omission.

12. We can draw reference from this general approach adopted under the UK Regulations, which has the merit of not being confined to particular types of goods or services and is also capable of dealing with new goods or services that may emerge in the market in the future. It is reasonable to expect traders to present pertinent and truthful information to their clients. We propose to draw reference from the UK Regulations

platinum, natural “Fei Cui”, diamond and five specified types of electronic products.

⁵ “Material information” is defined to mean “the information which the average consumer needs, according to the context, to take an informed transactional decision”. “Average consumer” means a consumer who is “reasonably well informed, reasonably observant and circumspect”.

⁶ These circumstances and features include the limitations of the medium used to communicate the commercial practice, and where the medium imposes limitations of space and time, whether the trader has taken any measures to make the information available to consumers by other means.

and create a new offence on misleading omissions in the TDO in respect of consumer transactions.

(c) *Aggressive practices*

13. Another type of unfair trade practices is aggressive or high-pressure practices, such as retaining consumers' belongings, subjecting them to lengthy and incessant sales pitches and preventing consumers from leaving the premises etc.

14. At present, common law and statutory criminal offences may be invoked to tackle some of the unfair conduct mentioned above⁷. Nevertheless, a high level of evidence including proof of the *mens rea* is required to press criminal charges. Separately, aggrieved consumers can resort to private actions for remedies. The Unconscionable Contracts Ordinance (Cap. 458) empowers the court to grant relief (such as striking out the relevant terms) to consumers who have entered into unconscionable contracts⁸. However, consumers may not have sufficient incentives to pursue private redress through the judicial route.

15. In both Australia and the UK, strict liability offences⁹ are created to prohibit the use of coercion, harassment or undue influence in consumer transactions¹⁰. Since existing criminal offences cannot effectively tackle these unfair practices, we propose to draw reference from the Australian and UK experience and create **a new strict liability offence** in the TDO to enhance protection for consumers from aggressive and high-pressure tactics. In order not to hinder the operation of legitimate marketing, we propose to put in place similar arrangements as the UK model, which specifies in the law factors¹¹ which are relevant in

⁷ If a victim is subject to physical violence (or the threat of it), common assault or related offences may apply. If the victim is threatened by words, the offence of intimidation may be relevant. If a victim is detained against his will, the offence of "forcible taking or detention" may apply. Various deception and fraud offences under the Theft Ordinance (Cap. 210), and the common law offence of conspiracy to defraud, may be relevant in situations where property is obtained by deception or fraud.

⁸ One of the matters which the court may consider, in its determination of whether a contract (or contract term) is unconscionable, is "whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer ..." (section 6(1)(d)).

⁹ A strict liability offence does not require proof of a specific state of mind (e.g. an intention to cause the victim to part with his property).

¹⁰ Regulation 7 of the UK Regulations and Section 75AZN of the Australian Trade Practices Act 1974.

¹¹ Section 7(2) of the UK Regulations provides that in determining whether a commercial practice uses harassment, coercion or undue influence, account shall be taken of a number of factors. Examples of such factors specified in the law include the timing, location, nature or persistence of the commercial practice; the use of threatening or abusive language

determining whether a practice is considered as having used harassment, coercion or undue influence¹².

(d) *“Bait-and-switch” and “accepting payment without the intention or ability to supply”*

16. There have been reports in the media every now and then on complaints relating to bait-and-switch¹³ and accepting payment without the intention or ability to supply the contracted products¹⁴. The reported cases are mostly related to beauty care services and pre-paid coupons for a wide range of products.

17. At present, there is limited legislative control over the two practices. In respect of bait-and-switch, there are no statutory requirements on traders to make available a sufficient quantity of the advertised item of products to meet demand. If traders made misrepresentations on the performance of goods in their attempt to switch consumers to substitute items, we can invoke the relevant provisions of the TDO regarding false trade descriptions on goods. The TDO, however, does not apply to services. Regarding the practice of accepting payment without the intention or ability to supply, consumers may resort to private actions for breach of contract. However, very often consumers do not have sufficient incentives to take legal actions. Although we can invoke the criminal sanctions regarding “obtaining property by deception” and “fraud” under the Theft Ordinance (Cap. 210) and the common law offence of “conspiracy to defraud” to tackle the practices, whether prosecution can be initiated would depend on the facts and sufficiency of evidence in individual cases. In short, there is inadequate protection for consumers against the two practices under the current regime.

or behaviour; the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment, of which the trader is aware, to influence the consumer’s decision etc.

¹² Undue influence is defined in section 7(3)(b) of the UK Regulations as exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision.

¹³ Bait-and-switch refers to the practice under which traders advertise or promote products at bargain prices without having reasonable quantities or capacity to meet the demand that would have been foreseen. The bargain item is used as a bait to attract consumers so that the trader can use the opportunity to switch them to over-priced products or old models under various pretences.

¹⁴ Some traders allow over-subscription of their products to the extent that consumers find it difficult to obtain products as pledged or before the validity of their pre-paid coupons expires. In extreme cases, traders continue to accept pre-payment even knowing that their businesses may not be sustainable.

18. The legislation in both Australia and the UK contains specific offences to prohibit the two practices¹⁵. To address the inadequacy of the current regulatory regime, we propose that **new offences be created in the TDO to prohibit bait-and-switch and accepting payment without the intention or ability to supply** in consumer transactions. While developing the details of the proposed offences, we will work out appropriate due diligence defences¹⁶ to protect the legitimate and reasonable rights of traders and at the same time strengthen consumer protection.

(e) Enforcement

19. The enhanced regulatory regime must be supported by an effective and proportionate enforcement mechanism. The Customs and Excise Department (“C&ED”) is currently responsible for enforcing the TDO. The work and performance of the C&ED are well recognized and supported by the public and overseas counterparts. To capitalize on and put to the best use its expertise and enforcement experience, we recommend that **the C&ED should be responsible for enforcing the proposed new offences.**

20. Separately, we see merits in drawing reference from the UK and Australian model by **introducing a compliance-based enforcement mechanism**, so as to complement the criminal sanctions provided in the TDO. Under the UK model, the enforcement authority may consult with a trader suspected of an offending act, request an undertaking to immediately stop the unfair practices and facilitate in the resolution of consumer disputes. If the trader refuses to give an undertaking or breaches an undertaking he has given, the enforcement authority may apply to the court for an injunction to stop the offending act on the part of the trader. In Australia, the enforcement agency also adopts a similar approach. There are merits in this compliance-based approach - it provides a quicker and more timely mechanism to stop an unfair practice from generating further harm to consumers by seeking undertakings from traders. This approach also facilitates mediation between traders and

¹⁵ Paragraphs 5 and 6 in Schedule 1 to the UK Regulations and section 75AZL of Australia’s Trade Practices Act.

¹⁶ For bait-and-switch, to ensure that businesses acting in good faith which have inadvertently misjudged the level of demand would not be caught by the offence, we will develop suitable due diligence defences by making reference to overseas practices. For instance, according to Australian legislation, a business can absolve itself from the offence if it has taken immediate remedial action in response to unmet consumer demands by, for example, replenishing the stock, causing another supplier to supply the same product at the same terms, or offering an equivalent product at the same terms. See section 75AZL of the Trade Practices Act.

consumers. The mechanism is not only more expeditious, but also preserves the statutory power of applying for a court injunction and criminal prosecution so as to impose sufficient deterrent effect.

(f) Consumer Redress

21. The Consumer Council proposes setting up a dedicated Consumer Tribunal which adopts simpler procedures similar to those of the Small Claims Tribunal, so as to facilitate consumers in seeking judicial redress. The Council also suggests other alternatives to enhance legal support available to aggrieved consumers for pursuing their claims, namely relaxing the criteria of the means test for the Supplementary Legal Aid Scheme¹⁷ and providing injection into the Consumer Legal Action Fund (“CLAF”). Furthermore, the Consumer Council proposes that a right be created for consumers to take out private actions on infringements of the new legislative proposals.

22. Under the current legal system, aggrieved consumers can take legal action in the court, including the Small Claims Tribunal the jurisdictional limit of which is set at \$50,000. The Council’s proposal aims to facilitate consumers in seeking redress through the court based on simpler procedures, irrespective of the amount of money involved. However, similar demands may be raised in other areas and these would have a far-reaching impact on the judicial function of the Small Claims Tribunal and the judicial system. Therefore, we have to carefully consider if consumer disputes should be handled differently from other types of disputes handled by the Small Claims Tribunal.

23. Regarding legal assistance for aggrieved consumers, the CLAF has been established, with the Consumer Council as the trustee, to assist consumers with meritorious cases to pursue legal action. We have injected \$10 million into the CLAF this financial year. Since a specialized fund is already in place to assist consumers, we do not think it necessary to introduce further measures under the legal aid regime solely for consumers.

24. On the suggestion to create a private right of action, we note that in the majority of cases, aggrieved consumers may have causes of action in contract or tort. While such a right is available in some

¹⁷ The Supplementary Legal Aid Scheme does not cover consumer disputes generally. It is only available to claims involving personal injury, death or medical, dental or legal professional negligence, and claims under the Employees’ Compensation Ordinance (Cap. 282). Therefore the Consumer Council’s proposal effectively amounts to changing and expanding the scope of the Scheme.

jurisdictions, it is consciously not created in others with specific considerations and justifications. There is no hard and fast rule. We will further examine the issue and are ready to consider views from different quarters.

(g) Sectors not covered by the new legislative proposals

25. The Consumer Council suggests that sectors with existing regulatory regimes should not be included within or should be carved out from the new legislative proposals if they meet the following criteria:

- (a) a significant degree of professional and specialized knowledge is required for enforcement; and
- (b) a similar level of protection is to be provided by such regulatory frameworks parallel to and compatible with the new legislative proposals to tackle unfair trade practices.

We agree in principle with the recommendations of the Consumer Council. Our inclination is not to cover transactions of financial services products and property under the TDO amendments.

26. On the financial services front, there are well-established regulatory regimes under the auspices of the Hong Kong Monetary Authority, the Securities and Futures Commission, the Mandatory Provident Fund Schemes Authority, the Financial Reporting Council and the Office of the Commissioner of Insurance. Regulation of this sector requires specialist knowledge and expertise. In addition, the Government and the Securities and Futures Commission are reviewing how the existing regime can be further improved to enhance protection for the investing public.

27. In respect of the property sector, the Government has all along been concerned about the fairness and transparency of property transactions. Property transactions should be done in a fair and transparent manner. Sanctions should apply to those who take advantage of asymmetric information. In the past two years, the Transport and Housing Bureau (“THB”) has strengthened the regulation of the sale of first-hand uncompleted residential properties through the “Consent Scheme” administered by the Lands Department and the guidelines issued by the Real Estate Developers Association (“REDA”). These measures have gone same way in helping home-buyers in obtaining information on properties and property transactions, and thereby protecting consumer.

28. To further enhance the transparency of information on first-hand private residential properties and the fairness of transactions, THB has requested REDA to implement the nine further enhancement measures through REDA's guidelines with effect from 1 June 2010. These include strengthening the regulation on show flats, enhancing the transparency of sales brochures and price lists, enhancing the provision of information about the development in the promotional materials, and enhancing the transparency of transactions involving Board members of the developers and their immediate family members. Also, the Lands Department has included the nine new measures into the pre-sale consent approved with effect from 14 May 2010. We will closely monitor the effectiveness of the new measures. Should these prove to be ineffective in controlling unacceptable practices, we do not rule out the possibility of introducing legislative measures.

(h) Cooling-off arrangements

29. There have been calls for introducing mandatory cooling-off arrangements in consumer transactions, (for instance, over the pre-payment mode of consumption, in particular industries or specific models of transactions), under which consumers have the option of cancelling the transactions. Concern is focused, in particular, on consumer transactions involving the purchase of pre-paid coupons for club membership, beauty care services, fitness and slimming services. The majority of complaints are related to oversubscription of services to the extent that holders of pre-paid coupons cannot enjoy the services, or the performance of a product is at variance with stated descriptions. In addition, there are complaints on the sale of time share rights and unsolicited visits promoting paid television and telecommunications services and other types of products, where various unfair trade practices such as high-pressure tactics or misrepresentations are deployed.

30. Different parties enter into contracts on the supply of goods or services according to their free will. We respect the freedom of contract, which is protected by law. While the suggestion of establishing cooling-off period is worthy of support in principle, it may generate problems if it is imposed mandatorily across the board. We do not recommend imposing mandatory cooling-off period for the pre-payment mode of transaction across the board¹⁸. Instead, we propose creating

¹⁸ Apart from pre-paid coupons for rights to goods or services, many other transactions are in

specific offences to tackle unfair sales practices, for instance, false trade descriptions, aggressive practices, bait-and-switch and accepting payment without the intention or ability to supply. Imposing mandatory cooling-off arrangements across the board will have far reaching effects which would adversely affect business operations and give rise to moral hazard. Besides, businesses may try to mitigate the risk arising from cooling-off arrangements by raising prices upfront which would not be in the interests of consumers.

31. That said, we encourage businesses and trade organizations to adopt suitable measures, including offering cooling-off period on a voluntary basis, to gain the confidence of their patrons. The voluntary approach will be beneficial not only to consumers, but also for brand-building of the businesses concerned. For example, the Office of the Telecommunications Authority has, after consulting the telecommunications industry, issued a new Code of Practice in which guidelines are provided on the drawing up of service contracts, including giving consumers the right to cancel a contract within a 7-day cooling-off period. This approach serves as a good reference. The Consumer Council has also been in dialogue with the beauty and slimming service sector to encourage voluntary introduction of cooling-off period.

32. Cooling-off periods are imposed only under specified circumstances in the UK, such as in transactions of time share rights¹⁹ (in view of their complexity) or in contracts made at non-business premises when consumers may be caught off-guard (such as visits to the consumers' places of residence). Cooling-off arrangements allow consumers to realize more fully what their rights and obligations are and consult other persons where appropriate, before taking a considered view without being subject to any undue influence. Making reference to the arrangements adopted in the UK and having regard to the local market situation, we recommend that a targeted approach be adopted if cooling-off arrangements are to be imposed by statute, so as to avoid unnecessary compliance cost for businesses and moral hazard. We are inclined towards **imposing cooling-off arrangements on transactions of time share rights in the light of their complexity and novelty to consumers in Hong Kong. Beside, we are also inclined towards imposing cooling-off arrangements on contracts made during unsolicited visits**

the nature of the pre-payment mode, for example, paying for an electrical appliance which will be delivered to a consumer's home later on.

¹⁹ General speaking, it refers to the right of users to use accommodation facilities at different places or locations within a specified period of time.

to consumers' homes or places of work, since consumers may be caught off-guard in such situations.

NEXT STEPS

33. In conclusion, the broad directions of legislative proposals that we recommend are as follows:

- (a) the coverage of the TDO be expanded to cover *false representations in respect of services* (paragraph 8);
- (b) a new offence in the TDO be created to prohibit *misleading omissions* (paragraph 12);
- (c) a new offence in the TDO be created to prohibit *aggressive practices* (paragraph 15);
- (d) specific offences in the TDO be created to control the practices of “*bait-and-switch*” and “*accepting payment without the intention or ability to supply*” (paragraph 18);
- (e) *C&ED* be designated as the primary *enforcement agency* for the new offences to be created (paragraph 19);
- (f) a compliance-based approach be introduced under which undertakings may be sought from traders to stop engaging in offending acts and court injunction may be sought if traders fail to comply (paragraph 20); and
- (g) *Mandatory cooling-off arrangements* under which consumers may cancel the contracts within a specified period be imposed on transactions of time share rights and on contracts made during unsolicited visits to consumers' homes or places of work (paragraph 32).

34. Consumer awareness and self-empowerment against unfair trade practices are equally important as legislative protection. Meanwhile, we will endeavour to continue our efforts in consumer education and publicity, where appropriate in partnership with the Consumer Council, government departments and other organizations (including major chambers of commerce, schools and the media).

35. Different quarters may have different views on how best to tackle commonly seen unfair trade practices. To take account of public views and strive for a consensus as far as possible, we welcome views from Members which will no doubt assist us in finalizing the public consultation paper. We will consult the public earliest possible in the third quarter of this year.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
May 2010

**Complaints Received by the Consumer Council
Relating to Unfair Trade Practices**

(excluding complaints relating to structured financial products)

Type	2008	2009
Misrepresentation	834	1,740
High-pressure tactics	145	109
Bait-and-switch	76	72
Misleading price indications	83	45
Unfair contract terms	2	23
Others	2,051	2,206
Total	3,191	4,195