

立法會
Legislative Council

LC Paper No. CB(1)1090/10-11(04)

Ref: CB1/PL/EDEV

Panel on Economic Development
Meeting on 24 January 2011

Updated background brief on legislative proposal to enhance consumer protection against unfair trade practices

Purpose

This paper provides background information on the Government's legislative proposals to enhance protection for consumers against unfair trade practices and summarizes views and concerns raised by Members on the subject matter.

Background

Existing legislation

2. Specific Ordinances have been enacted to protect different aspects of consumer interests. False trade descriptions of goods, inaccurate measurement and misrepresentations are respectively dealt with by the Trade Descriptions Ordinance (TDO) (Cap. 362), the Weights and Measures Ordinance (Cap. 68) and the Misrepresentation Ordinance (Cap. 284). The Unconscionable Contracts Ordinance (Cap. 458), the Sale of Goods Ordinance (Cap. 26) and the Supply of Services (Implied Terms) Ordinance (Cap. 457) deal with contract-related matters. The Consumer Goods Safety Ordinance (Cap. 456) and the Toys and Children's Products Safety Ordinance (Cap. 424) govern safety-related matters.

Review of consumer protection legislation

3. The evolution of trade practices in recent years, particularly the emergence of certain unfair trade practices which undermine consumer interests, calls for a review of the existing regulatory regime to ensure that it continues to be effective in meeting the needs and aspirations of the

community. To follow up the initiatives announced by the Financial Secretary in February 2007, the Consumer Council (CC) conducted a comprehensive review of existing measures to protect consumer rights. In February 2008, CC 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. Meanwhile, the Government introduced and enacted the Trade Descriptions (Amendment) Bill 2007 and eight pieces of subsidiary legislation under TDO in 2008 to prohibit misleading price indications and to require trades to disclose critical pieces of product information in the sale of precious metals and stones.

4. The Government has considered recommendations in the review report, and examined proposals raised in the community, latest development in the market which may have an impact on consumer interests, as well as overseas consumer protection regimes. The Government's review has borne out that the safeguards under current legislation are inadequate in tackling certain unfair trade practices. It has set out the broad policy directions for strengthening consumer protection legislation and subsequently conducted a consultation on legislative proposals to tackle commonly seen unfair trade practices.

Previous discussions

Council questions and motion debates

5. Issues relating to consumer protection have all along been the subject of contention. Members have raised a considerable number of LegCo questions in connection with unfair trade practices in various fields from property transactions to telecommunications and bodily care services. They urged the Government to consider requiring the contracts concerned to include a cooling-off period clause, and to enact specific legislation to regulate advertisements.

6. On 9 May and 4 July 2007, the Council passed the motion "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 at the Council 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

7. At the meeting of the former Panel on Economic Services¹ held on 25 June 2007, members expressed the view that a "cooling-off period" should be provided to safeguard consumers' interests as they were widely adopted in European Union and the United States etc. As the service providers being complained refused to attend the mediation meetings arranged by CC or provide CC with the requested information, members considered that CC should be provided with more power for enhancing consumer protection. Panel members also considered it necessary to regulate contents of advertisements delivered through both electronic and print media, require return arrangements for products sold at discounted prices and enforce relevant legislation more effectively.

8. When the subject of "Review of consumer protection legislation" was discussed at the meeting of the Panel on Economic Development (the Panel) on 22 June 2009, members expressed grave concern about the proliferation of advertising bluffs and consumer scams in the print media, especially the weekly magazines, which had existed for a long time but was not subject to any regulatory control due to Government's inaction. While noting that the Administration was exploring the possibility of extending the scope of TDO to cover the supply of services, members urged that the Consumer Legal Action Fund (CLAF) should be deployed more widely to deter unscrupulous trade practices in the interim. They also asked whether consideration would be given to providing a cooling-off period for consumers who acquired services under high pressure sales tactics.

9. During the policy briefing at the Panel meeting on 16 October 2009, members again expressed serious concerns about advertising bluffs. Some Panel members pointed out that the situation had worsened as consumer scams affected not only Hong Kong people but also Mainlanders and other visitors. They requested the Administration to combat unscrupulous sales practices by means of legislation.

10. On 24 May 2010, the Administration briefed the Panel on the broad policy directions in strengthening consumer protection legislation before setting out the detailed legislative proposals in the consultation document which was issued on 15 July 2010 for public consultation until 31 October 2010. The Panel also received views from deputations on the consultation document at the Panel meeting on 25 October 2010. The detailed proposals and members' view are set out in ensuing paragraphs.

¹ The Panel on Economic Services was renamed as the Panel on Economic Development with effect from the 2007-2008 session.

Unfair trade practices to be prohibited

False trade descriptions

11. The consultation paper proposed that suppliers of goods as well as services should have the primary responsibility of providing truthful information on their products. To plug the gaps in the existing TDO, the Administration proposed to extend its coverage to include trade descriptions in respect of services made in consumer transactions. The Administration also proposed that the definition of "trade description" be broadened to the effect that false indications of any matters with respect to goods or services would be prohibited. As regards concerns about enforcement against advertisements carrying false descriptions in the print media, the Administration explained that the current direction of the legislative proposals was to exercise regulation primarily on the traders who should have the onus of providing truthful information on their goods or services, and not the carrier of advertisements.

12. At the Panel meeting on 25 October 2010, some members expressed reservation about the proposal of extending TDO to cover trade descriptions in respect of services. As "services" were different from goods in nature, they considered that regulation in respect of services might be difficult.

Misleading omissions

13. The interests of consumers may be hampered if they cannot get hold of critical pieces of information in respect of the products in consumer transactions. To tackle the problem, it was proposed to draw reference from the United Kingdom (UK) Regulations² and amend TDO to create a new offence of misleading omissions in consumer transactions. On members' concern that frontline retail staff might inadvertently commit an offence by not being able to provide to customers information on goods/services to the required extent, the Administration assured members that due diligence defences should be available and that adequate evidence should be collected before a case could be established for further investigation. The Administration subsequently proposed to make available appropriate defences for the accused in criminal proceedings.

² "Misleading omissions" are prohibited in UK. According to the UK Regulations, a commercial practice is considered as a "misleading omission" if, in its factual context, it omits or hides "material information", provides material information in an unclear or ambiguous manner, and as a result, it causes the average consumer to take a transactional decision he would not have taken otherwise.

Aggressive practices

14. Consumers' freedom of choice is likely to be undermined when they are under undue pressure. Drawing reference from Australia and UK which prohibit the use of coercion, harassment or undue influence in consumer transactions, the consultation paper proposed to create a strict liability offence, together with a non-exhaustive list of the factors to be taken into account, in the TDO to enhance protection for consumers from aggressive and high-pressure tactics³. The Administration took note of members' concern about the availability of due diligence defences for the traders.

Bait-and-switch

15. To address the inadequacy in TDO to prohibit bait-and-switch⁴, it was proposed to create "bait advertising"⁵ and "bait-and-switch"⁶ offences in TDO in respect of consumer transactions and to provide appropriate defences in criminal proceedings. In response to members' concern about outdated products being gifted away during promotional sales of another item, the Administration advised that it would not constitute an offence if the traders had reasonable quantities or capacity to meet the demand. To address the concern raised at the meeting on 25 October 2010 that consumers should not be required to shoulder the burden of proof, the Administration indicated that strict liability offences under TDO would be proposed for certain new offences including the use of aggressive practices, "bait advertising", accepting payment without the intention or ability to supply.

Accepting payment without the intention or ability to supply

16. Pre-payment for goods and services is becoming an increasingly popular form of consumption. However, many problems may arise when

³ Examples of aggressive and high-pressure tactics are retaining consumers' belongings, subjecting them to lengthy and incessant sales pitches and preventing consumers from leaving the premises etc.

⁴ Bait-and-switch refers to the practice of traders advertising or promoting products at bargain prices or on very favourable terms without having reasonable quantities or capacity to meet the demand that should have been foreseen. The promoted item is in fact used as a bait to attract consumers into shop premises, so that the trader has the opportunity to switch them to more expensive products in various guises.

⁵ This offence prohibits a person from advertising for the supply of products at a specified price if there are no reasonable grounds for believing that he will be able to offer those products for sale at that price for a reasonable period and in reasonable quantities, having regard to the nature of the market and the nature of the advertisement. This is intended as a strict liability offence.

⁶ This offence prohibits a person from making an offer to sell products at a specified price with the intention of promoting a different product through various tactics (including refusing to show the advertised items, refusing to take orders or deliver the item within a reasonable time, or demonstrating a defective sample of the item). The enforcement agency is required to prove the existence of an intention of promoting a substitute.

traders with no intention or ability to supply the contracted products trick consumers into pre-payment. To tackle this objectionable trade practice, the Administration proposed to create an offence in TDO to prohibit, the practice of accepting payment, in consumer transactions, without the intention or ability to supply the contracted products. As regards members' concern that the above unfair trade practices might be caught by criminal offences under the current Theft Ordinance (Cap. 210) and the common law offence of "conspiracy to defraud", the Administration responded that the evidential threshold required was high, and that creating more specific offences could facilitate enforcement by Customs and Excise Department (C&ED) in launching covet operations. On members' suggestion of setting up a compensation fund for service sectors or a trustee account for depositing pre-payments, the Administration advised that the matter involved complicated issues such as financing and managing the fund, and there was existing legislation governing arrangements on liquidation.

Enforcement

17. To capitalize on its enforcement experience and expertise, the Administration proposed that C&ED be tasked to enforce the proposed offences under TDO. It also proposed to introduce a civil, compliance-based enforcement mechanism, in addition to criminal sanctions, to promote adherence to TDO. Some members considered that there should be more enforcement agencies and channels to meet the growing demand for regulating unfair trade practices. For example, CC should be empowered with an enforcement role to complement the efforts of C&ED. Some other members were concerned about the division or work between C&ED and the Police in enforcement of TDO.

18. The Administration advised that apart from being the trustee of CLAF, CC played a vital role in educating consumers, handling consumer complaints and mediating disputes and referring cases requiring immediate enforcement to C&ED. The Police and C&ED were conferred with clear and specific powers in their respective purviews to carry out enforcement, for instance, the Police would handle serious and blatant detention and extortion cases. Where necessary, C&ED and the Police would conduct joint operations to crack down unscrupulous trade practices.

19. According to the consultation paper, it was expected that CC's mediation work would be enhanced with the back up of the compliance-based mechanism. To ensure that no complaint would be overlooked, the Administration proposed to establish a referral mechanism under which the enforcement agency and CC could coordinate on the actions to be taken on consumer complaints received at their respective ends.

20. At the Panel meeting on 25 October 2010, some members expressed concern about the appropriateness to empower C&ED to inspect and take copies of books and documents for the purpose of ascertaining an offence. The Administration explained that the power for C&ED to inspect books and document during spot checks would allow it to take proactive and pre-emptive action to inspect and ascertain whether a business had in place suitable arrangements for the supply of services. Respective guidelines would be drawn up in consultation with the industries to facilitate compliance and prosecution.

Sector-specific regimes

21. The Administration generally shares CC's view that specific sectors should remain unaffected if a significant degree of professional and specialized knowledge is required for enforcement and a similar level of protection has already been provided by such statutory frameworks parallel to and compatible with the new legislative proposals to tackle unfair practices. It proposed that the financial services sector and property transactions need not be brought under the ambit of the expanded TDO. A number of members considered it unjustified taking out the financial services and property sectors from the TDO framework as transactions of these products usually involved substantial amount of money and thus called for greater consumer protection. The Administration explained that consumer protection in respect of transactions of financial products and properties required specialist knowledge and expertise in respective fields and were presently governed under their respective dedicated regulatory regimes. For the latter, the Administration would not hesitate in taking additional measures (including legislative measures) if the situation so warranted. Subsequent to the Panel meeting, the Administration further proposed not to include professional practices regulated by regulatory bodies established by statute under the TDO framework, and that concurrent enforcement powers be given to the Telecommunications Authority⁷ and the Broadcasting Authority under TDO in respect of the telecommunications and broadcasting sectors respectively.

Consumer redress

22. At present, consumers may take private actions against unfair trade practices based on contract law or tort. Various suggestions have been floated in the community on further empowering aggrieved consumers in seeking remedies, including CC's proposal of establishing a Consumer Tribunal to deal with consumer claims using simpler procedures similar to

⁷ Under the Communications Authority (CA) Bill which is being scrutinized by LegCo, the functions of the Telecommunications Authority and the Broadcasting Authority will be transferred to the CA.

those adopted in the Small Claims Tribunal (SCT), enhancing the availability of CLAF and creating a right in the law for consumers to institute private action on infringement of fair trade provisions. Having examined the various suggestions raised in the community, the Administration proposed that an express right to institute private civil action on contravention of the proposed offences should be created under TDO to facilitate aggrieved consumers to obtain restorative justice and promote business compliance.

23. Some Panel members shared CC's view on the need to set up a dedicated Consumer Tribunal which adopted simpler procedures similar to those of SCT. Other members also expressed concern that CLAF was rarely deployed to help aggrieved consumers to take judicial action to seek redress. The Administration stated in the consultation paper that it did not see sufficient grounds for treating consumer disputes differently from other types of civil actions. Moreover, having considered current and anticipated commitments, the Government has injected \$10 million into CLAF in 2010-2011.

Cooling-off arrangements

24. Currently, cooling-off period (during which consumers may choose to cancel the contracts) is offered by suppliers of certain goods and services on a voluntary basis. There have been calls for introducing mandatory cooling-off arrangements in consumer transactions either generally for all consumer transactions, in specific industries or particular modes of transactions. Public concern is focused, in particular, on pre-payments for club membership, beauty care, fitness and slimming services, timeshare rights, and unsolicited visits to consumers' homes promoting telecommunications and paid TV services etc.

25. After examining cooling-off arrangements available in other jurisdictions and having regard to the local Hong Kong situation, the Administration proposed to impose mandatory cooling-off period on transactions of timeshare rights/ long-term holiday product contracts, and consumer transactions concluded during unsolicited visits to consumers' homes and places of work. The former are complex and relatively novel products to the average consumer and CC has received an increasing number of complaints concerning unfair trade practices in the sale of these products. As regards the latter, since consumers (in particular the vulnerable and the frail) may be caught off guard and not have the opportunity to consult other sources of information during unsolicited visits, they may easily fall prey. Imposing mandatory cooling-off periods on related transactions should help address possible abuses. The Administration did not see sufficient grounds for imposing cooling-off periods across the board on the pre-payment mode of transactions, in view of its far reaching effects which would adversely

affect business operations and give rise to moral hazard.

26. Members expressed disagreement and disappointment about the limited scope in imposing the proposed cooling-off arrangements which did not target businesses commonly associated with complaints, such as beautification, slimming and fitness training. While some members suggested the Administration to consider imposing the cooling-off arrangements on transactions reaching a prescribed minimum amount of pre-payment and/or duration of service agreement, others opined that the proposed cooling-off arrangements should not be applied across the board indiscriminately.

27. At the Panel meeting on 25 October 2010, some members did not agree to impose cooling-off arrangements as it would have limited effect on tackling unfair trade practices while being unfair to business operators. There were also calls for protecting the interest of small and medium enterprises which might be adversely affected by the proposed arrangements.

Way forward

28. The Administration will brief the Panel on 24 January 2011 on the outcome of the public consultation on legislation to enhance protection for consumers against unfair trade practices.

References

29. A list of the relevant papers with their hyperlinks is in http://www.legco.gov.hk/database/english/data_es/es-consumer-protection.htm.

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21 January 2011