

香港特別行政區政府
商務及經濟發展局
工商及旅遊科



COMMERCE, INDUSTRY AND TOURISM BRANCH
**COMMERCE AND ECONOMIC
DEVELOPMENT BUREAU**
GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION

香港金鐘添美道二號
政府總部西翼二十三樓

LEVEL 23, WEST WING
CENTRAL GOVERNMENT OFFICES
2 TIM MEI AVENUE
ADMIRALTY, HONG KONG
Tel: 3655 5427
Fax: 2869 4420

25 April 2012

Ms Yue Tin-po
Clerk to Bills Committee
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms Yue,

**Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012**

Administration's Response to Follow-up Issues

I am pleased to provide the Administration's response to questions raised by the Bills Committee at the meeting held on 12 April 2012 in the paper enclosed for Members' reference.

Yours Sincerely,

A handwritten signature in black ink, appearing to be 'Daniel Fong', written over a horizontal line.

(Daniel Fong)

for Secretary for Commerce and Economic Development

c.c. Commissioner of Customs and Excise (Attention: Mr SY Cheung)
Secretary for Justice (Attention: Mr Eamonn Moran
Miss Angie Li)

**Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012**

Purpose

This note sets out the Administration's responses to questions raised by the Bills Committee at the meeting held on 12 April 2012.

Cooling-off period

2. At the meeting, Members asked for the Administration's position on the imposition of a cooling-off period in certain types of consumer transactions. Members also asked for information on the classes of transactions on which a cooling-off period is imposed in other jurisdictions.

3. Members may recall that we consulted the public on a package of legislative proposals against unfair trade practices in 2010. Generally speaking, our proposals received public support. The proposals can be broadly divided into two groups. The first group seeks to create offences against various types of unfair trade practices and enhance effectiveness in enforcement. The second group relates to the mandatory imposition of a cooling-off period. In the public consultation report published in January 2011, we proposed that the scope of the cooling-off arrangements should be expanded to cover two types of consumer contracts, namely those involving goods or services (or both) with a contract duration of not less than six months and those concluded during unsolicited visits to consumers' homes and places of work.

4. With the expansion in scope, the proposal would affect a wide range of traders dealing in different goods and services. It would also affect business operation and the process in which consumers enter into contracts. We have met with different stakeholders and discussed detailed arrangements for implementing the proposals. Trade associations and others have expressed concerns about practical arrangements including the arrangements for consumers to exercise the right of cancellation, the refund arrangements and small-value transactions. We need more time to study how to address these concerns

properly by legislation.

5. To ensure that consumer protection could be enhanced as soon as possible, we have proposed to tackle unfair trade practices as our top priority. Hence the Bill contains this group of legislative proposals. We briefed the Panel on Economic Development on the position at its meeting held on 14 October 2011. As requested by the Bills Committee, we will refer to this subject in the speech for resuming the second reading debate on the Bill.

6. We attach at the Annex a table setting out the classes of transactions on which a cooling-off period is imposed in selected outside jurisdictions. Members may note that they cover only specific products or modes of transactions.

Definition of “commercial practice”

7. Clause 3(9) adds a new definition “commercial practice” which reads as follows:

“commercial practice” (營業行為) means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or the sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.

8. Members raised three questions on the proposed definition:

- (a) whether an advertisement which ostensibly only states the possible negative effects of a product amounts to an act connected with the *promotion* of a product by a trader to a consumer;
- (b) the policy intention for confining the definition to acts *etc.* that are *directly* connected with the promotion etc of a product; and

- (c) whether a trader can circumvent the proposed prohibitions by purporting to supply a product to *non-consumers only*.

9. On the question at paragraph 8(a) above, members' concern was whether promotion could possibly be disguised under certain "negative" propaganda, thereby circumventing the law. In considering whether an act is a promotion, account has to be taken of all relevant facts and circumstances. That an advertisement only states the possible negative effects of a product does not necessarily mean that it is not a promotion of a product. The example quoted by Members (i.e. "don't buy this product if you wish to be miserable for the rest of your life") is, in effect, stating the positive effects of the product, i.e. you will not be miserable if you buy the product. Moreover, even if an advertisement is not directly connected with the promotion of a product, it could be connected with the *supply* of the product, and hence still falling within the definition of "commercial practice".

10. Regarding the question at paragraph 8(b), we wish to point out that the objective of the current legislative exercise is to enable that businesses and consumers can trade fairly by eradicating unfair trade practices that the businesses may deploy in promoting, selling and supplying products to consumers which may affect the decisions of consumers pertaining to specific products. Seen in this light, the proposed use of "*directly connected*" should be wide enough to cover the relevant acts. Traders may conduct general promotional campaigns to enhance, for instance, their brand image. Such campaigns which are not directly connected with the promotion or supply of a product should not be caught by the proposed offences. We consider that the use of the word "directly" is appropriate.

11. In response to the question at paragraph 8(c), whether a practice is a commercial practice as defined will depend on the facts and nature of the practice and not solely on the stated persons to whom it is directed. For instance, it is true that if an advertisement is to promote a product to wholesalers only, the advertisement is not directly connected with the promotion of a product to consumers and hence is not a "commercial practice". However, if somehow a consumer (as defined) comes across the advertisement and the trader supplies the product to the consumer, the

trader engages in an act “which is directly connected with the sale or supply of a product to consumers”, i.e. a commercial practice, in which case, the relevant provisions in the Bill will apply..

Definition of “trade description” in relation to a service

12. Members asked if paragraph (c) of the proposed definition of “trade description” in relation to a service (which is added by clause 3(9)) is appropriate. Paragraph (c) of the definition reads: “any other characteristic or attribute of the service not covered by paragraph (a) or (b)”. Members’ concern is that some of the paragraphs following (c) may be “characteristics” or “attributes” of a service, and if this is the case, those paragraphs should be placed before paragraph (c) which serves as a catch-all.

13. We will consider the matter and revert.

Definition of “consumer”

14. “Consumer” is proposed to be defined as “an individual who, in relation to a commercial practice, is acting, or purporting to act, primarily for purposes that are outside the person’s trade or business”. Members asked if the proposed definition of “consumer” (added by clause 3(9)) can be simplified by replacing “outside” with “not for”. We will consider the matter and revert.

Advice Sought

15. Members are invited to note the contents of this note.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
April 2012

Mandatory Cooling-off Periods in Selected Jurisdictions

| Jurisdictions | Types of Products / Contracts | Length of Cooling-off Period |
|-----------------------------------|---|------------------------------|
| United Kingdom | Timeshare rights contracts (contracts for buying the right to spend a set period in a holiday property for a specified period) | 14 days |
| | “Doorstep selling” contracts (contracts concluded over visits to consumers’ places of work or residence) | 7 days |
| | Distance selling contracts (contracts concluded by means of distance communication) | 3 working days |
| Singapore | Timeshare rights contracts | 5 working days |
| | Doorstep selling contracts | 5 working days |
| Australia (Commonwealth level) | Unsolicited consumer agreements (including doorstep and distance selling) | 10 business days |