Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau

Report on Public Consultation on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices

This report can be found on the internet at
http://www.cedb.gov.hk/citb

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CHAPTER ONE

INTRODUCTION

1.1 On 15 July 2010, the Government published a Consultation Paper titled "Legislation to Enhance Protection for Consumers Against Unfair Trade Practices" to seek public views on legislative proposals to tackle unfair trade practices deployed in consumer transactions. The improvement proposals were formulated by the Government following a thorough review of the current consumer protection regime, relevant developments in the local market as well as regulatory arrangements adopted in other jurisdictions. The consultation period ended on 31 October 2010.

1.2 In order to reach out to stakeholders and the public, the Consultation Paper was uploaded onto this Bureau's website and copies were made available at the 18 District Offices. A dedicated page on Facebook was established, providing an on-line platform for members of the public to express views on the proposals. Briefings were conducted for the Panel on Economic Development of the Legislative Council, chairmen of District Councils, chambers of commerce and trade associations. We also attended meetings of three District Councils (or their committees) and took part in programmes on the electronic media. The names of the organizations and bodies which we have met are listed in Annex A.

1.3 We have received 107 written submissions[1], by way of fax, mail or email including one in the form of a petition. Separately, the Legislative Council Secretariat has forwarded to us 24 submissions that were submitted to the meeting of the Panel on Economic Development held on 25 October 2010 at which the proposals in our Consultation Paper were discussed. These submissions are reproduced at Annex B to this report[2].

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[1] Some of the submissions are enquiries or complaints against individual companies. We have dealt with such enquiries and complaints separately by referring them to the Consumer Council or relevant Government Departments for follow-up actions where appropriate.

[2] We have crossed out the identity of some of the respondents at their

Respondents included members of the public, commerce and trade associations, political parties and professional bodies.

1.4 This report summarizes the main public views we received and sets out the Government's response and the way forward. Although the comments posted on the Facebook page are not reproduced at Annex B due to their rather different format, we have taken them into account when formulating the way forward. Readers may wish to refer to the Consultation Paper when studying this report.

express request and also the contact details in the submissions from individuals. Some of the submissions refer to names of individuals or companies. We have crossed out such references while keeping the rest of the submissions intact. Copies of the submissions are available at http://www.cedb.gov.hk/citb.

CHAPTER TWO

OVERVIEW

2.1 In our Consultation Paper, we set out our proposals in respect of the overall approach and focus, the unfair trade practices to be prohibited, enforcement mechanisms, how sectors with specific regulatory regime should be dealt with, consumer redress and cooling-off arrangements (Annex C). This Chapter presents an overview of the public views received and our overall response.

2.2 In paragraph 1.8 of the Consultation Paper, we stated that the key focus of the proposals was to enhance information flows and to ensure that the consumer could make an informed decision based on free will. We also stated that apart from safeguarding consumer rights, we should also give due weight to the importance of preserving the operational efficiency of businesses and avoid over-regulation and impacting on the majority of businesses which trade honestly.

2.3 None expresses strong objection to the focus stated above, but different stakeholders express views on how a proper balance between different interests should be achieved and to what extent government intervention is warranted. Many submissions support stepping up consumer protection and creating criminal sanctions, with some even suggesting expanding the scope beyond the current proposals. On the other hand, business stakeholders consider it important not to impose unnecessary compliance costs on businesses, and express concern on, among other issues, the application of criminal sanctions and the clarity and certainty of the proposed offences. This theme recurs in virtually all topics. Views are particularly diverse in relation to cooling-off arrangements. While many submissions from individual members of the public suggest an expanded scope of applicability, business stakeholders urge caution.

A Balance

2.4 At the heart of the review exercise is the need to strike a reasonable balance between protecting legitimate consumer interests and maintaining operational efficiency of businesses. Our proposals in respect of creating criminal offences to deter unfair trade practices, creating a private right of action and empowering the court to award compensation upon conviction and imposing cooling-off arrangements on specified types of transactions will enhance the protection of consumers. At the same time, in order to encourage compliance and facilitate enforcement, the following complementary measures will be taken:

(a) relevant factors in determining whether an offending conduct takes place will be included in the proposed legislative amendments where appropriate;

(b) suitable defences will be provided for the defendant in criminal proceedings;

(c) a civil, compliance-based enforcement mechanism will be introduced to complement the proposed criminal sanctions with the objective of resolving disputes and stopping unfair trade practices in a more expeditious manner; and

(d) implementation guidelines will be issued to provide reference for businesses and consumers.

2.5 After carefully considering the views and suggestions from the respondents, and drawing reference to regulatory regimes in other major jurisdictions, we propose to maintain the majority of our proposals and modify some. We believe that the revised package of proposals should be able to uphold legitimate consumer rights while addressing the concerns of the business sector. We will analyze the public views received on these specific matters and present our response in the Chapters that follow.

CHAPTER THREE

UNFAIR TRADE PRACTICES TO BE PROHIBITED, PENALTIES AND DEFENCES

3.1 In Chapter One of the Consultation Paper, we proposed that the suggested strengthening of the consumer protection measures be effected primarily through amendments to the Trade Descriptions Ordinance ("TDO") (Cap. 362). In Chapter Two of the Consultation Paper, we proposed to prohibit specified commonly seen unfair trade practices in consumer transactions. The proposed level of penalties and defences to be made available in criminal proceedings are also set out in the Consultation Paper. This Chapter summarizes respondents' views on these topics and our response.

Effecting Improvement Proposals through Amendments to TDO

3.2 All submissions we have received indicate support for our proposal to tackle unfair trade practices by legislative measures. Similar views were also expressed at the briefings we attended. While three respondents (submissions No. A060, A082 and A128) further suggest that a new comprehensive statute should be enacted to consolidate all consumer protection-related Ordinances, the general sentiment is that enhanced legislative protection should be put in place as soon as possible through amending the TDO. **We therefore affirm our proposed approach.**

Unfair trade practices to be prohibited

3.3 In the Consultation Paper, we proposed to broaden the scope of the offence of false trade description of goods and to prohibit other commonly seen unfair trade practices in consumer transactions, namely false trade descriptions of services, misleading

omissions, aggressive practices, bait advertising, bait-and-switch and accepting payment without the intention or ability to supply the goods or services contracted for (items 1 to 7 and 9 of Annex C).

Inclusion of a general provision

3.4 There is general support for our above proposals. Some even suggest that the current proposed scope should be further expanded. Two submissions (No. A060 and A124) specifically suggest that on top of the unfair practices to be prohibited as proposed in the Consultation Paper, a general prohibition, to be modelled on the provisions adopted in the United Kingdom[3], be included. This general prohibition, it is said, will serve as a catch-all provision capable of capturing forms of unfair trade practices which are not covered by our proposed specific offences. On the other hand, a few respondents (e.g. submissions No. A086, A098, A101) question whether criminalization is the only and an effective way of tackling these practices.

Our response

3.5 We welcome the support. On the issue of introducing a general prohibition, we recognize the flexibility it can provide. However, the specific offences that we proposed would already be able to combat and deter the more commonly seen unfair trade practices in Hong Kong, and our proposals as a whole amount to significant improvements over the current legislative regime. Also taking into account the importance attached by some quarters about specificity in crafting the prohibited unfair trade practices (see paragraph 3.16 below) and the likely enforcement difficulties arising from such a general prohibition, **we have no plan at present to introduce a general prohibition into the TDO.** We will

[3] In the UK Consumer Protection from Unfair Trading Regulations 2008, a general provision is included, which provides that a commercial practice is unfair if it "contravenes the requirements of professional diligence" and it materially distorts or is likely to materially distort the economic behaviour of the average consumer (Regulation 3).

nevertheless keep in view the effectiveness of the proposed offences (if enacted) in protecting the legitimate interests of consumers.

Other comments on the Unfair Trade Practices to be prohibited

3.6 Most respondents generally support creating offences of the specified unfair trade practices, though some raise specific concerns in respect of individual proposed offences, mainly on the interpretation and clarity. They are set out below.

3.7 On the offence of *false trade descriptions* (items 1 to 3 of Annex C), noting that the attributes and qualities of physical goods can be readily and objectively described, some respondents (submissions No. A075, A081, A086, A087, A091, A093, A122 and A130) are concerned that services are intangible and their characteristics are not always measureable by objective standards.

3.8 On the proposed offence of *misleading omissions* (item 4 of Annex C), some respondents (submission No. A050, A084, A100, A102, A120 and A130) query what may amount to "material information", the omission of which will become "misleading omissions" if it causes or is likely to cause the average consumer to take a transactional decision which he would have not taken otherwise. They consider that consumers vary in terms of their knowledge and demands, and what is trivial to one may be a critical piece of information to another. In relation to the proposed offence of *aggressive practices* (item 5 of Annex C), some respondents (submission No. A075, A084, A086 and A102) consider that the distinction between aggressive and "enthusiastic" promotional practices is only fine and subjective in nature. As regards the proposed offence of *bait advertising* (item 6 of Annex C), a few respondents (submissions No. A084, A093, A117 and A120) suggest that the notions of "reasonable period" and "reasonable quantities" cannot be defined clearly, as it may not be practicable to predict market demand accurately.

3.9 Lastly, on the proposed offence of *accepting payment without the intention or ability to supply the goods or services contracted for* (item 9 of Annex C), two respondents (submission No. A075 and A086) consider that it is difficult for service providers to accurately project consumer demand for services for which pre-payment has been made, and that accordingly, it is not fair to hold the providers liable.

Our response

3.10 We welcome the general support on the proposed creation of the specified offences. On the concern about the nature of services, we believe that the intangible nature of services does not by itself prevent a truthful trade description. While the characteristics of certain services are not always measureable by objective standards, we would like to point out that the definition of trade descriptions of services proposed in the Consultation Paper does not by itself require that traders have to provide a description of every aspect of services named in the definition, nor does the definition by itself require that any services provided have to display any particular attributes.

3.11 Regarding the concerns expressed relating to the definition and interpretation of the prescribed offences of misleading omissions, aggressive practices and bait advertising as well as related terms, our response are set out in paragraphs 3.22 and 3.23 below regarding definition of terms in general. We will also make available defences for the proposed offences (see paragraphs 3.29 for details).

3.12 As regards the doubts over the proposed offence of accepting payment without the ability to supply the services contracted for, we consider that difficulty in accurately projecting consumer demands is not a sufficient reason for dropping the proposed offence, as suppliers are indeed under contractual obligation to provide services within the time specified in the contract or within a reasonable time.

3.13 **We therefore affirm our proposals to broaden the scope of the offence of false trade description of goods, extend the coverage of the TDO to false trade descriptions of services and create the proposed offences of misleading omissions, aggressive practices, bait advertising, bait-and-switch and accepting payment without the intention or ability to supply the goods or services contracted for**.

Strict Liability and Legal Certainty

3.14 Aside from the current strict liability offence of applying false trade description to goods which we proposed to maintain, we also proposed in the Consultation Paper that the new offences created of false trade descriptions of services, misleading omissions, aggressive practices, bait advertising, and accepting payment without the ability to supply the goods or services contracted for, be cast as strict liability offences[4], i.e. a trader commits an offence if he engages in any of the prohibited acts; and the proof of any prescribed state of mind ("*mens rea*") is not required (items 1 to 6 and 9 of Annex C).

3.15 Only some respondents make specific comments on the issue of strict liability. For those who have commented, views differ as to whether the creation of strict liability offences for the unfair trade practices in question is appropriate. A number of respondents, mainly the Hong Kong Bar Association and those from the business sector (e.g. submissions No. A050, A071, A076, A084, A098, A099 and A101) object to the proposal. The view is expressed that a trader should not be held liable criminally unless intention, recklessness, knowledge or negligence is proved. The Bar Association (submission No. A050) is further concerned that the proposed strict liability offences may pose limitations to the presumption of innocence guaranteed under the Basic Law. Some

[4] The proposed offences of "bait-and-switch" and accepting payment without the intention to supply the goods or services contracted for will require proof of prescribed intention.

respondents (e.g. submissions No. A073 and A104), on the other hand, generally agree to the proposed creation of strict liability offences. The Law Society of Hong Kong (submission No. A073) states that it "does not see anything *per se* objectionable in strict liability offences in consumer protection situations".

3.16 Another concern expressed is the clarity of the definition of offences and related terms. Some respondents (e.g. submissions No. A068, A071, A077, A084, A087, A093, A098, A099, A100, A102, A117, A120 and A130) submit that the offences as well as some important elements[5] have either not been defined clearly or have not been defined in the Consultation Paper and call for greater details. The Bar Association (submission No. A050) states that the imprecision of the terms may fall foul of the principle of legal certainty. It considers that the relevant offences and the associated terms are not amenable to precise definition, so much so that the scope of their coverage is unclear. Some respondents (e.g. submissions No. A077, A080, A081 and A087) suggest that enforcement guidelines should be issued to aid the trade.

Our response

3.17 Firstly, while the common law presumption is that *mens rea* is required before a person can be held guilty of a criminal offence, the courts have recognized that this presumption can be displaced where the statute is concerned with an issue of social concern, and where it can be shown that the creation of strict liability will be effective in promoting the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited acts[6].

3.18 In this regard, there is little dispute that unfair trade practices have attracted widespread social concern in Hong Kong. In 2009 and 2010, the Consumer Council received 8,276 and 3,942

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5 Such as the concepts of "average consumer", "consumer contracts", "consumer transactions" and "transactional decision".

6 *Gammon (Hong Kong) Ltd. v Attorney General of Hong Kong* [1985] AC 1.

complaints respectively concerning unfair trade practices [7]. Unfair trade practices undermine consumer interests and confidence, thereby hurting honest businesses as well. Creation of strict liability will induce traders to be more vigilant to prevent the commission of the prohibited acts, thereby promoting the object of the statute, i.e. enhancing protection for consumers against unfair trade practices. We therefore consider that the criteria referred to in paragraph 3.17 above for dispensing with *mens rea* are applicable to the proposed offences. In fact, applying a false trade description to goods, contrary to section 7 of the TDO, is already a strict liability offence. Similar trade practices offences in Australia and the United Kingdom are also strict liability in nature.

3.19 Secondly, since traders should have reasonably good knowledge of the goods or services they supply, they have the responsibility of exercising reasonable care and due diligence to avoid committing any of the proposed offences. Under our proposals, due diligence defences will be in place for the proposed strict liability offences and additional defences, as set out in paragraph 2.17 of the Consultation Paper, will be made available to the proposed offences of bait advertising and bait-and-switch[8] (for more details, see paragraph 3.29 below).

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[7] Of the 8,276 complaints received in 2009, most of them involved misrepresentation, high-pressure or aggressive practices and "bait-and-switch" tactics. Some 4,000 of them were related to structured financial products and arose mainly from the Lehman-Brothers incident. The number of complaints relating to structured financial products dropped drastically to 87 in 2010.

[8] Section 26 of the TDO provides that in proceedings for any offence under the TDO, it is a defence for the defendant to prove that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control, and that the defendant took all reasonable precautions and exercised due diligence to avoid the commission of the offence by himself or any person under his control. Section 27 provides for defences for publishers. We proposed in the Consultation Paper that these defences should be made available in respect of the proposed offences. For the proposed offences of bait advertising and bait-and-switch, we proposed that additional defences, i.e. the defendant had taken immediate remedial action or he had stated clearly the quantity available and offered all of them for sale, be made available.

3.20 Furthermore, we envisage that the proposed compliance-based mechanism (see Chapter Four for further details), under which the enforcement agency will be empowered to seek undertakings from suspected offenders or injunctions from the courts with a view to stopping conduct which constitutes or may constitute an infringement, will go a long way in combating offending practices without the need in all cases to go down the route of criminal enforcement.

3.21 We believe that the package of proposals strikes a fair and reasonable balance between the interests of consumers and traders. **We therefore affirm our proposal to create strict liability offences of the specified unfair trade practices.**

3.22 As regards the definition of the offences and related terms, we proposed in the Consultation Paper to adopt a general and forward-looking approach in defining the unfair trade practices to be prohibited. This approach is, in our view, necessary to tackle unfair trade practices the forms of which may mutate in response to changes in market conditions or regulatory requirements. An over-prescriptive approach will bring about rigidity and open up loopholes for circumvention. By couching the proposed offences in general terms, our regulatory regime will be more responsive and be able to cater for different types of transactions and changing market situations. It is to be noted that the courts have recognized the need for flexibility in statutory provisions for the purposes of preventing fraudulent practices and aimed at consumer protection. This is also the approach adopted in advanced operative regimes in other common law jurisdictions such as the United Kingdom and Australia. As such, we believe that the lack of legal certainty would not be an issue. We will draw reference to the statutory provisions of operative regimes in other common law jurisdictions in crafting the terms (extracts of such provisions were Annexes A and B to the Consultation Paper).

3.23 **We therefore affirm our proposal of adopting a general and forward-looking approach in defining the proposed offences, drawing reference to the relevant legislative**

provisions in other common law jurisdictions. This notwithstanding, we will put in every effort to refine the terms and definitions of the proposed offences and related terms when preparing the legislative amendments. The Customs and Excise Department ("C&ED") (the principal enforcement agency for the proposed offences) will issue implementation guidelines upon the commencement of the implementing legislation. While the guidelines are not meant to be a substitute of law or an authoritative interpretation of the law, they would assist the trade and consumers in understanding the proposed offences.

Penalties and Defences

3.24 In the Consultation Paper, we proposed that the maximum penalty now prescribed under the TDO[9] similarly apply to the proposed offences (item 10 of Annex C). Only a few respondents comment on the proposal. A submission (No. A081) suggests that criminal sanctions should not apply to small-value transactions, while another (No. A058) considers that the maximum penalty is too heavy for minor contraventions. Some others hold contrary views, suggesting that heavy penalties are necessary to deter offenders (submissions No. A021 and A074). Economic Synergy and the Hong Kong Retail Management Association (submissions No. A077 and A084) ask that liability among owners, management and frontline staff be delineated more clearly.

3.25 We proposed in the Consultation Paper that the current "due diligence defences" provided for under sections 26[10] and 27[11]

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[9] Section 18(1): a fine of $500,000 and imprisonment for five years upon conviction on indictment, or a fine at Level 6 (presently at $100,000) and imprisonment for two years on summary conviction.

[10] i.e. the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control, and that the defendant took all reasonable precautions and exercised due diligence to avoid the commission of the offence by himself or any person under his control.

[11] The defence under the section applies to publishers: that he received the offending advertisement in the ordinary course of business and that he did not know and had no reason to suspect that its publication would amount to an offence under the TDO.

of the TDO be made available to defendants in proceedings for the proposed offences (item 11 of Annex C). We also proposed that additional defences[12] be made available for the proposed offences of bait advertising and bait-and-switch (item 8 of Annex C). There are no objections to our proposals.

Our Response

3.26 On penalty, while it is our intention that the majority of minor disputes between traders and consumers would be resolved under the proposed compliance-based enforcement mechanism (see Chapter Four for more details on the operation of the mechanism), there is a possibility that a particular practice deployed persistently in small-value transactions may cause significant collective harm to consumers. We cannot therefore reserve criminal intervention to high-value consumer transactions. As regards the concern that the penalty is too heavy, it should be noted that the penalty prescribed under the TDO is the statutory maximum, and that it is an established practice for the court to have full regard to the circumstances of the case when sentencing. **We affirm our proposal to apply the maximum penalty prescribed under the TDO to the proposed offences**.

3.27 We note the concern expressed by the trade on the apportioning of liability among owners, management and frontline staff. We will address this matter during the legislative drafting stage.

3.28 For the proposed offence of accepting payment without the ability to supply the goods or services contracted for, we believe that it would be appropriate to add as an additional defence for the defendant to prove that he had taken immediate remedial action by either replenishing stock, causing another supplier to supply the

[12] That the defendant had taken immediate remedial action to meet the unmet demand, by either replenishing the stock, causing another supplier to supply the same goods or service at the same terms or offering equivalent goods or service on the same terms, or that it had stated clearly and truthfully the size of the stock available and offered all of them for sale.

same goods or service on the same terms or offering equivalent goods or service on the same terms.

3.29 **We affirm our proposal to make available the due diligence defences set out in sections 26 and 27 of the TDO in proceedings for the proposed offences, and the specific defence available for the proposed offences of bait advertising and bait-and-switch. We further propose that an additional defence be made available to defendants in proceedings for the offence of "accepting payment without the ability to supply the contracted goods or services".**

Related issues

3.30 While our proposed offences are generally supported, some call for further legislative measures to tackle other specific issues. The views we received and our response are set out below.

Pre-payment

3.31 On the issue of traders failing to discharge contractual obligations after accepting pre-payment, some respondents (submissions No. A051, A072, A104 and A128) call for the setting up of trust accounts for holding pre-payments from which disbursements can be made to traders only upon satisfactory discharge of contractual obligations. One (No. A082) suggests establishing a fund, financed by levies, to compensate consumers in the event that traders who have received pre-payment fail to discharge their contractual obligations. Some others (submissions No. A001, A008, A009, A023, A029, A061, A072, A083, A085, A089, A092, A104, A121, A128 and A130) call for introducing cooling-off periods (during which the consumers may cancel the transaction) for the pre-payment mode of transactions, particularly in services industries including beauty care services, to give additional safeguards to consumers.

3.32 We have strong reservations over the suggestions of establishing trust accounts or compensation funds financed by levies. They would require an elaborate registration system and substantial resources to operate. Such costs might have to be borne by the suppliers and/or consumers. For the proposed trust accounts, there will be practical difficulties in devising appropriate benchmarks for determining how much of and under what circumstances the deposited pre-payments can be disbursed. For the proposed compensation funds, there would be difficulties in defining sectors for the purpose of establishing sector-based compensation funds, but if a single fund were to apply to pre-payments across the whole economy, it would mean requiring enterprises in different sectors to subsidize each other irrespective of their risks of default. We have doubt over the practicability and desirability of the suggestions.

3.33 On the suggestion of extending the scope of cooling-off arrangements, our response is set out in Chapter Seven of this report.

Unfair contract terms

3.34 Several respondents (submissions No. A060, A083, A085, A088 and A124) suggest that unfair contract terms be prohibited by legislative measures.

3.35 At present, the Unconscionable Contracts Ordinance (Cap. 458) provides for a range of relief measures for aggrieved consumers who enter into contracts that are found to be unconscionable. It sets out a list of factors for the court to determine if a contract (or part of a contract) is unconscionable, such as the relative strengths of the bargaining positions of the consumer and the other party. Many of these factors are analogous to benchmarks adopted in other jurisdictions for determining if a contract term is fair or not. In other words, the Ordinance already accords certain protection to consumers aggrieved by unfair contract terms. While there may be a need to consider whether actions to combat unfair contract terms may need

to be stepped up, our current priorities are to push ahead with the legislative amendments to tackle specified unfair trade practices. We can return to the subject only at a later stage.

CHAPTER FOUR

ENFORCEMENT

4.1 In Chapter Three of the Consultation Paper, we set out proposals in respect of enforcement-related matters. This Chapter summarizes the public views on our proposals as well as our response.

Enforcement Agency

4.2 We proposed in the Consultation Paper that the C&ED be appointed as the principal agency for enforcing the proposed offences, and that the Telecommunications Authority ("TA") and Broadcasting Authority ("BA") be given concurrent jurisdiction to enforce the proposed offences in respect of telecommunications and broadcasting services (items 12 and 17 of Annex C).

4.3 Most respondents either express support for our proposals or do not indicate any objection (e.g. submission No. A050 and A073). Only a few respondents make specific comments. Two respondents (submissions No. A101 and A128) express the concern about giving TA and BA concurrent jurisdiction. One (submission No. A098) suggests that the C&ED be the enforcement agency for the telecommunications sector for consistency and equal treatment. Another (submission No. A118) suggests that the division of responsibilities among the enforcement agencies should be made clear to avoid any duplication of efforts. Responses on the applicability of the TDO to the telecommunications and broadcasting sectors are separately dealt with in Chapter Five.

Our response

4.4 The C&ED is presently the enforcement agency for the TDO and is best placed to enforce the proposed offences. Our proposal to give concurrent jurisdiction to the TA and BA seeks to tap their expertise and knowledge in respect of the regulation of the trade practices of the respective licensees. On the interface between the C&ED and the TA and BA, as stated in paragraph 4.12 of the Consultation Paper, the three parties will closely liaise with each other to exchange operational experience and to ensure consistency in enforcement efforts and standards. Suitable training will be made available to staff of the parties for taking on the additional responsibilities. **We affirm our proposal of appointing the C&ED as the principal enforcement agency with concurrent jurisdiction to be conferred on the TA and BA in respect of telecommunications and broadcasting services.**

Compliance-based Mechanism

4.5 In the Consultation Paper, we proposed that a compliance-based enforcement mechanism be established for the enforcement of the proposed offences and the current offence of applying false trade descriptions to goods. Under the proposed mechanism, the enforcement agency may seek undertakings from businesses to stop or refrain from continuing an offending act. The enforcement agency may apply for a court injunction if the business breaches the terms of an undertaking it has given and in other circumstances as the agency sees fit. The Consumer Council will continue to play the role of mediating in disputes between aggrieved consumers and businesses. A referral mechanism will be established between the enforcement agency and the Consumer Council such that every complaint (no matter to whom it is addressed) will be dealt with promptly and effectively (items 13 and 14 of Annex C).

4.6 Most of the respondents either support the proposed mechanisms or do not indicate objection (e.g. submissions A047, A060, A082, A084, A100, A106). Some even suggest that there should be additional sanction tools. For instance, the Consumer Council (submission No. A060) suggests that in addition to the power to demand undertaking and to apply for court injunctions, other enforcement tools or sanction options, such as the power to impose court-enforceable cease-and-comply notices and financial penalties and the power to apply for court declarations, be made available; some respondents suggest empowering the enforcement agency to issue closure or disqualification orders or to impose financial penalties on offenders (e.g. submissions No. A042 and A085), and some others suggest strengthening or establishing a "name-and-shame" mechanism (submissions No. A046, A059, A061, A085 and A131).

4.7 On the other hand, a few respondents express reservations over the proposed mechanism. For instance, the Bar Association (submission No. A050) and the Law Society (submission No. A073) express doubts over the merits we expect of the proposed arrangements. The Law Society does not support the concept of "mixing" criminal and civil enforcement and considers that the proposal to introduce the mechanism is "cumbersome, potentially time consuming and an expensive process". The Bar Association considers that further information on the *modus operandi* of the proposed mechanism is needed. Some respondents (submissions No. A075, A086 and A087) suggest that it is not appropriate for the enforcement agency to possess both enforcement and adjudicative powers.

4.8 On the role of the Consumer Council under the proposed mechanism, there are no major dissenting views. Only two respondents (submissions No. A083 and A102) consider that it is not appropriate to rely on the Council for mediation.

Our response

4.9 We welcome the general support. Regarding the

concern about “mixing” civil and criminal enforcement, we consider that the two sets of measures complement each other. Undertakings and injunctions serve the purpose of stopping or preventing a particular practice, whereas criminal proceedings serve mainly the purpose of penalizing offenders. The availability of civil measures, aside from criminal sanctions as at present, enables the enforcement agency to take a course of action that is the most proportionate and appropriate to a suspected infringement. There is no question of concentrating both enforcement and adjudicative powers in an executive agency as submitted by some respondents, in that the independent judiciary will be involved if a suspected infringer refuses to give an undertaking. Furthermore, instead of being cumbersome and potentially time-consuming, the proposed compliance-based arrangement in fact presents a potentially quicker and more cost-effective way of stopping and preventing offending acts. Both consumers and businesses will stand to gain. **We maintain our proposal to establish a compliance-based mechanism.**

4.10 On the operation of the compliance-based enforcement mechanism, while details will need to be worked out, drawing reference to the arrangements under Part 8 of the United Kingdom’s Enterprise Act 2002, we intend to provide that the enforcement agency may seek an undertaking from a party which in the view of the agency, has infringed or is likely to infringe the fair trade provisions in the TDO. It may apply to the court for an injunction if the party refuses to give the undertaking or breaches any terms of an undertaking it gives.

4.11 Regarding the circumstances under which particular tool (or tools) the enforcement agency may invoke, our intention, similar to the arrangements in the United Kingdom and Australia, is that the enforcement agency will have to be guided by all relevant circumstances surrounding the case, including the nature of the infringement and the existence of any past records of infringements by the subject business. The implementation guidelines to be issued by the C&ED as mentioned in paragraph 3.23 above will also cover enforcement arrangements. The guidelines will be made public and the assistance of industry and trade organizations will be

sought in order to draw the attention of their members' to the guidelines. In the process of formulating the guidelines, the C&ED will engage the public including organizations advocating consumer welfare and industry and trade organizations.

4.12 On the suggestion to provide additional sanctions (such as closure orders and financial penalties), we consider that the present proposed compliance-based mechanism, together with criminal penalties, will serve the dual purpose of stopping and penalizing offending conduct and has struck an appropriate balance between the interests of consumers and business. On the suggestion of establishing a "name-and-shame" mechanism, our intention is that the enforcement agency may publish undertakings that it receives under the proposed compliance-based mechanism. This will enhance transparency in the enforcement process. Separately, the Consumer Council will also consider suitable measures to strengthen its current naming system for greater deterrent and educational effects.

Power to inspect Books and Documents

4.13 Currently, section 15(1)(b) of the TDO empowers the enforcement agency to inspect any goods and enter any non-domestic premises for the purpose of ascertaining whether any offence under the TDO has been or is being committed. This power does not extend to inspecting books or documents. Under section 15(1)(d), the C&ED may require books and documents relating to a supplier's trade or business to be produced, and make copies of them, only if the enforcement agency has reasonable cause to suspect that an offence under the TDO *has been* committed. In the consultation paper, we proposed to amend section 15(1)(b) to empower the enforcement agency also to inspect books and documents at non-domestic premises and take copies of them for the purpose of ascertaining whether a trade practice-related offence has been or is being committed, without being subject to the reasonable suspicion threshold (item 15 of Annex C).

4.14 Respondents commenting on this matter express reservations (submissions No. A047, A050, A058, A068, A070, A077, A080, A084, A093, A100 and A120). The view expressed is that, without any threshold of suspicion or belief, the power is excessive or intrusive.

Our response

4.15 The proposed amendment to section 15(1)(b) of the TDO to give an additional power to the enforcement agency was made for two reasons. First, it is required for ascertaining whether book-keeping requirements under the TDO in respect of certain trades are being complied with [13]. Second, it enables the enforcement agency to take preventive actions in respect of some of the proposed offences, particularly in respect of the provision of services where proof of claims and other facts may be more difficult to be established.

4.16 **Regarding books and documents that are required to be kept under the TDO or its subsidiary legislation, we affirm our proposal to empower the C&ED to inspect and take copies of them to ensure compliance without being subject to the threshold of suspicion**. The statutory object of requiring traders to keep relevant documents will be entirely frustrated if such a power is subject to any preconditions.

4.17 As regards **other books and documents relating to a supplier's trade or business** (other than those required to be kept under the TDO and its subsidiary legislation), in the light of the concerns of the respondents, we agree not to further pursue our original proposal. The present threshold under section 15(1)(d) of the Ordinance, i.e. the enforcement agency may require the production of these books and documents for inspection and to take copies **only if it has reasonable cause to suspect that an offence has been committed**, will continue to apply.

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[13] Such as the requirement for retailers in gold or gold alloy to retain copies of invoices or receipts issued to consumers for a period of not less than three years under section 6(2) of the Trade Descriptions (Marking) (Gold and Gold Alloy) Order (Cap. 362 sub. leg.).

CHAPTER FIVE

SECTOR-SPECIFIC REGIMES

5.1 In Chapter Four of the Consultation Paper, we proposed that the proposed amendments to the TDO should not apply to property transactions, services and products provided by institutions regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Securities and Futures Ordinance (Cap. 571) and the Financial Reporting Council Ordinance (Cap. 588), and professional practices regulated by regulatory bodies established by statute (item 16 of Annex C). As set out in Chapter Three of the Consultation Paper, we also proposed that the TA and BA should be given concurrent enforcement powers under TDO in respect of telecommunications services and broadcasting services respectively (item 17 of Annex C).

5.2 We have addressed in the previous Chapter the public views received in respect of the proposal to give concurrent jurisdiction to the TA and BA. We now summarize in this Chapter other public views received and set out our response.

General

5.3 A few respondents provide general comments on the proposed arrangements for the sector-specific regimes. The Consumer Council (submission No. A060) considers that the proposals are in sync with its previous recommendation, but suggests that a review of the existing statutes and/or codes of practice regulating the specially-treated sectors should be conducted. Other respondents (submissions No. A083 and A120) hold similar views, suggesting that unless the self-regulatory regimes should provide the same or greater level and extent of protection, the relevant sectors should be brought under the ambit

of the TDO. One respondent (submission No. A124) objects to the arrangements, citing the sector-regulators' lack of power to impose criminal sanctions.

Specific sectors

Property Transactions

5.4 A number of submissions contain views on the regulation of property transactions, with most suggesting that property transactions be regulated by legislation (submissions No. A003, A005, A008, A047, A072, A082, A083, A102, A104 and A128).

Financial Services Sector

5.5 Three respondents (submissions No. A003, A008 and A072) propose that transactions of financial services should be brought under the ambit of the TDO.

Professional Practices

5.6 Some of the relevant professional bodies express support for the proposed arrangements for professional practices (submissions No. A013, A045, A050 and A118). The Medical Council (submission No. A127) points out that while the relevant Ordinance empowers it to regulate the professional practices of individual medical practitioners, it does not have jurisdiction *per se* over corporate bodies or health maintenance organizations.

Telecommunications and Broadcasting Sectors

5.7 Various stakeholders, mainly from the trade, comment on the applicability of the proposed arrangements under the TDO to the telecommunications and broadcasting sectors. Several respondents (submissions No. A049, A076, A078 and A099) consider that the current section 7M of the Telecommunications Ordinance (Cap. 106) already prohibits a licensee under the

Ordinance from engaging in conduct which is misleading or deceptive in providing or acquiring telecommunications networks, systems, installations, customer equipment or services. They consider that the trade practices of such licensees should not be brought under the ambit of the TDO. Two other respondents make a similar point, with one (submissions No. A071) suggesting that the proposed offences under TDO should only apply to areas not presently regulated under section 7M of the Ordinance.

Our Response

Property Transactions

5.8 In relation to property transactions, mid-way in the public consultation exercise, on 13 October 2010, the Chief Executive announced in his 2010-11 Policy Address that a steering committee would be set up to discuss specific issues on regulating the sale of first-hand residential properties by legislation and put forward practicable recommendations within 12 months. The concerns expressed by many of the submissions on the arrangements for property transactions would be addressed by this policy commitment. **We therefore affirm our proposal of not subjecting property transactions under the ambit of the TDO.**

Financial Services Sector

5.9 We maintain our view that enforcement over the trade practices in relation to the provision of financial services and products requires specialist knowledge and expertise. Noting that the various related pieces of legislation already impose elaborate controls, **we maintain our proposal** that services and products provided by institutions regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Securities and Futures Ordinance (Cap. 571), and the Financial Reporting Council Ordinance (Cap. 588) should continue to be regulated by the respective regulatory agencies.

Professional Practices

5.10 Regulation over professional practitioners requires specialist knowledge in the respective fields, and we believe that the trade practices of professional practices regulated by bodies established (or registered/recognized, in the case of the legal profession) by the Ordinances listed in Annex G to the Consultation Paper should best be regulated by the respective professional bodies. **We maintain our original proposal.** We will encourage the relevant professional bodies to keep up with the times and consider suitable measures whenever necessary to enhance protection for their clients.

Telecommunications and Broadcasting Sectors

5.11 While section 7M of the Telecommunications Ordinance contains a general prohibition against misleading and deceptive practices, our fair trade provisions are more specific and extend its coverage to other types of unfair trade practices including aggressive practices. **We maintain our proposal of applying the TDO in respect of telecommunications services and broadcasting services.**

CHAPTER SIX

CONSUMER REDRESS

6.1 In Chapter Five of the Consultation Paper, we proposed that to facilitate aggrieved consumers to seek redress, a private right of action be created for any person who suffers loss or damage by conduct of action that was in contravention of the fair trade provisions in the TDO ("private right of action"). We also proposed to empower the court, where a person is convicted of a fair trade offence under the TDO, to order that person to pay to any aggrieved person such compensation for loss or damage sustained as a result of the offending conduct ("power to order compensation") (items 18 of Annex C).

6.2 This Chapter summarizes views on the two proposals and other views relating to consumer redress, as well as our response.

Private Right of Action

6.3 Our proposal has attracted little dispute. Only a few respondents make specific comments on the proposals. The Consumer Council (submission No. A060) and a few others (submissions No. A025 and A093) support the proposed private right of action. One submission (No. A101) considers that the proposal would "potentially provide consumers with undesirable latitude to sue traders" and therefore objects to the proposal. The Law Society (submission No. A073) expresses doubts on the effectiveness of the proposed right, citing difficulties in enforcing awards given by the Small Claims Tribunal. It is also concerned about the costs involved in taking actions at higher courts, as well as the additional workload that may be placed on the courts.

6.4 As regards the appropriate venue, the Consumer Council (submission No. A060) suggests that further consideration

be given to establishing a specialized Consumer Tribunal in the future and enhancing the availability of assistance under the Consumer Legal Action Fund. Two other submissions (No. A082 and A083) echo the latter suggestion. On the other hand, the Bar Association (submission No. A050) and the Law Society (submission No. A073) consider that there are no justifications for establishing a Consumer Tribunal. The Bar Association suggests that the venue of enforcement of the proposed right should be the ordinary courts if it is considered necessary to introduce the right.

Power to order Compensation

6.5 Only one respondent comments on this matter: the Law Society (submission No. A073) suggests that some limited civil powers should be given to the Magistrates (or Principal Magistrates) to award compensation instead of relying on civil courts.

Other Issues

6.6 Some submissions suggest establishing a mechanism for representative actions and empowering the Consumer Council to represent multiple consumers (submissions No. A046, A082, A083, A085, A124 and A128). A few submissions propose establishing a regime for class actions (No. A083 and A124) or a regime for arbitration and mediation (No. A085 and A131).

Our Response

6.7 We welcome the support. On the concerns about the enforceability of awards given by the Small Claims Tribunal, costs of litigation and mechanisms for class and representative actions, they relate to the broader question of administration of justice and accessibility. We do not believe that it is appropriate to delay our proposed actions because of these broader issues which are matters beyond the purview of the current exercise. In connection with the suggestion of establishing a regime for class action, we

note that a Subcommittee of the Law Reform Commission has conducted a study and proposed a package of recommendations for public consultation. We will keep in view the progress of the study and consider if, for instance, the ambit of the Consumer Legal Action Fund should be adjusted when a mechanism for class actions is established.

6.8 We have carefully considered the suggestions to establish a Consumer Tribunal and enhance the Consumer Legal Action Fund. Our views as set out in paragraphs 5.6 and 5.7 of the Consultation Paper stand. In gist, as a matter of principle, we do not see sufficient grounds for treating consumer disputes differently from other types of civil actions and hence do not support creating a Consumer Tribunal. As regards the Consumer Legal Action Fund, the Government has been rendering full support to the Council in the management and operation of the Fund, and has injected $10 million into the Fund in 2010-11. We will keep in view if further injection into the Fund is justified.

6.9 Regarding the Law Society's suggestion of giving Magistrates civil powers, we consider that the suggestion is in sync with the spirit of our proposal and will further explore the matter with relevant parties.

6.10 In the light of the above, **we affirm our proposals to create an express right under the TDO to allow aggrieved consumers to institute private actions on infringements of fair trade provisions and empower the court to order compensation upon conviction.**

CHAPTER SEVEN

COOLING-OFF ARRANGEMENTS

7.1 In Chapter Six of the Consultation Paper, we proposed that cooling-off arrangements be imposed on consumer transactions of timeshare rights and long-term holiday products, and those concluded during unsolicited visits to consumers' homes and places of work (item 19 of Annex C). We also sought public views and comments on various aspects of the operational arrangements involved (such as the length of the cooling-off period, financial and return arrangements and the option for curtailment) (item 20 of Annex C). This Chapter sets out the public views received and our revised proposals in the light of such views.

Public Views

Scope

7.2 Views are polarized on whether there should be mandatory cooling-off and on the scope of application, if any. The business sectors including trade associations and individual business entities (e.g. submissions No. A075, A076, A077, A086, A091, A101) consider that cooling-off is by nature problematic. General views expressed are that cooling-off induces moral hazards, encourages risk-taking by consumers and as a result means additional costs for business, which may translate into higher prices for consumers. It is further pointed out that the option for consumers to cancel a contract in effect provides a low-cost exit for unscrupulous suppliers. The sentiment is that if unfair practices have been involved, they should be tackled through the proposed offences to be created, and if such practices are not involved, the contract should be respected. Respondents from the beauty care services industry (submissions No. A075, A086 and A091) oppose to imposing cooling off on their trade, some pointing that cooling-off periods cannot effectively solve the prevalent problems complained

of the industry, such as difficulties in securing booking for services and poor service quality, since unscrupulous businessman will only allow these problems to surface after the cooling-off period has ended. Respondents from the telecommunications and broadcasting sectors (submissions No. A076 and A101) likewise object to imposing cooling off on their sectors. Quite a number of respondents, including the Bar Association (submission No. A050), and many trade and commerce associations (e.g. submissions No. A077 and A087), on the other hand, support our proposal of imposing cooling-off periods on only the two types of transactions.

7.3 There are also quite a number of respondents who take the opposite view. They consider our proposed scope of mandatory cooling-off too narrow and ask for an expanded scope of application. The general view is that cooling-off arrangements can allow consumers to reconsider their decisions, free from any undue influence that could have been applied during the contract-making process.

7.4 There are different views on the proposed scope of expansion. Two (submissions No. A027 and A059) propose that there should be cooling-off period for all transactions. Some (submissions No. A029, A121 and A128) suggest that it should apply to contracts for the supply of services in general. Some others (submissions No. A001, A008, A023, A061, A085 and A130) consider that it should cover contracts with pre-paid arrangements (irrespective of whether they involve the supply of goods or services). Yet some other suggestions involve mixed elements: the Consumer Council (submission No. A060) suggests that cooling-off periods be imposed on contracts with prepaid arrangements, "… where the time between contract negotiation and conclusion is short; … and consumers may make short-sighted or emotion-based decisions"; some (submissions No. A048, A072, A082 and A104) suggest covering contracts for the supply of services of a long duration or involving pre-paid arrangements; and one (submission No. A129) suggests covering contracts of a duration longer than two years or worth above a certain amount (e.g. $10,000). Furthermore, some respondents (submissions No. A009, A083, A089 and A092) propose that cooling-off periods be imposed on

specified sectors like the provision of beauty care services or fitness training. Others (submissions No. A004, A035, A040 and A073) suggest that transactions concluded over the phone or those entered into as a result of unsolicited emails, or not at the premises of the supplier should be given the same benefit of cooling-off.

Operational arrangements

7.5 The Consumer Council (submission No. A060) considers that there is no straitjacket for the operational arrangements for cooling-off periods. It suggests that the arrangements should be designed such that consumers can get hold of critical information about their rights of cancellation and that the exercise of the rights would not be fettered.

7.6 Views vary as to the appropriate *length of cooling-off periods*. Two submissions (No. A024 and A085) support pitching it at 7 days. Two others suggest (No. A094 and A121) extending the period to 14 days, and another (submission No. A061) suggests 21 days to 1 month. Referring to our original proposal of imposing cooling-off periods on consumer transactions concluded during unsolicited visits, one respondent (submission No. A093) suggests a shorter period of 3 to 7 days.

7.7 On *cancellation fees*, several respondents (submissions No. A047, A083, A120 and A122) propose that suppliers should be allowed to charge fees for contract cancellation. One (submission No. A022) proposes that the fees should be capped at $500 or 10% of the consideration. Some others (submissions No. A041, A073, A094 and A130) suggest that such fees should not be chargeable as they may fetter the exercise of the right of cancellation.

7.8 On the issue of whether consumers may *waive the right of cancellation or curtail the cooling-off period*, views are mixed. While some (e.g. submissions No. A024, A040, A041, A122 and A130) suggest that such an option should not be given, some (A073 and A076) consider that it is desirable, in the light of the possibility that suppliers will be reluctant to start performing the contract during the cooling-off period, thereby failing to meet the needs of those

consumers who want immediate supply of the product concerned. On the related issues of *whether contract performance can commence during the cooling-off period* and, if so, how much the supplier may charge the consumer for damages to the goods or the part of the services used, some respondents (submissions No. A024, A047, A073, A083, A087, A093, A120 and A122) consider that contract performance should be allowed to start, and that suppliers should be allowed to charge reasonable costs of the product consumed and necessary expenses in the event that the contract is cancelled.

Revised Proposals

Scope

7.9 If we understand it correctly, suggestions for imposing cooling-off periods primarily stem from concerns over various types of unfair trade practices (such as misleading descriptions and aggressive practices) and the difficulty experienced by consumers in getting their money back when suppliers fail to discharge their contractual obligations. Our original proposal of limiting mandatory cooling-off periods to two types of consumer transactions was premised on the ground that creating specific criminal offences, as we have proposed, will be more effective in combating these unfair practices than imposing cooling-off periods[14]. The two types of transactions proposed, on the other hand, were well justified to be subject to mandatory cooling-off because, as set out in paragraph 6.8 and 6.9 of the Consultation Paper, timeshare rights and long-term holiday products are relatively novel to average consumers in Hong Kong, and consumers are often caught off guard during unsolicited visits to their homes or places of work and could be subject to abuse.

[14] For instance, misrepresentation on the efficacy of the product and misleading omissions may only come to light after the expiry of the cooling-off period and after a consumer starts to use the product. Neither can cooling-off period deal with the unfair practice of accepting payment without the intention/ability to supply the contracted products.

7.10 However, we have considered the overwhelming call for expansion of the scope of application. We do recognize that cooling-off periods can accord greater protection for consumers in terms of allowing them to reconsider their decisions, after consulting third parties where necessary, free from any undue influence that may have been exerted during the course of the transaction. Moreover, the availability of cooling-off periods can also add to deter unscrupulous acts like aggressive practices in the first place. In the light of these benefits and the sentiments of the community, we agree that an expansion of the scope of mandatory cooling-off arrangements is suitable.

7.11 We have carefully considered the appropriate scope of expansion. While there are views suggesting that cooling off be applied to specific sectors, a sectoral approach is not practicable. In the absence of an industry specific registration system in many trades, it is not possible to delineate the boundaries between sectors for the purpose of imposing cooling-off. For instance, whether a service offered by a business entity is beauty care services can be arbitrary and arguable. A sectoral approach cannot meet changing market conditions and may easily be circumvented in the circumstances. In any case, we do not have sufficient empirical data for targeting a particular industry.

7.12 We also do not consider it appropriate to use the transaction amount for determining the scope of application either. Whether an amount is expensive or not is relative. There may be divergent and subjective views on what should be the appropriate amount.

7.13 We consider that using the duration of contract is a more pragmatic yardstick. We propose that **mandatory cooling-off periods be imposed on contracts involving goods and/or services with a duration of not less than six months**. A six-month timeline is proposed because it allows less scope for circumvention when compared with, say, a 12-month timeline. Transactions of timeshare rights and long-term holiday products, being one of the two types of transactions subject to cooling-off arrangements under our original proposal, will be subsumed under

this category. **As to the other type of transactions covered by our original proposal, viz. consumer transactions concluded during unsolicited visits to consumers' homes and places of work, we maintain that these transactions should be subject to cooling-off arrangements irrespective of their contract duration.**

Curtailment

7.14 Whether cooling-off periods may be curtailed by mutual agreement of the supplier and the consumer is an important issue. While there is a possibility that suppliers may offer incentives to induce consumers to curtail the cooling-off period to the latter's disadvantage, we recognize that it is not uncommon that consumers may want to use the products or commence the service immediately, well before the end of the cooling-off period (such as in the case of paid TV and telecommunication services). Providing for curtailment would therefore be appropriate. In any case, any aggressive practices or misrepresentations deployed in the process of the curtailment agreement will be subject to the regulation of our proposed offences. Nevertheless, we recognize that if consumers start using the products during the cooling-off period but ultimately decide to cancel the contract before its expiry, what constitutes reasonable compensation to suppliers may be subject to dispute (e.g. in the event that a consumer cancels a paid TV contract after viewing a football match final).

7.15 On balance, we propose that **the cooling-off periods can be waived or curtailed by mutual agreement of the consumer and the supplier**. Consumers will benefit from the extended scope of cooling-off arrangements and, at the same time, they are expected to exercise their rights rationally and responsibly. Suppliers will be required to inform consumers of the cooling-off arrangements, including the rights of cancellation and curtailment, to facilitate the latter to make an informed choice. Since curtailment is allowed, if consumers want to start using the goods and/or services right away, they can curtail the cooling-off period or waive the right of cancellation. The question of compensation for goods or services consumed during the cooling-off period therefore falls

away, and in this light, we propose that **contract performance cannot commence within the cooling-off period**. We believe that these arrangements strike a proper balance between the interests of consumers and suppliers. Compliance costs will also be reduced.

7.16 On other aspects of the operational arrangements, we maintain our previous proposal that **a cooling-off period of seven working days** is about right. When a contract is cancelled, **suppliers should return to the consumers any money paid**, including any security provided, **within 30 calendar days** after the day on which the contract is cancelled, as we originally proposed.

CHAPTER EIGHT

CONCLUSIONS AND WAY FORWARD

8.1 The public consultation exercise has drawn a good response from various quarters of the community. The feedback received suggests that there is general support for our broad approach and most of our specific proposals. We have modified the proposals in respect of the enforcement authority's power to inspect books and documents as well as the cooling-off periods, in the light of the public feedback and comments.

8.2 We have started the preparatory work for legislation to implement the recommendations. Our target is to introduce it into the Legislative Council for scrutiny within the 2010-11 legislative session. With the introduction of the Bill, the community will have the opportunity to comment on the detailed legislative provisions. We invite the public to participate in the process as it has done in the present consultation exercise.

Annex A

Public Consultation on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices

Briefings for Organizations

Organization	**Date**
Commerce, Industry and Housing Committee of the Tuen Mun District Council	9 August 2010
Federation of Hong Kong Industries	26 August 2010
Hong Kong Retail Management Association	17 September 2010
Hong Kong Chinese Importers' and Exporters' Association	20 September 2010
Retail and Tourism Committee of the Hong Kong General Chamber of Commerce	21 September 2010
Central and Western District Council	6 October 2010
New Territories Association of Societies	7 October 2010
Small and Medium Enterprises Committee	14 October 2010
North District Council	14 October 2010
Wan Hon District Elderly Community Centre of the Hong Kong Christian Service	25 October 2010
Retail Task Force of the Business Facilitation Advisory Committee	29 October 2010
Professional Validation Centre of Hong Kong Business Sector	9 November 2010

Annex C

List of Proposals contained in
Public Consultation Paper on
Legislation to Enhance Protection for Consumers
Against Unfair Trade Practices

1. To extend the coverage of the Trade Descriptions Ordinance (TDO) to prohibit false trade descriptions in respect of services made in consumer transactions, and to define "services" as including "any rights, benefits, privileges or facilities that are, or are to be, provided, granted, conferred or offered" under any consumer contract but excluding rights, privileges or facilities that are, or are to be, provided under a contract of employment (paragraph 2.3 of the Consultation Paper).

2. To broaden the existing definition of trade description in respect of goods to mean any indication, direct or indirect, and by whatever means given, with respect to any goods or parts of goods (paragraph 2.4 of the Consultation Paper).

3. To adopt a non-exhaustive definition of trade description in respect of services made in consumer transactions to mean any indication, direct or indirect, and by whatever means given, with respect to any services or parts of services (paragraph 2.5 of the Consultation Paper).

4. To create a strict liability offence under the TDO prohibiting misleading omissions in consumer transactions. 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. When deciding on whether a practice is a misleading omission, all the features and circumstances of the commercial practice should be taken into account (paragraph 2.8 of the Consultation Paper).

5. To create a strict liability offence under the TDO prohibiting aggressive practices in consumer transactions. A commercial practice will be considered as aggressive if, in its factual context, taking into account all relevant circumstances, it significantly impairs the consumer's freedom of choice through the use of harassment, coercion or undue influence and it thereby causes him to take a transactional decision he would not have taken otherwise. Also to be included in the TDO will be a non-exhaustive list of factors which should be taken into account when determining whether a practice uses harassment, coercion or undue influence (paragraph 2.13 of the Consultation Paper).

6. To create a strict liability offence under the TDO of "bait advertising" in consumer transactions prohibiting 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 (paragraph 2.16 of the Consultation Paper).

7. To create an offence under the TDO of "bait-and-switch" in consumer transactions prohibiting a person from making an offer to sell products at a specified price with the intention of promoting a different product. The enforcement agency is required to prove the existence of an intention of promoting a substitute (paragraph 2.16 of the Consultation Paper).

8. To provide additional defences in proceedings for the proposed offences of "bait advertising" and "bait-and-switch" viz. it will be a defence for the accused to prove that it has taken immediate remedial action by either replenishing the stock, causing another supplier to supply the same goods or service on the same terms, offering equivalent goods or service on the same terms, or it has stated clearly and truthfully in the relevant advertising materials the size of stock available at the specified price and offered all of them for sale (paragraph 2.17 of the Consultation Paper).

9. To create an offence under the TDO prohibiting the practice of "accepting payment without the intention to supply the contracted products" in consumer transactions, where the prosecution is required to prove a prescribed intention, and to create a strict liability offence prohibiting the practice of "accepting payment without the ability to supply the contracted products" in consumer transactions (paragraph 2.20 of the Consultation Paper).

10. To apply the maximum penalty prescribed under section 18(1) of the TDO to the proposed offences, i.e. on conviction on indictment, a fine of $500,000 and imprisonment for 5 years, or on summary conviction, a fine at Level 6 (presently at $100,000) and imprisonment for 2 years to all proposed offences (paragraph 2.21 of the Consultation Paper).

11. To make available due diligence defences (as set out in sections 26 and 27 of the TDO) in proceedings for the proposed offences. Under section 26, it is a defence for the accused to prove that the commission of the offence was due to, among other things, a mistake or information supplied by a third party or an accident, and that he had exercised due diligence to avoid committing the offence. Section 27 provides defences for publishers (paragraph 2.22 of the Consultation Paper).

12. To designate the Customs and Excise Department (C&ED) as the primary enforcement agency in respect of the proposed offences under the TDO (paragraph 3.4 of the Consultation Paper).

13. To introduce a compliance-based mechanism to complement criminal sanctions to promote adherence to the TDO. The enforcement agency will be empowered to seek undertakings from businesses, as appropriate, to stop or refrain from continuing an offending act. The enforcement agency will be empowered to publish the undertakings, and to apply to the court for an injunction if a business has breached any undertaking it has given, or in other circumstances as the enforcement agency sees fit (paragraphs 3.7 to 3.8 of the Consultation Paper).

14. To establish a referral mechanism under which the enforcement agency and the Consumer Council can coordinate with each other on actions to be taken on consumer complaints (paragraph 3.9 of the Consultation Paper).

15. To amend section 15(1)(b) of the TDO to empower the C&ED to inspect books and documents at non-domestic premises and take copies of them for the purpose of ascertaining whether an offence under the TDO has been or is being committed (paragraph 3.14 of the Consultation Paper).

16. Not to apply the fair trade provisions in the TDO to services and products provided by institutions regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Securities and Futures Ordinance (Cap. 571), and the Financial Reporting Council Ordinance (Cap. 588), property transactions and professional practices regulated by regulatory bodies established by statute (paragraphs 4.3 to 4.10 of the Consultation Paper).

17. To give concurrent jurisdiction to the Telecommunications Authority and Broadcasting Authority to enforce the fair trade provisions in respect of telecommunications services and broadcasting services under the TDO (paragraphs 3.4, 3.8, and 4.11 to 4.12 of the Consultation Paper).

18. To expressly provide in the TDO that a person who suffers loss or damage by conduct of another person that was in contravention of the fair trade provisions may recover the amount of loss or damage by action against that other person or against any person involved in the contravention. Where a person is convicted of an offence relating to unfair trade practices under the TDO, the court may, in addition to passing a sentence, order the person so convicted to pay to any aggrieved person such compensation for loss or damage sustained as a result of the offending conduct as the court thinks appropriate, or make any other orders as it thinks fit (paragraph 5.4 of the Consultation Paper).

19. To impose cooling-off periods on transactions of timeshare rights and long-term holiday products, and transactions concluded during unsolicited visits to consumers' homes and places of work (paragraph 6.7 of the Consultation Paper).

20. To further develop detailed arrangements for implementing cooling-off period in the light of public views and suggestions (paragraph 6.10 of the Consultation Paper).