



對立法打擊不良營商手法諮詢的建議書

Submission on the Consultation on Legislation to Enhance Protection for Consumers against Unfair Trade Practices

YOGA



公共專業聯盟

The Professional Commons

**Submission on the Consultation on
Legislation to Enhance Protection for Consumers
Against Unfair Trade Practices**

I. Introduction

1. It is imminent for the Government to further strengthen the legislation combating unfair trade practices, in a bid to alleviate the disparity between consumers and business under current market environment in the nearest future. In the light of this, The Professional Commons (hereafter “The ProCommons”) generally agrees to extend the coverage of the existing Trade Description Ordinance, subject to amendments, to service industry. As the proposed legislation is of crucial importance to safeguarding people’s wellbeing, particularly their basic rights as a consumer, it would be advisable to incorporate the following principles:
 - All kinds of trade practices that infest consumers should be seriously addressed;
 - The amendments should be considered the “lowest common standard” for the sake of regulating unfair trade practices of all kinds, by which all sectors of trade should maintain without any exemptions;
 - Various sector-specific rules and regulations should still be valid on condition that standards accordingly should be up to par, as far as the lowest common standard is concerned;
 - The proposed mechanism aiming to effectively settle disputes between consumers and business, via negotiation to compliance, are not supposed to be watering down the significance of law enforcements. In so doing, the presence of a clearly identified body responsible for law enforcement, as well as a set of punitive measures in association with the seriousness of offences committed, could help combat unfair trade practices in a forceful manner;
 - The imbalance in information on consumer end should be seriously addressed in order to safeguard their right of being informed;
 - Empowerment on consumers through embodying their title to appeal is also an effective means of combating unfair trade practices;
 - Consumer rights are by nature manifold, therefore protection of consumer

right to choose should also be achieved through enactment of other rules and regulations.

II. Unfair Trade Practices to be Prohibited

A. Regulating “Improper Free Trial” under “Bait-and-Switch” Practices

Present Situation

2. People sometimes mistakenly fell prey to the “free trial” consumer traps, where “easier registration than its cancellation” constitutes the crux of problem. These tricks are somewhat similar to those being used by “Bait-and-Switch” practices. Consumers are always attracted to campaigns and advertisements that use “free trial” as a bait, claiming that services can be suspended without any charge involved if the consumers are finally not satisfied with the services. It involves no wrongdoing if there is no intended misleading of consumers. But the fact is that the registration procedure is so simplified that services can be triggered by just a simple confirmation of acceptance of service over phone or official website of companies concerned. By contrast, procedures involved in cancellation are rather difficult like unapparent pages or hyperlinks leading to service cancellation, no answer on Customer Service Hotline, etc. Many customers failed to cancel the service even after the “free trial period” and eventually incur big payments, so on and so forth. The situation might be even worse when cancellation of direct debit is involved.

Proposals

3. In order to give due weight to fair trade practices, service providers should only be required to provide a convenient opt-out mechanism that is comparable to the ways leading to a successful registration of services. Such an arrangement is designed to strike a healthy balance between interests of consumers and businesses.

B. Unconscionable Contract Provisions: Proposed Area of Scrutiny

Present Situation

4. Some service providers, for various reasons, change contract terms and constitutions unilaterally, which might put interests of their clients in jeopardy. This is possibly attributed to the presence of unfair contract terms.
5. It is not uncommon to realize cases that involve severe damage on clientele's interest arising from business's unilateral change of contract terms, despite presence of statutory regulatory bodies in sectors of finances and telecommunications respectively. Recently, there has been an incident involving a company that revised the terms of fund prospectus it published in extensive scale. Even worse, the client was not informed of the change on time and therefore missed the redemption period¹. The second case involves a banking corporation that mailed its clients new credit card without their consent but assume they agree to accept without receiving their written objection during a designated period². Also, consumers are beset by recurrence of problems concerning automatic contract renewal, in which clients had not been informed of any contract renewal by individual telecommunications companies, and even penalty was imposed for those who rescinded a contract³. Given the non-compliance in sectors that are under the scrutiny of existing framework, it is unreasonable not to put them under regulation of the proposed legislation, not to mention other sectors without similar framework in place, on which regulation should be enhanced.
6. Consumers always receive loads of notifications concerning change of terms of contract and prospectus *ex parte* by banking and credit card corporations. They are always annexed with a long text justifying the change in esoteric legal terms, or just some minor amendments in unison with relevant requirements from regulatory bodies which cause no practical impact on the service itself. In the face of these revised terms, ordinary people neither understand nor pay serious attention to them. For a better protection over consumer rights, transparency in connection with relevant documental revisions should be enhanced.

¹ “基金章程頻大改 收信已過贖回期”, *Mingpao*, Oct 8 2010

² “銀行暗招促銷白金卡”, *Apple Daily*, Sept 9 2009

³ “消委斥電訊公司自動續約”, *Mingpao*, Sept 16 2010

7. Despite the fact that the courts are entitled to deal with unfairness and illegitimacy in contract terms and dispense verdicts accordingly by invoking the Unconscionable Contracts Ordinance (Cap. 485), it would result in great wastage of valuable legal resources due to the tedious proceedings and hearings concerned. Given that the proposed legislation is aimed at resolving more business disputes by civil means, it would be much accomplished by further extending the scope of the existing Trade Description Ordinance to unfair contract terms.

Proposals

8. We are of the view that the proposed legislation should put unfair trade practices like “unilateral change of contract terms”, “automatic contract renewal” and “no denial as acceptance” under regulation:
- Service providers are obliged to offer a higher degree of transparency whenever change of contract terms happens. Prompt notification is a must and the information within should comprise a summary in plain language describing the amendments for easy reference, as well as a formal revised version of contract for detailed examination. It is also crucial that the enforcement agencies should launch a direct investigation where appropriate once their receipt of complaints. It is suggested that specific measures to boost transparency can refer to the proposed amendments on the Personal Data (Privacy) Ordinance over collection and use of personal data in direct marketing⁴;
 - As an ordinary business practice, a complete ban on automatic contract renewal would not be practical. Remedial measures aimed at enhancing transparency should be in place, including issue of reminder by service providers within a reasonable period in advance. It should also be highlighted that the renewal is only effective upon consent of clients concerned;
 - The proposed legislation should clamp “No denial as acceptance” down without leniency, which has unreasonably placed consumers into an inferior position;
 - In the long run, the Government should encourage respective business

⁴ “The Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance” (Summary of Proposals), p. i, Oct 2010.

sectors to jointly develop and therefore adopt standard contracts, so as to boost confidence of consumers.

III. Effective Law Enforcement

A. Compliance-based Mechanism

Present Situation

9. In view of the high evidential threshold concerning criminal proceedings, a problem derived from introducing “compliance-based mechanism” is that enforcement agencies will not be easy to make prosecutions, whereas consumers are less likely to recoup the compensation they deserve. Proposed amendments on the Trade Description Ordinance put in place a civil arrangement in a bid to facilitate the resolution of business disputes in a more efficient and effective manner but may incur problems including inadequate legal involvement. First, as the designated enforcement agency, the Customs and Excise Department does not share the right comparable to Privacy Commissioner for Personal Data of issuing Enforcement Notices. Second, the consultation paper does not establish the necessity to treat the “undertakings” signed by businesses engaged in unfair trade practices as a formal legal document. For this reason, the court, within its jurisdiction, can only issue an injunction even these businesses failed to fulfill their “undertaking”, which is seriously speaking not regarded as penalty of any sense. More importantly, no punitive measures has been laid out as a principle by the consultation paper when in violation of any undertakings businesses previously committed, which is far from the principle underlying the “compliance-based mechanism” of the UK⁵.

Proposals

10. To ensure the deterrence of the proposed “compliance-based mechanism”, it is of utmost significance that the “undertakings” tendered to the enforcement agency should be a formal legal-binding document, whereby the enforcement agency can in turn tender to the court to trigger the necessary

⁵ Detail refers to <Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries>, ESRC Centre for Competition Policy, The Government of the United Kingdom
< <http://www.bis.gov.uk/files/file50027.pdf> >

legal proceedings in view of any non-compliance situations. By doing so, enforcement agency can indirectly impose necessary punishment on businesses of non-compliance, therefore not descended into a “toothless tiger”.

B. Consumer Council as a Mediator: Potential Conflict of Interests

Present Situation

11. Despite the fact that “forestalling and mediating disputes between consumers and business” is considered one of the main duties of the Consumer Council⁶, we do not concur with any proposals attempting to make mediation become its “regular duty”. It is because once the Consumer Council becomes a mere mediator, it is supposed not to be representing any of the particular sides, therefore no longer be on behalf of consumers while engaging into complaints concerning consumer rights. As far as the current market environment of Hong Kong is concerned, consumers are always at a disadvantage, and it should be highlighted that the Consumer Council has had an impressive track record of safeguarding consumer rights. If strengthening its role as a mere mediator, its paramount role as a “safeguard” of consumer rights is expected to decline and their wellbeing will be under threat accordingly.

Proposals

12. Subject to limitations, the Consumer Council is still able to continue its role as a mediator. However, we do not believe such a role has any room for further expansion, otherwise violating its existing role as a “spokesperson” for consumers. On the other hand, the Council is expected to be more proactive in representing aggrieved consumers as an advocate via capitalizing on the existing Consumer Legal Action Fund, where the Government is advised to inject more money into (Please see the paragraph #17).

⁶ Detail refers to “Main Duties” section on the official website of the Consumer Council, <http://www.consumer.org.hk/website/ws_chi/profile/mission/mission.html>

13. By virtue of its abundant experiences on handling complaints and legal proceedings concerning alleged damage to consumer rights, the Consumer Council is advised to be a major party held responsible for any necessary case referral to enforcement agencies concerned when crimes that allegedly harm the consumer right are involved.

IV. Consumer Rights and Empowerment

Present Situation

14. Despite the fact that aggrieved consumers are entitled to resort to private actions for remedies when encountering offending acts of business, the protection for consumers against unfair trade practices, as suggested in the proposed legislation, is by no means adequate. As mentioned in the consultation paper, most consumers may not have the incentive to seek private law remedies through the court⁷. Furthermore, there is a growing trend in complaints concerning protection of consumer rights in recent years without a proportional increase in figures indicative of successful prosecutions. Even worse, there has been in a few years zero prosecution⁸, suggesting that the performance on consumer rights protection via the existing legal channels is far from satisfactory.
15. The Consumer Legal Action Fund managed by the Consumer Council is in principle entitled to subsidize consumers with legally justified cases to make legal appeal, but in reality there are still considerable legally justified cases that were declined due to the lack of “demonstration effect”⁹. The Fund has been established for over 15 years, in which only 32 cases were accepted, when compared to torrents of complaint cases received by the Council averaging 36,000 per year¹⁰. The situation is so worrying that the Fund will no longer be capable of providing aggrieved consumers with viable legal means if its current mode of operation persists.
16. In fact, it is evident that class actions are able to facilitate empowerment on consumers. Last year, the Law Reform Commission of Hong Kong launched a consultation on this topic, suggesting that considerable claimants involved, or to be involved, in any litigation can result in a better and affordable

⁷ “Legislation to Enhance Protection for Consumers Against Unfair Trade Practices” (Public Consultation Paper), Commerce and Economic Development Bureau, para 2.19, July 2010.

⁸ Detail refers to “LCQ5: Regulating contents of advertisements”, Commerce and Economic Development Bureau, Feb 4, 2009.

⁹ “Report on Condition Fees” (Executive Summary), the Law Reform Commission, para 48, Nov 2005
< http://www.hkreform.gov.hk/en/docs/rconditionals_e.pdf >

¹⁰ Detail refers to the minute of the Legislative Council meeting dated Jan 6, 2010, p. 136.

distribution of legal fee amongst each claimant. On the other hand, class actions have been proved successful in “narrowing down the disparity between consumers and business parties” particularly the conglomerates. More civil appeals are favourable to the establishment of more precedents, therefore the enhancement of the legal justice¹¹.

Proposals

17. The Government is advised to provide the existing Consumer Legal Action Fund with a more active role in empowerment on aggrieved consumers via lowering down its threshold of application so as to, coupled with more fund input, benefit more potential claimants to launch litigation where necessary. It would also be important for the Consumer Council to play the role as the advocate on behalf of aggrieved consumers and help them claim their loss back.
18. The Government should speed up the introduction of class actions via necessary legislation, therefore making consumers better equipped to fight for their rights against disingenuous business on an equal footing. In addition, as far as the merits of introducing class actions is concerned, less public resources would be necessary because it is basically a civil proceeding and more claimants would be involved, therefore less abuse on legal resources is expected.

¹¹ “Class Actions” (consultation paper), the Law Reform Commission, para 23b, 27, Nov 2009
< <http://www.hkreform.gov.hk/en/publications/classactions.htm>>

V. Issues Concerning Exemption over Sector-Specific Regimes

Present Situation

19. The consultation suggests the sectors including finances, telecommunications and real estate should continue their own sector-specific regimes. But in fact, many are skeptical about their effectiveness when looking deeply into the terribly skyrocketing figures of complaints over these sectors, as well as grievance being smoldered in a midst of general public. Amidst of complaints received by the Consumer Council are the telecommunications one that top the list, where 9,759 and 9,166 were received in 2008 and 2009 respectively. In the light of this, the Office of the Telecommunications Authority (“the Authority”) issued a Code of Practice for Service Contract in February this year for compliance of the trade on a voluntary basis. Despite this, 6,087 complaints against telecommunications services were still received by the Council, while 546 cases concerning contract disputes were in the hand of the Authority during the first eight months of this year that has overtaken the whole last year. It can be seen that the Code of Practice fails to ensure compliance, suggesting the need to enhance regulation.
20. There has been a lack of effective legal regime over sales of private properties, where the operation hinges upon the operating guidelines issued by the Real Estate Developers’ Association of Hong Kong, a trade association of property developers. Such an arrangement is generally self-discipline based without any sense of legal validation, as far as these trade guidelines are concerned. More importantly, the association is not an independent statutory body but a mere “guild” that is supposed to look after the business interest of its members. To date, there has been no impressive track record in self-regulation that could help build its credibility amongst the public. On the contrary, its bad track record was vividly illustrated by a vicious circle in which once issues concerning improper selling practices exposed, the association did nothing but cobbled together piecemeal a guideline to temporize. Against this background, sagas involving “shrunk flats” and “expanded flats” come after one another. The latest example is its procrastination of the

enforcement of the “nine new measures and 12 requirements” over sales of completed flats.

21. In fact, there has been a discourse of authority by the Law Reform Commission concerning the way to protect consumers while they are buying flat. In 1995, the Commission published the “Report on Description of Flats on Sale”, suggesting despite the fact that “the purchase of a property is likely to be the most significant investment an individual would make, purchasers of flats, particularly uncompleted flats, in Hong Kong are often not provided with accurate and sufficient sales information”. It went on to highlight “legislation is the most effective way to bring about the intended results and ensure adherence to a uniform set of standards”¹².

Proposals

22. We are of the view that the proposed legislation should be considered the lowest common standard to regulate unfair trade practices of all kinds, whereupon all sectors of trade should maintain without any exemptions. In addition, sectors without control in the form of proper rules and regulations should be put under the umbrella of the proposed scrutiny, whereas those under par should be revised in compliance with the above-mentioned lowest common standard. To this end, it would be advisable to look into the current regulations over industries of finances and telecommunications and make revisions where necessary.
23. As a matter of fact, not only is real estate sector not being overseen by an independent statutory supervisory body, there is also no sector-specific rules and ordinances in place, therefore not justified to have itself excluded from the regulation of the proposed legislation. A steering committee has been set up by the Transport and Housing Bureau to study sale of first-hand flats by legislation. It is expected that the committee will put forward practicable recommendations within one year, followed by public consultation exercise and legislation procedure, which is quite long. In the meantime, we suggest

¹² “Report on Description of Flats on Sale” (Executive Summary), The Law Reform Commission of Hong Kong, para 117, April 1995. <http://www.hkreform.gov.hk/tc/docs/rflats_c.pdf>

the whole industry should be under the scrutiny of the proposed legislation, so as to combat the trade-based unfair trade practices in the nearest future. In so doing, the Government is advised to introduce legislative measures to tackle market malpractice by referring to relevant courses in section 275, 277 and 278 of Securities and Futures Ordinance (Cap. 571), which have been proved significant in addressing issues arising from insiders trading, intended disclosure of false and misleading information in stock market.

VI. Cooling-Off Arrangements

Problems

24. It is disappointing that the Government declines to address the issues arising from unfair trade practices involved in beauty and slimming services, as well as gymnastic service comprising yoga via imposition of “cooling-off period”. Such position is justified, as far as the Government is concerned, simply because pre-payment is the routine that is commonly used in the above-mentioned trades and any restrictions over this might shatter their capability of raising funds for necessary operation. In addition, businesses will have to shoulder extra compliance cost if consumers do not have to pay any fee to cancel the contract during cooling-off period¹³. Government officials also worried that a more lenient contract cancellation arrangement might trigger off imprudent consumption, and subsequently an emergence of moral hazard. Despite these, both of these issues could be tackled via introduction of appropriate administrative measures.
25. Comparatively speaking, complaints received by the Consumer Council concerning beauty/slimming and gymnastic services including yoga outpaced those on timeshare rights and long-term holiday product contracts, therefore necessary to put the former under regulation. Taking statistics in 2009 as an example, there were 1,480 and 514 cases connected to delivery of beauty/slimming services and gymnastic services respectively, much higher than services concerning timeshare rights and long-term holiday product contracts, recorded as only 251. Besides, as far as beauty/slimming service is concerned, success rate in case resolution has plummeted from 44% in 2007 to 26% in 2009. Similar happened on gymnastic service, which was on a downhill from 65% in 2007 to marginally above 30% in 2009¹⁴, suggesting the further deterioration of the situation.

¹³ “Legislation to Enhance Protection for Consumers Against Unfair Trade Practices” (Public Consultation Paper), Commerce and Economic Development Bureau, para 6.5, July 2010.

¹⁴ Detail refers to “LCQ10: Tackling unfair trade practices”, Hong Kong Special Administrative Region Press Release, May 19 2010.

< <http://www.info.gov.hk/gia/general/201005/19/P201005190163.htm>>

26. Cancellation of contracts during cooling-off period incurs problems in relation to reimbursement. Now banking and credit card corporations claim that all transactions settled by credit cards are considered loans by nature, which are then transferred to goods and services providers concerned, and therefore the financial institutions are entitled to charge an enormous amount of administrative fee when consumers demand a refund. On the other hand, some of them have had another story, in which banking and credit card corporations are being criticized to have delayed the settlement of credit card payments¹⁵. If so, difficulties involved in reimbursement is no longer an issue due to the unfinished money transfer from these financial institutions to businesses concerned.
27. There comes another issue concerning imposition of cooling-off period, which is an indirect cost totally borne by the consumers. Under current arrangement, those who rescind the contract are usually blacklisted by the banking and credit card companies concerned. Such a routine is not fair to aggrieved consumers in the sense that service providers are off from any responsibility. This is explicitly a discrimination against consumers who are supposed to be inferior in position.

Proposals

28. The Government should be more vigilant to the wide-spreading public concern by imposing a 7-day cooling-off period in a bid to put beauty/slimming and gymnastic services under scrutiny. However, the administrative procedure should be flexible, whereby the consumers can opt for an immediate validation of contract, and enjoyment of offers, right after the transaction procedures. On the other hand, these consumers are required to pay the administrative cost involved. Such eclectic arrangement is believed to strike a healthy balance between maintenance of the existing trade-specific mode of operation and protection of consumer rights.
29. Moral hazard problems derived from the establishment of “cooling-off” period is also avoidable on the ground that consumers are required to pay

¹⁵ “卡數拖 200 日 趕絕美容院”, *Wenweipo*, Apr 6, 2009

the administrative cost concerning application and contract cancellation. It would be of equal importance that these disbursements should be confined to recovery of costs concerned, therefore no loopholes for businesses to profiteering. The same principle should also be applied to services and offers enjoyed by consumers during the cooling-off period. By doing so, it could help maintain prudent shopping amongst consumers.

30. Notwithstanding the involvement of severe time-lag concerning settlement of credit card payment, the contractual arrangement of reimbursement will be far easier if no fund transfer has been made. By the same token, administrative fee accordingly should also be within an acceptable limit, not to mention any hindrance against applications towards cancelation of transfer.
31. Besides, credit card and banking corporations should consider lowering down the impact of negative transactions on credit card holders arising from cancellation of contract as mentioned, whereas the same negative vetting system should be equally imposed to businesses. It is because recurring cancellation of contract on consumer side are indeed the unraveling of systemic issues arising from problematic sale strategies.

VII. Other Recommendations

32. It should be highlighted that the ultimate goal of regulating unfair trade practices is to safeguard consumer interests and the remedial measures should not be confined to combating unfair trade practices as suggested in this consultation document. In this sense, The ProCommons advises the Government to adopt multiple perspectives in a more holistic manner, utilizing the amendment of the Personal Data (Privacy) Ordinance and the legislation of the Competition Law, so as to better facilitate the protection of consumer rights.

A. Protection of the Privacy of Individual Consumers

Present Situation

33. Based on the findings of the Personal Data (Privacy) Ordinance review last year, the Government tends to use legislative means to strengthen the protection of personal privacy and the fight against alleged violations of personal privacy. To this end, the Government will amend the ordinance by giving a clearer definition over the collection and use of personal data for direct marketing purposes, and to make those malpractices an offence¹⁶. The Professional Commons is in favor of a special legislation for the protection of specific type of individual rights. However, the protection of individual rights should not be restricted to personal privacy only but should take account of its identity as consumers. The relevant legislation should also play a role in the protection of consumer rights.
34. However, there is much room for improvement regarding the penalties for violations of personal data protection. Based on the recommendations of the above-mentioned report, should any data users contravene the enforcement notice issued by the Privacy Commissioner, it shall be considered as an offense punishable by a Level 5 fine at HK\$50,000 and an imprisonment for two years, which is lower than the proposed penalties via summary programs

¹⁶ "Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance – Highlights"
<http://www.cmab.gov.hk/doc/issues/report_highlights_tc.pdf>

against unscrupulous business practices, which is at Level 6 (HK\$100,000) and an imprisonment for two years.

35. More importantly, the legislation does not deal with the proceeds generated from the infringement of personal privacy, which allows the offenders to keep their proceeds of crime. The proceeds of Octopus Company concerning the sale of customer data is more than forty million Hong Kong dollars, a mere hundreds of thousands or even millions of fine has no deterrent effect.

Proposal

36. In the light of this, the proposed amendments on the "Personal Data (Privacy) Ordinance" should make reference to the penalty measures in the "Trade Descriptions Ordinance" to achieve a cohesive standard between the two ordinances. Proceeds of privacy crimes should also be dealt properly. Generally speaking, the offender should not be allowed to retain the proceeds of crime, or be penalized by deterrent fines.

B. Regulating the abuse of market dominance

Present Situation

37. The said excessively long settlement period imposed by the banks and credit card companies merits greater attention. In some cases, the settlement period may last up to a few months, six months or even 9 months, hence the businesses was being held with a large sum of money, causing cash-flow problems. On one hand, the financial institutions receive an administrative charge of several percentage points. On the other hand, they do not bear any risk of the loan, which is totally unfair. More importantly, SMEs are unable to resist, because the banks and credit card corporations have a significant market advantage. The market dominance of large enterprises has made the SME suffer from of unfair competition, but will eventually harm the interests of the consumers.

Proposal

38. The Legislative Council is now in the legislation process for the fair competition law. In addition to the introduction of a better business environment for SMEs, the new law should take into consideration the wellbeing of consumers and try to safeguard their rights of choice. As regards individual cases, the Hong Kong Monetary Authority should appeal to the big corporation, urging them not to discriminate against the SMEs, and set a reasonable period of settlement and transfer.

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Advisory Board

Mr. Kenneth Leung

Mr. SC Leung

Mr. Charles Mok

Research Team

Mr. KM Chan

Mr. CK Chung