

17 April 2012

The Hon Fred Li, SBS, JP
Chairman
Bills Committee on Trade Descriptions
(Unfair Trade Practices) (Amendment) Bill 2012
Legislative Council Complex
1 Legislative Council Road
Hong Kong

Dear Mr Li,

Major Concerns on the
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

The Hong Kong General Chamber of Commerce supports the objective of the above Bill to step up efforts to eliminate obnoxious commercial practices which hurt consumers. However, we have a number of major concerns about the Government's proposals. For example, bad conducts are not clearly identified in the Bill; there is a lack of detailed guidelines; and the Government's target date of passing this complicated Bill within this legislative session is simply unrealistic.

Our views are stated in the enclosed. We hope that they would be helpful to members in scrutinizing the Bill.

Yours sincerely,



Shirley Yuen
CEO

cc Ms Alice Cheung, Deputy Secretary for Commerce and Economic Development

Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012
Submission by Hong Kong General Chamber of Commerce

17 April 2012

Executive Summary

1. The Hong Kong General Chamber of Commerce (“HKGCC”) supports the objective of this Bill, namely to step up efforts to eliminate obnoxious commercial practices which hurt consumers. However, we have a number of major concerns about the Government’s proposals.
2. The proposed new offences in the Bill do not clearly identify bad conduct, but are so broad and vague that they catch normal commercial activities. Unless the offences are clearly restricted to bad conduct, businesses will be deterred from bringing innovative products and services to the market, for fear of committing an offence. This will benefit the established major brands, at the expense of SMEs. Consumers will also suffer from less choice and less innovation.
3. If the proposed offences do not clearly target bad conduct, there should be no prospect of criminal prosecution. The enforcement authorities should be obliged (not merely entitled) to use the compliance-based mechanism in the Bill in all cases. There is a clear precedent for this in the Competition Bill. Due to similar concerns expressed by SMEs about the lack of clarity in the Bill as to what conduct would be prohibited, the future Competition Commission will be obliged to issue a Warning Notice (instead of taking formal enforcement action) where the conduct is not clearly identified as prohibited.
4. Detailed guidelines on the application of the law should be issued before the Bill is passed, not afterwards. The experience with the minimum wage legislation emphasises the need for detailed guidelines to be issued before the Bill is passed.
5. The Government’s target date of July 2012 for passing the Bill is unrealistic, and potentially dangerous, given the amount of work that needs to be done on the Bill, and its widespread and significant implications.

Introduction

1. Hong Kong has a vibrant and entrepreneurial retail sector, fuelled by consumers (including tourists) seeking value for money. Consumers expect to find the newest gadgets and the widest variety of fashion and accessories in Hong Kong. Retailers, driven by competition and business motives, try their best to meet such demands.
2. For market forces to work, buyers need to be assured that they are getting legitimate products and services, and that such goods and services are properly represented in the sales process. At the same time, sellers need to have the assurance that the relevant laws are clear and enhance the growth of a positive and sustainable business environment.
3. The vast majority of retailers compete vigorously and honestly, which benefits consumers. However, the sector's image has been tarnished by a few retailers who have resorted to unscrupulous tactics. These retailers harm Hong Kong's image and the legitimate business community. Accordingly, HKGCC agrees with and supports the general objective of this Bill, namely to step up efforts to stamp out such practices. Nonetheless, the Bill in its current form has brought concerns on its effectiveness in achieving this objective.

The fundamental need for clarity

4. The challenge of this Bill is to target the practices which are genuinely unacceptable and harm consumers, without inadvertently deterring the majority of honest businesses from continuing to compete fairly and vigorously, even aggressively, to satisfy consumer demands and preferences. This means that the Bill must identify clearly the conduct which is to be prohibited as well as who is liable. This is especially true (and a Basic Law requirement) where criminal penalties exist.
5. Concerns were expressed in the responses to the Government's earlier consultation on both of these points, by HKGCC as well as many others. We argued that the proposed offences were overly broad and vague and could capture normal competitive conduct. We also indicated that it was unclear who would be liable if an offence was committed: would it be frontline sales staff, managers to whom they report, senior management or the company itself? Regrettably, after reading through the Bill, these concerns still remain outstanding.

The poorly drafted Bill makes it overly-intrusive in major respects

6. The drafting of the Bill is convoluted (and therefore often unclear), and requires references to many definitions and sections to determine whether there is an offence. For example, in order to determine if an advertisement for a service is in breach of s.7A for applying a false trade description, it is necessary to:

- look at whether a trade description to a service has been “applied” (by reference to section 6A);
 - refer to s.8 “Trade descriptions used in advertisements” to see which services it applies to and the “scope” of the offence;
 - determine if the claim was actually a “trade description” (by looking at the definition of “trade description” in relation to a service under s.2);
 - determine whether a “service” is being provided (by looking at the definition in s.2);
 - determine if the service was provided to a “consumer” (by looking at the definition in s.2); and
 - determine if that “trade description” amounts to a “false trade description” (by looking at the definition of “false trade description” in s.2).
7. The current convoluted drafting makes it very difficult for businesses to determine how to interpret and apply the legislation, leading to a lack of certainty. This is clearly inappropriate in any legislation but even more so where criminal penalties apply. Much clearer language and drafting need to be created which will make it easier for businesses and consumers to identify where the “lines” are.
 8. Another example of poor drafting and lack of clarity is the proposed new offence of misleading omissions. To avoid committing the offence, a sales person, would have to know a large number of details about the product being sold (a hurdle and a large hurdle in a situation where a store sells multiple or even hundreds of products). Further, when approached by a customer, the sales person would have to provide information based on what the “average customer” would know or not know – not necessarily based on what the specific customer in front of him knows or inquires about. If the sales person did not get this assessment correct and inadvertently omitted a piece of information, and as a result the customer bought the product, the salesperson would be guilty of an offence.
 9. What is worse is that it would be an offence even if the customer decided not to buy the product on the basis of the allegedly missing information. This is draconian, disproportionate and over-intrusive. It is simply not the situation where a sales person deliberately hides important information from a customer to secure a sale which he would not have obtained otherwise, which most people would regard as unacceptable. The general principle of contract law is *caveat emptor* (let the buyer beware) and the Government itself has acknowledged in the consultation paper that consumers have a responsibility to seek information, but the current Bill places too much responsibility on the retailer and the sales staff

10. It should also be noted that most of Hong Kong's retailers import their products from overseas. If such stringent measures are placed on the retailer, the most likely scenario is that retailers will import and sell products that most people are familiar with (especially for small retailers who do not have the know-how or financial resources to research each product). Will these rules make it more difficult to bring in new or innovative products that are not yet popular? Will retailers risk introducing products that have not been market-tested so that most people are aware what the functions are? The end result could be less consumer choice and less competition.
11. A third example is the proposed new offence of "aggressive commercial practices". Aggression is not limited to trapping customers and bullying or otherwise forcing them into buying products and services they do not want, which most people would regard as unacceptable, but can consist of "undue influence". Since any sales or marketing activity may involve influencing customers into buying, so when does the influence become "undue"? Under the Bill, undue influence involves three key elements, namely "exploiting a position of power... to apply pressure...in a way which significantly impairs the consumer's ability to make an informed decision". Nevertheless, each of these elements is subjective and open to debate. Does having a busy shop full of customers anxious to buy the latest smartphone place the sales person in a position of power? Where is the dividing line between applying pressure and applying persuasion, which is what sales people normally do? And how does a sales person know whether what he says (or does not say) will impair the customer's ability to make an informed decision (whatever this means)? The most extreme cases are clear, but the cases in the middle are not.

It is unclear who is liable for the offences

12. As regards the question on who is liable for the offence, this is still not clear from the Bill. In the smartphone example above, would it be the frontline sales person, or the manager of the shop, or the manufacturer, or the first two, or all three?

The risks of unintended consequences

13. Unless bad and prohibited conduct is clearly identified and there is clarity as to who commits the offence, the Bill is likely to have unintended adverse consequences. Firstly, by making it easier and encouraging consumers to renege on transactions and use the threat of a criminal complaint to return goods, this will inevitably raise retailers' costs. It may in turn be reflected in higher prices, to the detriment of those more responsible customers. Secondly, businesses and their staff will be deterred from competing aggressively for fear of committing an offence. This would reduce market competition and harm consumers, benefiting established brands and market players which do not have to try so hard to retain customers and gain new ones. Thirdly, the high risks of inadvertently committing a criminal offence might deter new sales and marketing talent from entering the sector. These consequences would be bad for the economy and bad for consumers, contrary to the Bill's objective.

Compliance with the Rule of Law and Hong Kong's Bill of Rights

14. Adverse effects on consumers and the economy are not the only consequences of the wide-sweeping, vaguely defined criminal offences. The Bill may violate the fundamental principle of the rule of law enshrined in Hong Kong's Bill of Rights that criminal offences must clearly define what conduct is prohibited, and who is liable.

The way forward

15. So what could be done? The first is to seek greater clarity in the Bill itself. HKGCC has identified a significant number of areas where the Bill could be clarified and we look forward to providing more detailed submissions to the Committee in this regard in due course.
16. Secondly, if sufficient clarity is not going to be provided in the Bill as to what conduct is prohibited, there should be no question of criminal prosecution. The compliance-based mechanism proposed in the Bill, whereby persons are offered an opportunity to undertakings to stop the conduct, should be used instead. There is a precedent for this in the Competition Bill. In response to concerns from SMEs that they could be prosecuted for inadvertently breaching the law given its vaguely-worded provisions, the Government has agreed that the future Commission must give the business in question an opportunity to stop the conduct and undertake not to re-engage in it. The same principle should apply here.
17. Thirdly, detailed guidelines must be provided to the Committee and the public before the Bill is passed, giving as many examples of real life situations as possible, and on which side they would lie – legality or illegality. This would provide re-assurance to the majority of businesses who want to trade honestly and fairly and comply with the law. The Bill at present only provides for guidelines to be issued after the Bill is passed (and there is no obligation for the Government to do so). This is unacceptable.

18. The absence of advance guidelines has been recognized as a problem in the case of the minimum wage legislation. This was a reason for the Bills Committee insisting on the Administration to produce draft guidelines before deciding whether to pass the Competition Bill. In fact, HKGCC urges the Administration to follow the approach of the Securities and Futures (Amendment) Bill, which is also currently before LegCo. In parallel with the Bills Committee's deliberations on the Bill, the Securities and Futures Commission has produced detailed draft enforcement guidelines clarifying how the new rules will apply in various real-life, practical situations. It has already consulted the public twice on these draft guidelines. The intention is that the guidelines will be published in final form when the Bill is passed by LegCo.

The proposed Legislative time table is unrealistically (and dangerously) short

19. Finally, HKGCC would like to raise the issue of timing. It is clear from the points raised above that a great deal of work needs to be done on the Bill to make sure that it hits the right targets, while ensuring that honest businesses competing fairly are not caught. There is also a great deal of drafting which would benefit from greater clarity (we look forward to providing further submissions to the Bills Committee on this in due course). We are therefore very concerned that the Administration is hoping that this Bill be passed by LegCo before the end of the current legislative session in July. This is a major, complex piece of legislation seeking to create a new set of criminal offences (with accompanying stringent penalties including imprisonment) for activities which have hitherto been perfectly legal. Not only that, but it is proposed to dispense with the normal requirement of *mens rea* for at least some of these criminal offences, and to make them offences of strict liability. This in itself deserves extremely careful consideration, particularly from the point of view of legal certainty and the rule of law.
20. The Bills Committee has just been formed, and public hearings are to take place on 24 April. This leaves less than 3 months between that date and the passing of the Bill if the Administration's proposed target date is to be achieved. HKGCC has to respectfully submit that this timetable is inappropriate and unrealistic for a Bill of this significance and with such wide ramifications. By comparison, the Competition Bill has been in discussion before LegCo for about eighteen months already (with extensive public consultations beforehand over a number of years, unlike this Bill), and this Bill is arguably even wider in its implications and potentially more intrusive.
21. We sincerely hope that the Bills Committee should not feel obliged or pressurised to pass this Bill by any particular deadline. It is much more important to make sure that the legislation is as well-drafted and well-targeted as it can be to meet its objectives. The stakes for Hong Kong consumers, businesses and the economy are too high for any other approach. The need to tackle unscrupulous business practices will not go away with the change in the current Administration.