

A Report to Advocate Mandatory Cooling-Off Period in Hong Kong

倡議設立強制性冷靜期的研究報告



Abbreviations

ACL	Australian Consumer Law
Als	Authorized Institutions
ASIC	Australian Securities and Investments Commission
CAHK	Communications Association of Hong Kong
CAHK Code	Code of Practice for Telecommunications Service Contracts
CASE	The Consumers Association of Singapore
CCR 2013	Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013 of the UK
COP Regulations	Queensland Fair Trading (Code of Practice – Fitness Industry) Regulations 2003
Cooling-Off Rule	Federal Cooling-Off Rule
CPFTR	Consumer Protection (Fair Trading)(Cancellation of Contracts) Regulations of Singapore
C&ED	Customs and Excise Department
C&SD	Census and Statistics Department
Directives	EU Consumer Rights Directives (2011/83/EU)
DSA	Direct Selling Association of Hong Kong Limited
EU	European Union
Harmonization Agreement	Direct Sellers Harmonization Agreement
HKFI	The Hong Kong Federation of Insurers
HKMA	Hong Kong Monetary Authority
IA	Insurance Authority
IPP	Credit card instalment payment plan
LTHPs	Long term holiday products
Online Retail Report	Online Retail – A Study on Hong Kong Consumer Attitudes, Business Practices and Legal Protection
PICOP	Pre-Investment Cooling-Off Period
SAIC Guidance	Guidance in respect of the application of cooling-off period in online purchases published by the State Administration for Industry and Commerce of the People’s Republic of China
SFC	Securities and Futures Commission
SROs	Self-Regulatory Organizations
TDO	Trade Descriptions Ordinance Cap. 362

Timeshare Regulations	The Consumer Protection (The Timeshare, Holiday Products, Resale and Exchange Contracts) Regulations 2010 of the UK
TSS	The UK Trading Standards Services
UK	United Kingdom
USA	United States of America

Online Content

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Executive Summary

Introduction

The Consumer Council ("the Council") is committed to safeguarding consumers' rights and interests. It is our belief that through the establishment of an effective and transparent system which is fair and equitable to both consumers and traders, not only can the rights and interests of consumers be enhanced, but also a favourable business environment can be fostered thereby promoting social harmony.

A cooling-off period is a useful tool to protect consumers by allowing them to cancel a purchase unilaterally and seek refund within a reasonable period of time after the conclusion of a contract. As there is no need to prove any wrongdoings on the part of the trader, this cancellation right enhances consumer protection in situations where unscrupulous and high pressure sales tactics were deployed. This in turn should act as a deterrent to traders or their representatives who have the intention to or habitually engage in such tactics.

Over the years, the Council strenuously advocated in favour of introducing a mandatory cooling-off period in Hong Kong. In addition to helping different industries develop and implement codes of practice which contains voluntary cooling-off provisions, the Council also advocated for the Government to legislate for a mandatory cooling-off regime. In 2010-11, the Government conducted a public consultation on the legislative proposals to strengthen consumer protection against unfair trade practices. Apart from amending the Trade Descriptions Ordinance ("TDO") to create new offences, the consultation report also recommended imposing a mandatory cooling-off period for 2 types of consumer transactions, namely contracts involving goods and/or services with a duration of not less than 6 months and transactions concluded during unsolicited visits to consumers' homes or places of work. Notwithstanding strong support of this proposal by the Council and the community as it was thought that imposing a mandatory cooling-off period on specific transactions would not only give consumers enhanced protection but also deter unscrupulous traders from engaging in malpractices, this recommendation was not included in the bill to amend the TDO in 2012 due to concerns expressed by the business sector and others.

In recent years, the Council observed that unfair trade practices in different sectors are still prevalent. Not only are there worrying incidents of high pressure selling by unscrupulous traders causing consumers to suffer loss financially, in some instances, consumers could also be hurt either physically or mentally. In May 2016, the Panel on Economic Development of the Legislative Council passed a motion

urging the Government to introduce legislation on the imposition of a mandatory cooling-off period, according priority to pre-paid services involving large volumes of complaints and large amounts of payment, such as those provided by fitness centres and the beauty industry, so that consumers may unconditionally receive a refund of the paid fees and cancel the contracts during the cooling-off period.

Learning from past experience, the Council renewed its efforts in its advocacy for the introduction of a mandatory cooling-off period, and decided to conduct an in-depth study on this subject. For this report, the Council identified common malpractices through analysing enforcement statistics relating to unfair trade practices and examining the Council's complaints cases. In addition, the Council reviewed the features and limitations of the various voluntary cooling-off regimes of different sectors in the market and made references to the Mainland and overseas mandatory cooling-off legislations and experience. Furthermore, the Council considered the views and concerns of businesses in relation to the proposed introduction of a mandatory cooling-off period. Taking into account all of the above, the Council formulated its recommendations in the Report.

The contents of this study include:-

- (1) A review of consumer complaints from recent years and identification of common malpractices in the market;
- (2) An evaluation of the effectiveness of a voluntary cooling-off period and analysis of the pros and cons of a mandatory cooling-off regime;
- (3) An exploration the need to impose a mandatory cooling-off period; and
- (4) Recommendations on the scope of application and the operational arrangements of a mandatory cooling-off regime.

Current situation in Hong Kong

At present, there is no legislation in Hong Kong mandating traders to provide a cooling-off period to consumers. Over the years, the Council continuously encouraged businesses to provide a voluntary cooling-off period to consumers. To this end, the Council worked closely with different industries to develop codes of practice and encouraged relevant industry players to follow the codes voluntarily. In response to competition or as a measure to enhance consumer confidence, some industries and individual traders also offer a cooling-off period on a voluntary basis. In the market, several regulated industries offer their customers a cooling-off period of differing durations for certain products. For example:-

- (1) As a self-regulatory measure, the Hong Kong Federation of Insurers implemented a 21-day¹ cooling-off period for life insurance products enabling a policyholder to cancel the policy within that time. The Government announced in March 2018 that the Voluntary Health Insurance

¹ Unless otherwise specified, "day" refers to a calendar day

Scheme will also have a 21-day cooling-off period.

- (2) The Communications Authority of Hong Kong promulgated the Industry Code of Practice for Telecommunications Service Contracts, which is a self-regulatory initiative aimed at drawing up contracts that are balanced, fair and reasonable for both consumers and the industry. The Code stipulates that a cooling-off period of no less than 7 days shall apply to telecommunications service contracts concluded during an unsolicited visit to a consumer's home. Since 2011, all major fixed and mobile network operators have implemented this code.
- (3) The Hong Kong Monetary Authority has required retail banks to provide a pre-investment cooling-off period of at least 2 days when selling unlisted derivative products and debentured with special features to certain retail customers, so that they have sufficient time to understand the product and consider the appropriateness of the investment before subscription.
- (4) The Securities and Futures Commission's ("the SFC") Code on Unlisted Structured investment Products requires issuers of any unlisted structured investment products authorized by the SFC with a scheduled tenor of more than 1 year to provide investors a cooling-off period of at least 5 business days after the investor places an order for the relevant product.
- (5) The Code of Conduct issued by the Direct Selling Association of Hong Kong Limited requires its member companies and direct sellers to offer a cooling-off period allowing their customers to withdraw from the order within a minimum of 7 days.
- (6) For the purposes of encouraging self-regulation, the Council worked with representatives from the beauty industry to develop a Beauty Industry Code of Practice which was issued in June 2006. It recommends beauty services providers to offer a cooling-off period to consumers. However, to date, the Council is not aware of any quantitative data in respect of the implementation of this voluntary cooling-off period in the beauty industry.

As can be seen from the above, any voluntary cooling-off scheme relies on the initiative and self-discipline of the individual industry and its will and determination to build a better reputation. In addition, the presence of a credible and dominant trade representative in the establishment, maintenance and management of a voluntary cooling-off regime is also a key factor for success. Furthermore, even if there are established codes of practice or cooling-off policies in some industries, their voluntary nature cannot compel compliance nor can they prohibit unscrupulous traders from deliberately indulging in malpractice.

Where individual traders offer voluntary cooling-off periods to consumers, the study shows that unfortunately, there are many different terms and conditions, which from time to time, cause confusion and disputes. From a review of complaint cases relating to the cooling-off period, the Council notes that indeed, some of these terms are unfair and unreasonable to consumers. For example, a cooling-off

period of only 24 hours; consumers losing the right to cancel after either commencement of services, or acceptance of gifts; and the failure to disclose the substantial administrative fee charged if the consumer were to cancel the contract etc. These unreasonable terms would deter consumers from exercising their cancellation rights. Some sales representatives may even use a cooling-off period as a marketing tactic to attract consumers, and improperly induce him to enjoy the services immediately after the conclusion of the transaction, thereby defeating the cancellation right of the consumer and ultimately undermining the spirit of having a voluntary cooling-off period in consumer protection. As can be seen, consumer protection afforded by voluntary cooling-off in Hong Kong still has a way to go and there is much room for improvement.

Meanwhile, although the effectiveness of the Trade Descriptions (Unfair Trade Practices)(Amendment) Ordinance 2012 has gradually become evident, enforcement and prosecution under the TDO take time and are not without challenge. For example, the standard of proof in these criminal prosecutions is "beyond reasonable doubt". As these high pressure sales tactics are usually carried out in a private setting, prosecution has to rely on the accuracy and precision of the consumer's evidence, including his ability to recount meticulous details of the sales pitch. Quite often, the emotional distress suffered by consumers when subjected to such malpractices, affects the quality of their evidence. This is particularly so in cases where consumers are vulnerable or disadvantaged. In reality, given that what most consumers ultimately want is to get their money back, once a settlement has been achieved, often times, the consumer loses interest in continuing with the investigation. According to the Customs and Excise Department, more than 70% of the complaints involving the service sector could not be pursued due to the withdrawal of complaints and the refusal by complainants to assist in investigations. Even if the delinquent trader is successfully convicted, considerable time has to be spent to recover the prepayment or compensation. The introduction of a mandatory cooling-off period would enable aggrieved consumers to cancel the transaction without reason and recover their payments, as well as allowing traders' to mitigate any risks associated with litigation, and is therefore a scheme worth exploration.

Mainland and overseas experience

This Report examines the mandatory cooling-off legislations in the various jurisdictions, including the United Kingdom ("UK"), the United States ("USA"), Australia, Canada, Mainland China, Taiwan, Singapore and South Korea. The Council observed that all these jurisdictions have imposed mandatory cooling-off periods on specific types of contracts or in selected sectors to protect consumers. In summary, most of these jurisdictions provide mandatory cooling-off for unsolicited sales, while some do so for distance sales. In light of the popularity of e-commerce, some jurisdictions have legislated mandatory cooling-off for online shopping, including the UK, Latin America, Mainland China, Taiwan and South Korea. Furthermore, mandatory cooling-off is also applicable to timeshare

products in the UK, the USA, Australia, Canada and Singapore, while in Australia (Queensland), Canada (Ontario) and the USA (New York), there are legislations imposing a cooling-off period on the fitness industry.

Most of the above mandatory cooling-off legislations have a minimum transaction requirement, for example, in the UK it is £42; in Singapore, SG\$50; which is equivalent to about HK\$300 to HK\$500. Furthermore, any waiver, restriction or curtailment of the cancellation right is prohibited in all of the above researched jurisdictions.

In terms of operational arrangements, different jurisdictions have formulated their own operational arrangements according to their local circumstances. For example, the duration of a cooling-off period varies from 3 to 14 days, and the duration for refund varies from 3 to 60 days (please refer to chapter 4 for details). Of the jurisdictions reviewed, the Council observed that the mandatory cooling-off legislation in the UK is the most comprehensive. It clearly sets out the rights and obligations of traders and consumers, for example, traders are required to provide consumers certain information prescribed by the legislation before the conclusion of a transaction; consumers can cancel the contract within 14 days in writing and any ancillary contract will be terminated automatically. In addition, consumers have to bear the cost of return generally; and traders have 14 days to refund to the consumers. If goods have been damaged due to mishandling by the consumer, he would have to pay a reasonable amount of compensation. If the consumer enjoyed the services during the cooling-off period, he would have to pay for the service used. In Mainland China, traders are allowed to deduct a handling fee if such fee was paid by consumers in a purchase made by credit card. Moreover, the relevant legislation in Australia (Queensland) allows fitness centres to charge AUD\$75 or 10% of the membership fee (whichever is lower) as administrative fee on cancellation.

In terms of enforcement, the Council looked into a number of jurisdictions which have similar legal systems to that of Hong Kong, including the UK, Australia and Singapore. Broadly speaking, their enforcement regimes share points of commonality, namely, the adoption of a compliance-based civil enforcement mechanism. Under this mechanism, law enforcement agencies are empowered to require traders who are suspected of violating the cooling-off legislation to undertake to stop and refrain from repeating the infringing acts. If traders do not cooperate, as a last resort and in serious breaches, law enforcement agencies can apply to the court for an injunction or impose a fine. Failure to comply with court orders constitutes contempt of court which is punishable by a fine or imprisonment. Apart from the civil compliance mechanism, criminal sanctions are also provided for in the legislation in the UK and Australia under which offending traders could be prosecuted and fined.

Benefits and risks of a mandatory cooling-off period

An assessment based on Council's research and taking into account stakeholders' views raised on this issue, it is clear that there are both pros and cons to a mandatory cooling-off period. First of all, there is worry that the introduction of a mandatory cooling-off period allowing consumers to cancel a transaction unconditionally would undermine the spirit of freedom of contract and be open to abuse by consumers. Secondly, a cooling-off period would increase the operation costs of businesses and could affect their cash flow, putting pressure on SMEs. These increased costs would also likely be transferred to consumers. Finally, the diverse mode of operation of different industries in the market could give rise to implementation difficulties, for example, how should credit card transactions and related credit arrangements be handled in case of cancellation?

On the other hand, a mandatory cooling-off period can help combat unfair trade practices. This is especially important for the protection of vulnerable consumers such as the elderly, students, people just started working in society and the disadvantaged such as those with lower education, people who suffer from mental or emotional illnesses. For industries or traders with tarnished reputation, a cooling-off period can possibly boost consumer confidence and help restore a positive image for the industry or trader, which in turn could improve its business and reduce costs related to handling consumer disputes. For traders who value goodwill and quality customer services, the Council is of the view that the implementation of a cooling-off period would have limited impact as there is unlikely to be a large number of cancellations.

Drawing on the Mainland and overseas experiences, and taking into consideration local circumstances, the Council believes that an "across the board" legislative approach may not be practicable. A more balanced and practical option would be to implement a mandatory cooling-off period for specific transactions and industries, and formulate appropriate measures to mitigate the impact on the relevant affected businesses. The Council believes that such approach would allow the community to gradually adapt to the changes brought about by having such a cooling-off period, observe its effectiveness, and ensure that proper balance is struck between enhancing consumer rights and maintaining a viable business environment.

Scope of application

The Council recommends introducing a mandatory cooling-off period for the following types of consumer transactions:-

- (1) Unsolicited off-premises contracts;
- (2) Distance contracts (other than online shopping);
- (3) Fitness services contracts;

- (4) Beauty services contracts; and
- (5) Timeshare contracts.

Unsolicited off-premises contracts

As mentioned above, most overseas jurisdictions have already imposed a mandatory cooling-off period on unsolicited transactions. It is widely recognised that when consumers are approached away from business premises by traders on an unsolicited basis, they are generally psychologically unprepared to make a purchase or indeed at times they have no intention of making any purchases. Where unsolicited sales happen at the consumers' home, overseas research reveal that consumers are under even greater psychological pressure because they cannot choose to leave. As such, they are more prone to making involuntary and irrational purchase decisions.

It is for this reason that the Council recommends that a mandatory cooling-off period be imposed on unsolicited transactions concluded away from traders' business premises. A cooling off period does not apply to "on-premises" transactions and business premises usually include temporary shops in shopping malls and booths set up at an exhibition venue, such as at wedding expos and book fairs. However, mobile premises set up in the street with the use of pull-up or roller display banners should not be regarded as business premises. If a transaction is concluded in an unsolicited manner, mandatory cooling-off should be applicable. In summary, the following examples illustrate what usually constitutes unsolicited off-premises transactions:-

- (1) A consumer transaction concluded during an uninvited visit to the consumer's home or workplace;
- (2) A consumer receives a "cold-call" from a direct seller and permits its representative to carry out a home visit for product demonstration. The consumer purchases the product during the home visit;
- (3) Unsolicited sales conducted and concluded in the street or other public places like the common area in a shopping mall; and
- (4) Contracts concluded at the trader's business premises immediately after an uninvited approach by the trader's representative in the street.

Distance contracts

In the context of distance sales, consumers are unable to inspect the products prior to their purchase; they can only rely on the written description of the products, or by reference to images or videos, perhaps also by reference to online peer reviews and opinions from social media. Depending on the circumstances, that information may not always be reliable and sufficient and consumers could easily be misled. The imposition of a mandatory cooling-off period for distance transactions would provide consumers an opportunity to inspect the product after delivery and mitigate the problems caused by information asymmetry.

The Council recommends imposing mandatory cooling-off period on distance contracts, including telephone, fax, and mail order, but does not recommend imposing cooling-off on online shopping. The application of a mandatory cooling-off period for online purchases is comparatively more controversial. Supporters opine that Hong Kong should follow the examples of some overseas jurisdictions such as Europe and South Korea and impose mandatory cooling-off on online shopping in order to offer adequate protection to e-consumers. In addition, having a cooling-off period could boost consumer confidence and online sales, so it is not necessarily more harmful than beneficial to online businesses. On the other hand, opponents argue that the competition in the online retail market is extremely fierce. The profit margin of SMEs is very limited, and any imposition of a mandatory cooling-off period would greatly increase their burden. Furthermore, as online shoppers were in the main satisfied with their online shopping experience², legislating a cooling-off period for e-commerce is not the most pressing issue. Given that there is no legal definition of “online shopping”, plus the fact that this often involves cross-border transactions, the legal issues involved should not be ignored. For example, should overseas traders and cross-border transactions be regulated? Would orders by emails or other electronic messages be covered? How would Hong Kong enforcement authorities enforce against overseas traders? Taking into account the above factors, the Council believes that given the enforcement issues of cross-border transactions, legislating under such circumstances to impose mandatory cooling-off may mislead consumers into thinking that they are protected. More time should be given to the community to discuss the need, the feasibility, and the pros and cons of providing a mandatory cooling-off period for online shopping.

In view of the above, the Council recommends the imposition of a mandatory cooling-off period on distance contracts including telephone, fax and mail order, but excluding online shopping. For the purpose of imposing mandatory cooling-off, distance selling should be the usual sales channel of the trader and the whole process must be conducted by means of distance communications. In summary, it is intended to cover business transactions conducted through telephone or mail order, except for the following situations:-

- (1) Upon consumer’s request, a trader sells a product by distance communications on one-off basis;
- (2) A contract which is negotiated at the business premises of the trader but finally concluded by telephone; and
- (3) A contract initiated at a distance by telephone but finally concluded at the business premises of the trader.

² In the Council’s study report titled “Online Retail – A Study on Hong Kong Consumer Attitudes, Business Practices and Legal Protection” which was published in 2016 (“the Online Retail Report”), 98% of consumers who have shopped online found the experience of online shopping satisfactory.

Fitness services contracts and beauty services contracts

According to the Council's complaint statistics, the total number of consumer complaints dropped from around 30,000 in 2013 to around 25,000 in 2017. Similarly, complaints relating to sales practices decreased from 3,970 in 2013 to 3,514 in 2017. Notwithstanding such a reduction, the percentage share of complaints relating to sales practices remains at more or less 12-14% of the total number of complaints.

Insofar as the fitness industry is concerned, there were more than 200 sales practices related complaints every year for the fitness clubs, on average representing about 40% of all complaint cases in the fitness industry. The total complaint amount involved reached \$14 million, i.e. averaging about \$36,000 per case. In order to protect consumers, the Council publicly named California Fitness in April 2016 for their aggressive and misleading sales practices.

Apart from the fitness clubs, various unfair trade practices also appeared in the beauty industry. According to the Council's statistics, the number of sales practices related complaints increased from 225 in 2013 to 373 in 2017, on average, representing over 30% of all complaint cases in the beauty industry. The total amount involved increased from \$4 million to \$13 million, i.e. averaging about \$33,000 per case.

Of the complaints in the fitness and beauty industries, consumers indicated that the purchase of fitness club memberships or beauty packages involved large prepayments and long contract durations. Some consumers even applied for instalment loans from banks to make these purchases due to his own impecuniosity or upon the persuasion of sales representatives. Whereas initially, some consumers made these purchases because they were attracted by the discounts or marketing tactics, however, there are cases where consumers ended up signing these contracts involuntarily due to traders employing certain malpractices on them such as aggressive and prolonged sales pitches up to several hours; or even withholding the identity cards or credit cards of the consumer. All these tactics were designed to exert great psychological pressure on consumers to sign the contracts.

In view of the above situations, and considering the fact that the beauty and fitness industries have large number of complaints which involve high monetary value, and that the complaints often relate to sales practices, especially high pressure sales tactics, the Council recommends imposing mandatory cooling-off on these two types of contracts to strengthen consumer protection. Specifically, the Council recommends that a mandatory cooling-off period be imposed for fitness services contracts and beauty services contracts with a duration of not less than 6 months or involving prepayment. The Council proposes that fitness services contracts should cover the provision of advice, instruction, training or assistance in bodybuilding, exercise, yoga and weight management; and also the provision of fitness facilities at a fitness centre. But fitness services supplied by sporting clubs, clubhouses of residential properties, registered schools and licensed hotels etc. should be excluded. For beauty services, it should cover procedures used or

intended to be used to maintain, restore, correct, modify, or improve the physical appearance of the human body, irrespective of whether it is a general beauty service or a medical beauty procedure. But some special situations like plastic surgery or orthodontic treatments should be excluded (please refer to chapter 5 for details).

Timeshare contracts

Timeshare contracts are different from general consumer contracts in that their terms and conditions are more complicated and usually involve large prepayments or lengthy financial commitments. The fact that the property is located outside Hong Kong, means that consumers may not have sufficient information to make an informed decision before the conclusion of a transaction. Hence, most overseas jurisdictions, including the USA, Australia, the UK, Canada, Singapore etc. have already implemented mandatory cooling-off periods for timeshare contracts.

Locally in Hong Kong, with the joint efforts of the Council and the enforcement authorities, the number of complaints in relation to timeshare products dropped for a time, but unfortunately it climbed back up recently. According to Council statistics, the sales practices related complaints of timeshare products soared from 16 cases in 2013 to 82 cases in 2017, on average representing about 80% of the total timeshare complaints. The total amount involved also increased from about \$730,000 to \$ 3.7 million, i.e. averaging about \$49,000 per case. In September 2017, the Council carried out a name and public reprimand exercise against Great Time Universal, a timeshare company, for its persistent use of misleading and high pressure marketing tactics in the promotion of timeshare products, causing serious damage to consumer interest. In view of the above, the Council, by reference to the relevant UK legislations, recommends the imposition of a mandatory cooling-off period for timeshare contracts with a duration of over 1 year.

Exemptions

Notwithstanding the above recommendations, not all types of consumer transactions falling within the scope of application need to have cancellation rights. Suitable exemptions are required. After examining the practices in other jurisdictions, the Council proposes that a cooling-off period should not apply to the following contracts:-

- (1) Financial services such as banking, credit, insurance;
- (2) Property transactions, such as the sale of immovable property and tenancies;
- (3) Passenger transport services such as flight/train/bus/ferry tickets;
- (4) Professional services such as legal services, accounting services, and healthcare services such as plastic surgery and physiotherapy;
- (5) Utility services, including the supply of gas, electricity and water; and
- (6) Public services provided by the Government and public bodies.

In addition to the above, the following transactions should also be exempted:-

- (1) Purchases involving not more than \$500;
- (2) Custom-made goods;
- (3) Food and drinks;
- (4) Books and magazines;
- (5) Goods received sealed for health protection or hygiene reasons once unsealed;
- (6) Sealed audio, video and software products once unsealed;
- (7) Audio, video, computer software or other digital content products which are not supplied on a tangible medium;
- (8) Supply of accommodation, catering or vehicle rental services, transportation and leisure activities if the contract provides for a specific date of performance;
- (9) Urgent household repairs;
- (10) Fully performed service; and
- (11) One-off fitness services or beauty services with specific date of performance (such as wedding make-up).

Operational arrangements

In addition to determining the scope of application, a comprehensive cooling-off regime must also lay down operational arrangements, including the duration of the cooling-off period, information disclosure, method of exercising the cancellation right, refund and return arrangements, handling of ancillary contracts after cancellation and enforcement matters. Taking into account the Mainland and overseas experiences and local circumstances, the Council proposes the following in relation to the operational arrangements (please refer to chapter 6 for details).

Duration

Insofar as the proposed scope of application is concerned, the Council recommends that the duration of a cooling-off period should not be less than 7 days. For service contracts, the cooling-off period should end 7 days after the date of transaction. For sales contracts (for goods, or both goods and services), the cooling-off period should end 7 days after the date of delivery of goods to consumers.

Information disclosure

To ensure that a consumer has sufficient knowledge about his cancellation right and the method of exercising it, the Council recommends that traders be required to provide certain essential information to consumers before the completion of a transaction, including the trader's identity and contact information, the consumer's cancellation right, the method of exercising and the required procedures (with an

accompanying cancellation form), refund and return arrangements, fees involved as a result of the cancellation etc. In addition, if traders fail to inform the consumer of his cancellation right, the cooling-off period will not commence until the consumer receives such information, subject to a limit of 3 months from the date of the transaction.

Exercise of the cancellation right

In order to minimise unnecessary disputes, the Council recommends that consumers should, if so decided, effect cancellation of the contract within the cooling-off period in writing. As the trader is obliged to provide a cancellation form to the consumer prior to the conclusion of the transaction, the consumer should use that form to exercise his cancellation right. If no cancellation form is provided by the trader, the consumer can use the form as prescribed by legislation.

Refund arrangements

The Council recommends that the time limit for refund should not be more than 14 days. Unless otherwise agreed, traders should reimburse the consumer using the same payment method as the consumer used in the purchase transaction. For service contracts, traders should reimburse the consumer within 14 days from the day after the consumer exercises his cancellation right. For sales contracts (for goods, or both goods and services), traders should make a refund within 14 days from the day after receipt of the returned goods.

If proper disclosure is made by traders prior to the conclusion of the transaction, they are allowed to make the following deductions from the refund:-

- (1) If service is provided upon the request of the consumer during the cooling-off period, the trader can deduct the value of service used. The amount should be in proportion to the full contract price.
- (2) A reasonable amount of compensation caused by the mishandling of goods by the consumer. Improper handling means any handling beyond what might reasonably be allowed in a shop. Reasonable compensation depends on different factors, for example, the severity of damage, the cost of repairing, the presence of secondary market and the second-hand price etc.
- (3) If the consumer paid by way of credit card, an administrative fee of not more than 3% of the credit card transaction value; and
- (4) If the consumer opted for express delivery, such express delivery charge.

Return arrangement

The Council recommends that consumers should return the goods within 14 days after cancellation. The cost of return should be borne by the consumer. Furthermore, consumers should be allowed to choose the method of return.

Ancillary contracts

Ancillary contracts means a contract by which the consumer acquires goods or services related to the main contract, where those goods or services are provided (a) by the trader, or (b) by a third party on the basis of an arrangement between the third party and the trader. A common example is when an instalment payment plan was entered into between the consumer and the bank via the trader. The Council proposes that if the consumer cancels a main contract within the cooling-off period, any ancillary contracts should also be terminated automatically.

Curtailment

Some consumers may be very familiar with the subject products and therefore are willing to give up their cancellation rights in return for a better bargain. However, the Council observed that one of the major problems of voluntary cooling-off is that consumers could unknowingly lose their cancellation rights, for example, upon commencement of services or acceptance of gifts offered by traders. To prevent unscrupulous traders from using various means, whether legitimate or not, to induce consumers to waive their cancellation rights, the Council recommends that the mandatory regime does not allow waiver or curtailment of this right under any circumstances. Without this stipulation, the intended effect of providing a mandatory cooling-off period for combating unfair trade practices would be greatly undermined.

Enforcement matters

The Council proposes that the mandatory cooling-off period should be a civil regime, and failure to comply could attract civil sanctions. The Council also proposes that a designated public body be appointed or established to take charge of investigation and enforcement matters. This body should be empowered to seek undertakings from traders in order to stop or refrain them from continuing a breach of the law. If the trader is uncooperative or is in repeated breach of the legislation, the enforcement body could apply to the court for an injunction. Failure to comply with a court order constitutes a contempt of court which would attract criminal sanctions including fines or imprisonment. In tandem, the legislation should also expressly provide a private right to the consumer to take civil proceedings against the trader to recover compensation. The Government should review the mandatory cooling-off regime after implementation. If there is evidence to show that civil sanctions are inadequate, serious consideration should then be given as to the need to introduce criminal liability.

Conclusion

A mandatory cooling-off period is a useful tool for the protection of consumer interests and for the combating of unfair trade practices, in particular high pressure sales tactics. Notwithstanding the complexity of and the controversy surrounding this subject and in light of the Mainland and overseas experience and local circumstances, the Council recommends the Government to introduce a mandatory cooling-off period to prescribed consumer transactions and industries. In formulating its recommendations, the Council has carefully considered and taken into account concerns expressed by business sectors, and sought to strike a reasonable balance between the interests of consumers and traders. By publishing this report, the Council hopes that the Government and other stakeholders can have an in-depth discussion on the imposition of a mandatory cooling-off period from the perspective of wider consumer protection, build consensus, and work together to create a fairer and healthier consumer market for Hong Kong.

The Chinese translation is for reference only. In case of any discrepancy between the Chinese and English version, the latter prevails.

摘要

引言

消費者委員會(「本會」)一直致力保障消費者權益。我們相信透過建立有效、具透明度，對消費者及商戶雙方均公平公正的制度，可提升消費者權益之餘，也有助營造良好的營商環境，促進社會和諧。

冷靜期是一種保障消費者的工具，在買賣雙方簽訂合約後，讓消費者在一段合理時間內不需要證明商戶曾作出不當銷售行為而有權取消合約及獲得退款。冷靜期不但能保障消費者權益，也能間接減低商戶或相關從業員採用不良和高壓推銷手法的誘因。

推動香港設立冷靜期一直是本會的重點工作。除支持不同行業推行自願性冷靜期外，本會亦倡議政府為強制性冷靜期立法。回顧過去，政府於 2010-11 年就如何打擊不良營商手法及加強消費者保障進行公眾諮詢，除建議修訂《商品說明條例》，加入有關不良營商手法的罪行外，諮詢報告中亦建議就有效期不少於六個月的貨品及/或服務提供合約及以非應邀形式到訪消費者住所或工作地點所訂立的消費交易設立強制性冷靜期。雖然當時本會及其他社會人士均表贊成，認為就特定消費交易設立強制性冷靜期不但可給消費者帶來額外的保障，亦能對不良營商者產生阻嚇作用，唯有關建議最終因商界及其他人士的擔憂而沒有包括在 2012 年修訂《商品說明條例》的草案中。

近年，本會注意到在消費市場中，不良營商手法層出不窮。儘管不法商戶可來自不同業界，然而個別行業不時出現嚴重損害消費者權益的銷售手法，導致不少消費者不論經濟上或甚人生安全上受到損害，十分令人擔憂。立法會經濟發展事務委員會在 2016 年 5 月通過議案促請政府就強制實施冷靜期進行立法，並優先就投訴多、金額大的預繳式服務，例如健身中心和美容業，推行法定冷靜期，讓消費者可在指定期限內無條件取消合約及取得退款。

汲取過往的經驗並再次倡議為強制性冷靜期立法，本會就冷靜期進行深入研究和討論。研究從多方面進行。首先，本會就過去幾年關於不良銷售手法的執法情況和本會接獲的投訴個案進行分析，歸納出常見的不良營銷手法。另外，本會亦審視市場上現有自願性冷靜期的特點及限制，並參考海內外地區設立強制性冷靜期的法例和經驗，加上考慮商界就強制性冷靜期一直所表達的意見及擔憂，本會作全面的考慮後才作出本報告的建議。

這專題研究的內容包括：

- (1) 審視近年不良營銷和消費者投訴的情況；
- (2) 探討自願性冷靜期的不足之處和強制性冷靜期的利弊；
- (3) 檢討立法引入強制性冷靜期的需要；及
- (4) 建議強制性冷靜期的應用範圍和運作安排。

現時香港情況

香港現時沒有法例強制商戶向消費者提供冷靜期，但有少數受監管的行業須就特定的消費交易提供冷靜期。多年來，本會一直鼓勵商戶設立自願性冷靜期保障，亦與不同行業協作制定行業守則鼓勵業界自願採用冷靜期。另一方面，基於競爭或增加客戶信心，有些行業或個別商戶亦自願向消費者提供冷靜期。舉例如下：

- (1) 香港保險業聯會制定行業自律監管措施，為壽險產品提供 21 天¹冷靜期，保單持有人可於冷靜期內取消保單。另外，政府於今年 3 月公布的自願醫保計劃亦設有 21 天冷靜期。
- (2) 香港通訊業聯會發出《電訊服務合約業界實務守則》，該守則屬電訊業界的一項自行規管措施，旨在制定對消費者和業界雙方均屬公平、公正和合理的合約安排。守則訂明若銷售員是以非應邀的方式造訪客戶住所，而電訊服務合約是在這情況下訂定，該合約須提供不少於 7 天的冷靜期。由 2011 年起，各主要固定與流動網絡營辦商均已落實推行守則。
- (3) 香港金融管理局要求零售銀行向特定類別的零售客戶，銷售非上市衍生產品及特定類別的非上市債權證時，須設有至少 2 天的落單冷靜期，讓客戶有充足時間了解有關產品及考慮有關投資是否合適。
- (4) 證券及期貨事務監察委員會發佈的《非上市結構性投資產品守則》規定，發行人必須就任何獲委員會認可及預定投資期為 1 年以上的非上市結構性投資產品提供冷靜期，讓投資者可在發出該產品的交易指令後最少 5 個營業日內取消交易。
- (5) 香港直銷協會制定的《商德守則》要求會員與其銷售代表向客戶提供冷靜期，容許客戶下訂單後在不少於 7 天內隨時撤銷買賣合約。
- (6) 為加強美容業的行業自律，本會曾與多名美容業的代表成立研究小組，並於 2006 年 6 月發佈《美容業營商實務守則》，守則包括建議業界為客戶提供冷靜期，本會至今未見有具體數字反映美容業界落實有關建議的情況。

從上述的例子可見，自願性的措施需要依靠個別行業的自發、自律、以及建立良好商譽的決心。此外，行業是否有一個具代表性、公信力和權威性的商會去設立、維持和管理一個自願性冷靜期的制度亦尤為關鍵。再者，縱使個別行業已設立守則或具代表性的冷靜期制度，但由於屬自願性質，難以排除行業內會有故意利用不良手法營銷的商戶，拒絕採用及遵守相關守則或制度。

除此以外，本會注意到有個別商戶提供自願性冷靜期保障，可惜一般都受不同的條款細則所約束，不時惹起爭議和糾紛，從本會接獲有關冷靜期的投訴個案中，本會發現有關商戶部份條款細則是對消費者不公平和不合理，舉例說，冷靜期只有 24 小時；服務開始或收取禮物後不能取消；如取消合約會牽涉高昂的行政費但未有事先說明等。這些不合理條款會嚴重窒礙消費者行使取消權，更會被部份

¹ 除另有註明外，「天」指曆日

從業員不當利用，先以合約有冷靜期保障作推銷，簽約後誘使客戶馬上享用服務令取消權失效，最終令自願性冷靜期不能達致原有保障消費者的精神。總括來說，現時自願性冷靜期在香港的發展未見成熟，尚待改善。

執法方面，儘管《2012 商品說明(不良營商手法)(修訂)條例》在打擊不良商戶方面已漸見成效，然而本會關注到搜證和檢控需時，當中亦會遇到各種困難。例如，刑事檢控須達至排除合理懷疑的舉證準則，加上不良銷售行為通常發生在密閉的地方，故舉證十分依靠消費者記憶的準確性和細緻度，包括清楚講述事發時每一細節、與被告的談話內容，但實際上，當不幸經歷不良營商銷售時，一般消費者（尤其較弱勢的一群）在被受威脅的情況下，情緒已受到困擾，自然影響所作出證供的質素。另外，由於消費者的訴求主要是取回付款，調查可能會因雙方達成和解而受影響。根據海關資料，超過 7 成與服務有關的投訴因被投訴人撤回和拒絕提供協助而未能跟進調查。即使最終成功檢控不良商人，亦已耗上不少時間，消費者才能討回預付款或賠償。引入強制性冷靜期可讓消費者遇到不良營銷時，可無需交代理理由取消交易並取回預付款項，而商戶亦不須冒被訴諸法庭的風險，方案值得探討。

海內外經驗

本會檢視了多個司法管轄區強制性冷靜期的法例，包括英國、美國、澳洲、加拿大、中國內地、台灣、新加坡及南韓等。本會發現它們都已就個別類型或行業的合約設立強制性冷靜期以保障消費者。總括而言，大部份地區都已就非應邀形式銷售設立強制性冷靜期，而部分地區亦有就遙距銷售設立強制性冷靜期。有鑑於電子商務的流行，部份地區更就網購設立強制性冷靜期，這些地區包括英國、拉丁美洲、中國內地、台灣及南韓。此外，英國、美國、澳洲、加拿大及新加坡就時光共享產品設立強制性冷靜期，而澳洲(昆士蘭)、加拿大(安大略省)及美國(紐約)也設法例於健身行業實施冷靜期。

以上大部份地區的強制性冷靜期法例都設有最低交易金額，例如英國將最低交易金額定為 42 英鎊，新加坡為 50 新加坡元，折合大約 300 至 500 港元；而所有地區都不容許交易雙方放棄、限制或更改取消合約的權利。

在運作方面，不同地區會根據當地情況制定不同的運作安排，包括容許消費者在 3 至 14 天內取消合約，並要求商戶在 3 至 60 天內作出退款(詳情見第 4 章)。當中英國的冷靜期法例甚為全面，清楚列明商戶和消費者的責任和權利。舉例說，商戶須在交易完結前向消費者提供法例訂明的資料，而消費者可於 14 天內以書面方式通知商戶取消交易，一般情況下，消費者須承擔退貨的運費，而有關附屬合約亦會自動終止和商戶有 14 天的時間安排退款等。若貨品因消費者的不當使用而損耗，消費者須作出合理賠償。如消費者在冷靜期間享用了部份服務，便須支付有關費用。在中國內地，若消費者購買商品時採用信用卡付款並支付手續費，商戶在退款時可以不退回手續費。另外，澳洲(昆士蘭)的法例亦容許健身中心收取不多於 75 澳元或 10%會籍費用(以較低者為準)的手續費。

在執法方面，本會對一些法律制度與香港相似的司法管轄區作出研究，包括英國、澳洲及新加坡。大體來說，它們的執法模式都有共通之處，就是採用遵從為本的民事機制。根據這機制，執法機關可與懷疑違反冷靜期法例的商戶商討，要求商戶作出承諾，停止及不再重複違規行為。如商戶不合作，在較嚴重的情況及作為最終手段，執法機關可向法庭申請禁制令或罰款。不遵守法庭命令等同藐視法庭，可被判處罰款或監禁。民事機制以外，英國和澳洲亦有刑事懲處機制，違規商戶會被檢控和罰款。

強制性冷靜期的利弊

綜合所搜集的資料和持份者過去就冷靜期所提出的意見，本會認為引入強制性冷靜期的影響主要有幾方面。首先，有意見認為由於強制性冷靜期容許消費者無條件取消交易，某程度上破壞合約精神，容易被消費者濫用。其次，冷靜期會增加商戶的營商成本及影響現金流，尤其對中小企造成壓力，最終亦會轉嫁到消費者身上。最後，由於市場上不同行業有不同營運模式，冷靜期在實際運作上會出現困難。舉例說，若交易取消，如何處理信用卡交易和有關的信貸安排？

另一方面，強制性冷靜期有助打擊不良營銷手法，對於保障較容易受不良營銷手法影響的消費者尤其重要，例如長者、學生、剛踏入社會工作或教育程度較低的人士、精神或情緒病患者等。此外，針對較常出現不當營銷手法的行業，冷靜期可提升消費者信心，對行業的整體形象有正面影響，改善銷售的同時又可減低因處理消費者爭議而產生的成本。本會相信對以口碑和優質服務贏取商譽的商人而言，實施冷靜期不會導致大量消費者取消合約，因此影響甚為有限。

借鑑海內外經驗，加上考慮本地的情況，本會認為涵蓋所有行業的立法方式未必可行。一個較平衡和切實可行的方案是就特定交易及行業引入強制性冷靜期，並制定合適的措施以顧及對有關商戶的影響。本會相信這做法既可讓社會逐步適應冷靜期的安排，同時觀察有關措施的成效，並在改善消費者權益和顧及商戶的營商環境之間取得適當的平衡。

應用範圍

本會建議就下列消費交易設立強制性冷靜期：

- (1) 在營業處所以外訂立的非應邀合約（「非應邀合約」）；
- (2) 遙距合約（網購除外）；
- (3) 健身服務合約；
- (4) 美容服務合約；及
- (5) 時光共享合約。

非應邀合約

如上文所述，大部份海外地區都已就非應邀形式訂立的交易設立強制性冷靜期。眾所周知，消費者面對在商舖以外的地方進行的非應邀形式銷售，一般都欠缺心理準備，或根本沒有購買相關產品的打算。如非應邀銷售在消費者住所進行，由於消費者不能選擇離開，海外研究發現消費者面對的心理壓力會更大。在此情況下，他們會較容易作出非自願和非理性的交易決定。

因此，本會建議應就非應邀合約設立強制性冷靜期。冷靜期不適用於在營業處所進行的交易，營業處所一般包括在商場內的臨時商舖和不時舉辦的展覽會，如婚紗展和書展等。另一方面，在街上擺設易拉架則不會被視為營業處所。若有關交易是在非應邀形式的情況下進行，商戶須向消費者提供冷靜期。總括來說，非應邀合約旨在涵蓋以下常見的情況：

- (1) 以非應邀形式到訪消費者住所或工作地點而訂立的消費交易；
- (2) 消費者接到直銷電話，同意直銷人員上門作產品示範。消費者於示範後隨即購買有關產品；
- (3) 銷售人員在街上或其他公眾地方(如商場的公共空間)，未經邀約而向消費者推銷及進行交易；及
- (4) 銷售人員在街上未經邀約而向消費者推銷，然後將消費者帶回附近的營業處所簽約。

遙距合約

在遙距銷售的情況下，消費者無法在購買前直接接觸產品，只能透過商戶就產品作出的描述(如的文字、圖像或影片)，或參考網上評語以及來自社交媒體的意見來作出購買決定。視乎情況，這些資訊對貨品的描述未必可靠及充分，容易出現誤導消費者的情況。為遙距交易設立強制性冷靜期可讓消費者在貨不對辦的情況下取消交易及取回付款，減少因資訊不對稱而帶來的問題。

本會建議為遙距交易(包括電話、傳真及郵購)設立強制冷靜期，但不建議為網購設立強制冷靜期。冷靜期在網購上的應用存有較大爭議。贊成在網購引入強制性冷靜期的人士認為香港應跟隨海外地區如歐洲和南韓等例子，為網購引入強制冷靜期，加強對網上購物消費者的保障。此外，冷靜期可加強消費者信心，提升網上銷售，對商戶而言並不一定是弊多於利。另一方面，反對的人士認為網上零售市場的競爭異常劇烈，中小企的邊際利潤已十分有限，設立強制性冷靜期將加重它們的營運負擔。除此之外，現時普遍網購消費者對網上購物的體驗都非常滿意²，強制要求網上商戶設立冷靜期並非當務之急。加上網購未有法律上的定義和往往涉及跨境交易，當中的法律和執法問題亦不能忽視，例如，海外商戶及跨境交易會否受到相關法例的規管?透過電郵或其他電子通訊方式與商戶交易又是否受規

² 根據本會 2016 年公布的《網上消費 - 香港消費者態度、營商手法及法律保障的研究》，98%曾經網購的消費者對其網購經驗表示滿意或非常滿意。

管?香港執法機構如何針對海外商戶執法?考慮到上述各種的爭議，本會認為由於存在跨境交易的執法問題，在這情況下立法實施冷靜期會誤令消費者認為有所保障，所以應讓社會有更多時間討論為網購設立冷靜期的需要、可行性和利弊。

因此，本會建議為電話、傳真及郵購等遙距交易設立強制冷靜期，但不包括網購。冷靜期應適用於以遙距通訊方式，與消費者進行洽談及簽訂的合約(網購除外)，而遙距交易須為商戶的通常銷售渠道，及整個過程須以遙距通訊的方式進行。總括來說，遙距合約旨在涵蓋通常以電話或郵遞形式作銷售的商戶，但不包括如以下的情況：

- (1) 商戶按消費者要求而偶然出現的遙距銷售；
- (2) 商戶和消費者在店舖進行洽談，但最後以電話確定交易；及
- (3) 商戶和消費者以電話進行洽談，但最後於商戶營業處所訂立合約。

健身服務和美容服務合約

根據本會的投訴數字，整體投訴由 2013 年的約 3 萬宗下跌至 2017 年的約 2.5 萬宗，有關銷售手法的投訴亦由 2013 年的 3,970 宗下跌至 2017 年的 3,514 宗，雖然有關銷售手法的投訴宗數有所減少，但其佔整體投訴的比例未見有下降跡象，普遍介乎 12-14%。

關於健身中心的銷售手法投訴自 2013 年起每年也有超過 200 宗，平均佔該行業總投訴約 4 成；涉及總金額最高達 1,400 多萬元，平均每宗個案為 3.6 萬元。為保障消費者，本會於 2016 年 4 月公開點名譴責加州健身中心，以威嚇及誤導等銷售手法，損害消費者權益。

除健身中心外，美容行業近年亦出現各種不良營銷手法。根據本會的投訴數字，關於美容中心的銷售手法投訴由 2013 年的 225 宗升至 2017 年 373 宗，平均佔該行業總投訴超過 3 成；涉及總金額由 400 多萬元升至超過 1,300 萬元，平均每宗個案為 3.3 萬元。

在有關健身和美容的投訴個案中，消費者表示購買的健身會籍或美容套票均涉及大額預繳和合約期較長的交易。有些消費者更因負擔能力問題或在被銷售員誘使的情況下，向銀行借貸作分期付款。有消費者起初因被折扣優惠或宣傳手法吸引，而購買這些昂貴的會籍或套票，但當中亦有部份銷售員使用不當的銷售手法，例如疲勞轟炸或車輪式游說，甚至扣押身份證或信用卡等，令消費者面臨巨大的心理壓力，在不情願的情況下簽署合約。

鑒於上述情況，及考慮到健身和美容行業的投訴數字較多，牽涉的金額大，而且往往涉及營銷手法，特別是高壓銷售，本會建議為這兩種服務合約設立強制冷靜期，加強消費者保障。具體而言，本會建議為合約期不少於六個月或涉及預繳的健身服務合約及美容服務合約，設立強制性冷靜期。本會建議健身服務合約應包括由健身中心提供有關健身、運動、瑜伽、體重控制的顧問、指導、訓練或輔助服務，以至健身設施的提供，但不宜包括由體育會、住宅會所、註冊學校、酒店

等提供的健身服務；而美容服務合約，則應涵蓋任何提供用作保養、修復、矯正、修改或改善人體外觀程序的服務，不論是一般美容服務或醫學美容療程，但不宜應用於整形手術或齒顎矯正療程等特殊情況（詳情見第 5 章）。

時光共享合約

時光共享產品與一般消費合約不同，它們的條款較複雜，而且通常涉及大額預繳或冗長供款年期。再加上相關的物業是處於海外，消費者在進行交易前未必能掌握足夠的資料，作出知情的決定。因此，大部份海外地區，包括美國、澳洲、英國、加拿大、新加坡等，已為時光共享產品設立強制性冷靜期。

在本地方面，雖然在本會及執法機構的宣傳及教育工作下，過去幾年有關時光共享產品的投訴數字一度回落，但是近年相關的不良營商手法有死灰復燃的跡象。根據本會的投訴數字，關於時光共享產品的銷售手法投訴由 2013 年的 16 宗急升至 2017 年的 82 宗，平均佔該行業總投訴接近 8 成；涉及總金額由大約 73 萬元升至 370 萬元，平均每宗個案為 4.9 萬元。本會於 2017 年 9 月公開點名批評時光共享公司 Great Time Universal，持續以誤導及威嚇等高壓手法促銷海外度假屋會籍計劃，嚴重損害消費者的利益。有見及此，本會認為有必要為時光共享合約設立強制性冷靜期，並建議政府可參考英國的相關法例，規管合約期超過 1 年的時光共享合約。

豁免

然而，並不是所有在上述應用範圍內的消費交易都適合提供冷靜期。因此，有必要制定合適的豁免。綜合海外經驗，本會建議下列類別的合約可獲豁免：

- (1) 金融服務（如銀行、借貸、保險服務）；
- (2) 物業買賣及租賃；
- (3) 交通運輸服務（如飛機、火車、巴士、渡輪服務）；
- (4) 專業服務（如法律、會計、醫療服務 - 如整形及物理治療）；
- (5) 公用服務（如燃料、電力、水的供應）；及
- (6) 政府及公共機構提供的公共服務。

除上述以外，本會建議以下交易也應獲得豁免：

- (1) 不超過 500 元的交易；
- (2) 按消費者要求訂造的貨品；
- (3) 食物和飲品；
- (4) 書籍和雜誌；
- (5) 已拆封的衛生用品；
- (6) 已拆封的影音商品、電腦軟件或數碼內容產品；

- (7) 非以有形媒體提供的影音商品、電腦軟件或數碼內容產品；
- (8) 合約內已訂明服務提供日期的住宿、餐飲、租車、運輸及消閒服務；
- (9) 緊急家居維修；
- (10) 已完成的服務；及
- (11) 一次性並已訂明服務提供日期的健身或美容服務（如婚禮化妝服務）。

運作安排

一個全面的冷靜期制度，除了訂明應用範圍之外，同時須制定運作安排，包括冷靜期的時限、資訊的披露、行使取消權的方法、退款和退貨的安排、附屬合約的處理及執法的安排等等。綜合海內外和本地的經驗，本會就冷靜期運作上的安排主要有以下建議(詳情見第 6 章)。

冷靜期的時限

就以本報告建議的應用範圍而言，本會認為冷靜期不應少於 7 天。如果是服務合約，冷靜期在交易日起 7 天後結束。如果是銷售合約（包括貨品、或貨品和服務），冷靜期則在消費者收到貨品起 7 天後結束。

資訊披露

為確保消費者知悉及有效地行使取消權，本會建議商戶須在交易完結前向消費者提供主要資訊，包括商戶身份及詳細聯絡資料、消費者取消合約的權利、行使取消權的方法和程序(並附上有關取消表格)、合約取消後的退款和退貨安排、取消交易時可能衍生的費用等等。此外，如商戶未有在交易完結前向消費者述明取消合約的權利，冷靜期則改為由商戶告知消費者起開始計算，有效期最長為交易日起 3 個月。

行使取消權的方法

為減少不必要的爭議，本會建議如消費者決定取消合約，必須在冷靜期內以書面形式通知商戶。由於商戶必須在交易完結之前向消費者提供取消表格，消費者應使用該取消表格行使取消權。若然商戶未有提供取消表格，則消費者可利用法例訂明的表格通知商戶。

退款安排

本會建議商戶作出退款的時限不應多於 14 天。除非另有協議，商戶應以消費者付款的方式退款。如果是服務合約，商戶須於消費者行使取消權後 14 天內退款。如果是銷售合約（包括貨品、或貨品和服務），商戶須於收到消費者退還貨品後 14 天內退款。

如商戶在交易前作出了妥善披露，商戶可從退款中扣除以下費用：

- (1) 若消費者於冷靜期內要求使用服務，則商戶可扣除已使用服務的價值。有關費用須參照合約中訂明的總代價按比例計算；
- (2) 若貨品因消費者的不當使用而損耗，消費者須向商戶作出合理賠償。不當使用指超越實體店所容許的合理檢驗。至於賠償金額可視乎不同因素，例如損耗情況、維修費用、二手市場及其價格等等；
- (3) 若消費者以信用卡付款，商戶可扣除不多於信用卡交易金額的百分之三作為行政費；及
- (4) 若消費者使用特快送貨服務，商戶可扣除有關的運費。

退貨安排

本會建議消費者在行使取消權後 14 天內向商戶退還貨品。退貨的運費由消費者承擔。視乎情況，消費者可自行選擇退貨的方法。

附屬合約

附屬合約是指由商戶或由商戶安排的第三方，向消費者提供與主合約相關的貨品或服務的合約。常見例子有消費者透過商戶與合作銀行訂立的信用卡分期付款計劃。本會建議如消費者在冷靜期內取消主合約，則任何附屬合約即自動終止。

縮短或放棄冷靜期

個別消費者可能對某些產品非常熟悉，願意放棄冷靜期去換取折扣優惠。但是本會留意到現時由商戶自願提供的冷靜期的一大問題是，消費者可能會在不知情的情況下放棄了取消權，例如消費者收取了商戶提供的禮物或觸碰設施已被界定為已使用服務而被豁免等等。因此，為防止不良商戶利用各種手段(不論是否合法)去誘使消費者放棄冷靜期，本會建議不應容許消費者放棄或縮短冷靜期，否則會大大減低實施強制性冷靜期作為打擊不良營銷的預期效用。

執法事宜

本會建議冷靜期應是民事性質的制度，而不遵守規定的罰則應是民事責任。本會亦建議政府委任或成立一個公營機構負責有關強制性冷靜期的調查和執法工作，執法機構可要求不遵從的商戶作出書面承諾，停止及不再重複違規行為。如商戶不合作或重覆違規，執法機構可向法庭申請禁制令。不遵守法庭命令等同藐視法庭，可被判處罰款或監禁。與此同時，法例應賦予消費者提出民事訴訟的權利，向違規的商戶追討賠償。政府可於實施強制性冷靜期後進行檢討。如發現民事執法機制的阻嚇力並不足夠，應考慮引入刑事責任。

結語

強制性冷靜期是保障消費者權益和打擊不良營商手法，特別是高壓銷售，的有效工具。儘管此議題具複雜性和爭議性，因應海內外經驗和香港情況，本會建議政府就特定消費交易及行業設立強制性冷靜期，在討論及制定建議的過程中，本會充份考慮商戶的憂慮，建議方案務求在消費者和商戶兩方利益之間取得合理平衡。透過發表本報告，本會期望政府和各持份者以廣大消費者的利益出發，就強制性冷靜期這議題作出深入討論，尋求共識，協力為香港營造一個更公平、更健康的消費市場。

中文譯本僅供參考。如中文版與英文版文義上有差異之處，以英文版為準。



Chapter 1 - Introduction

Chapter outline

As a means to boost consumer confidence or to safeguard consumers from undesirable trade practices, a “cooling-off period” can allow consumers to cancel a purchase unilaterally and seek refund after a contract has been made. Globally, this is a common and useful tool for the enhancement of consumer protection. In situations where unscrupulous high pressure sales tactics are employed or where no opportunity is given to inspect goods before making a purchase, a cooling-off period affords consumers protection by giving them a right of cancellation without the burden of having to prove wrongdoing on the part of the trader. Taking into account local culture and trade practices, this Report will examine how the introduction of a “cooling-off period” could further enhance consumer protection and make recommendations on the scope of application as well as proposing operational arrangements of a mandatory cooling-off regime.

1.1 Meaning of a cooling-off period

All contracts, including contracts concluded in consumer transactions, are legally binding. In the absence of mutually agreed exit provisions, a party may cancel the contract without legal consequences only if that party can prove a breach of contract or the existence of some vitiating factors, such as duress or misrepresentation. A “cooling-off period” is a period of time following a purchase when the consumer is allowed to change his mind and cancel a purchase unilaterally.

The existence of a cooling-off period in essence confers on the consumer a right to withdraw or cancel a purchase unilaterally and seek refund notwithstanding the conclusion of a legally binding contract. While a cooling-off period is, on occasion, being offered by some traders on a voluntary or self-regulatory basis to foster consumer confidence, it may also be imposed by legislation or regulation, or by regulatory authorities to provide certain and consistent protection for designated types of consumer transactions. In this Report, a cooling-off period in the former case is referred to as a “voluntary cooling-off (period)” whereas the latter case a “mandatory cooling-off (period)”.

1.2 Background of the study

In 2010-11, the Government conducted a public consultation on the legislative proposals with a view to strengthening protection for consumers against unfair trade practices which eventually led to the amendment of the Trade Descriptions

Ordinance (“TDO”) in 2012¹. Taking into account views and comments received during the public consultation, the Government proposed imposing a mandatory cooling-off arrangement on contracts involving goods and/or services with a duration of not less than six months, as well as contracts concluded during unsolicited visits to consumers’ homes and places of work irrespective of duration. The rationale of such a proposal was to “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”².

This proposal triggered much controversy and resistance from various quarters, including concerns that such a measure would increase the costs of doing business without necessarily having the desired deterrent effect on unscrupulous traders. In the end, the aforesaid proposal was not included in the bill leading to the amendment of the TDO in 2012.

Since its implementation in April 2013, the amended TDO with its scope expanded to include services and the creation of new offences for unfair trade practices¹, strengthened consumer protection considerably. Apart from the Council’s education efforts, it was also observed that the Customs and Excise Department (“C&ED”) regularly briefed traders on what would constitute offences under the TDO and how to comply with the legislation, and took enforcement actions where warranted and pursuable (prosecution and conviction rates for TDO unfair trade practice offences standing at 12% and 89% respectively³). In collaboration, C&ED and the Council launched different publicity and education programmes to raise consumer awareness in relation to their rights. With these sustained efforts, helped by the publicity of some significant conviction cases⁴, traders in general have become much more aware of and compliant with the unfair trade practices provisions.

From its experience of implementing the TDO, C&ED revealed that a high number of the complaints received were non pursuable because the complainants withdrew their complaints or refused to assist in the investigations. For instance, of the complaints received involving the service sector, more than 70% were non

¹ The amended TDO created the following 6 new offences: false trade descriptions of services, misleading omissions, aggressive commercial practices, bait-and-switch, bait advertising and wrongly accepting payment. It was anticipated that the new offences should effectively combat unfair trade practices at source and in that way enhance consumer protection. See HKSAR Government Press Release dated 22 May 2013. Traders convicted under the “fair trading sections” of the amended TDO are liable to a maximum penalty of imprisonment for five years and a fine of \$500,000.

² Commerce and Economic Development Bureau, Report on Public Consultation on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices, 2011, paras 7.9-7.13.

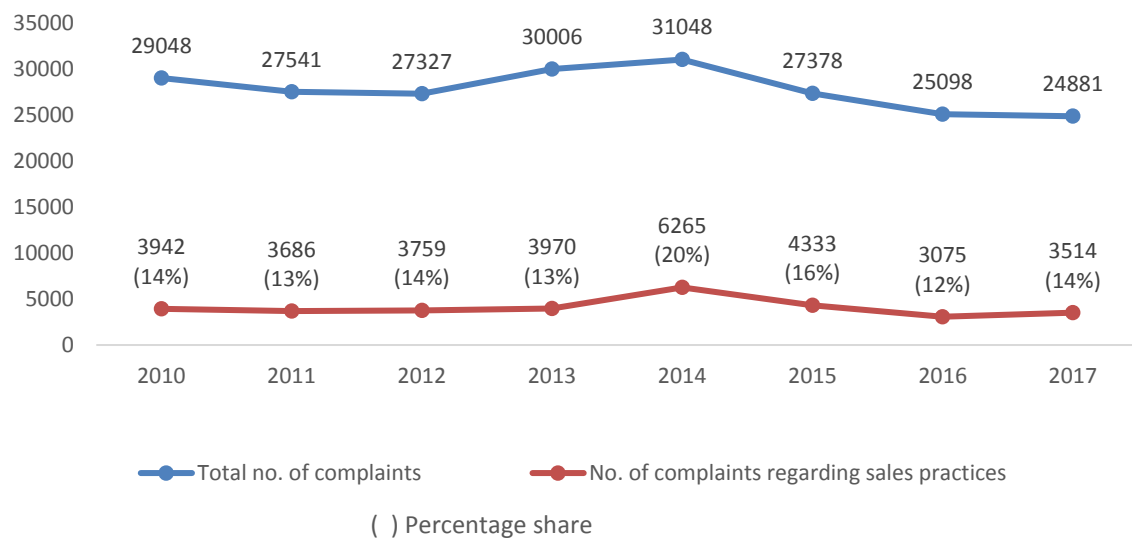
³ According to C&ED statistics, the authority completed 2471 detailed investigation cases and instigated 340 prosecutions against traders for unfair trade practices under the TDO since commencement of the amended TDO. Out of these 340 prosecutions, there was conviction in 302 cases. In addition, C&ED accepted undertakings from 13 traders in 12 cases.

⁴ Examples of significant conviction cases included misleading pricing of goods at ginseng and dried seafood shops, aggressive commercial practices at beauty parlor, fitness centre as well as investment and finance company, misleading omission by a renovation company, and false trade descriptions of services provided by employment agency, travel agency and educational centres etc.

pursuable due to the above two factors and for the beauty and fitness industries, this was as high as 80%.

Meanwhile, the Council's statistics also reflect that the effectiveness of the amended TDO has gradually become evident (see chart below). Notably, the number of consumer complaints received by the Council rose in 2013 and 2014 as public awareness started to grow, and has dropped gradually thereafter. In particular, the pattern of change is more obvious for the number of consumer complaints regarding sales practices. However, notwithstanding a drop in the overall volume of both the total complaint figures and that relating to sales practices, the percentage share of complaints involving sales practices did not decrease.

Chart 1 - No. of complaints received by the Council (2010-2017)



Given that breaches of the TDO are criminal offences, it means that the evidential requirement for prosecution and enforcement is high and as a result, not always easy to attain. Some complainants may not be willing to go through criminal proceedings. The Report will discuss this in greater detail in chapter 2. Where complaint cases cannot be pursued by the enforcement agencies, the public, in particular the complainant involved, would become very frustrated. As private civil actions can be costly and time consuming, hardly any of the complainants would decide to go down this route, in effect, leaving the complainants with little prospect of redress.

In reality, what most complainants ultimately want is to be released from the contract they had entered into unwillingly through unfair means and tactics and to get their money back. Whether delinquent traders would be punished by the Court for breaches of the TDO might not always be a primary concern of theirs. Hence,

a cooling-off period could add another layer of consumer protection by offering consumers quick and effective redress without necessarily having to resort to criminal prosecutions or civil litigation.

Apart from relying on enforcement actions to be taken by the enforcement agencies, consumer empowerment is also equally important to combat unfair trade practices. When consumers are better informed, they become more astute and are less susceptible to high pressure sales tactics or misleading sales pitches. This should hopefully make it increasingly difficult for traders to succeed in concluding sales using these tactics and in the long run, they would be less inclined to indulge in these bad practices.

Over the past few years, in partnership, the enforcement agencies of TDO and the Council have launched extensive publicity and education programmes to raise consumers' alertness to and traders' awareness of the types of unfair trade practices which are prohibited by law. From 2013, the Council has continuously reached out to the community through various channels including briefing sessions/seminars, exhibitions, education videos and comic etc. In addition, CHOICE, the monthly magazine published by the Council, regularly reports on unscrupulous or problematic trade practices adversely impacting consumers in order to bring greater awareness to the general public when faced with similar kinds of "traps" and situations.

In addition to referring suspected infringement cases to the enforcement agencies, for unscrupulous traders who do not heed the Council's advice and continually indulge in malpractices despite repeated warnings, the Council would resort to public naming by way of press conferences to the mass media. In the past 5 years, the Council named 12 traders from 4 industries. For example, the Council named 8 drugstores in 2015, California Fitness in 2016 and Great Time Universal (a timeshare company) in 2017 in view of their employment of misleading and heavy-handed tactics to pressure consumers and visitors into making high-value purchases.

Notwithstanding the above efforts, repeated incidents of intimidation and traders pressuring consumers into transactions have been reported by the media and the Council continues to receive complaints of such practices from individual complainants. The tactics employed by the unscrupulous traders include unauthorised charging of consumers' credit cards, keeping consumers in enclosed premises without access to outside communication, subjecting consumers to prolonged sales pitches up to several hours, traders making physical or mental threats etc.

This spawned a growing tide of opinion from the public and legislators to enhance protection for consumers who fell victim to unscrupulous high pressure selling tactics, that a mandatory cooling-off period should be introduced as early as possible to enable the affected consumers to walk away from contracts which have

been unwillingly signed. On 23 May 2016, the Panel of Economic Development of the Legislative Council passed the following non-binding motion⁵:-

“That this panel urges the Government to introduce legislation on imposition of mandatory cooling-off periods, and accord priority to implementing a statutory cooling-off period for pre-paid services involving a lot of complaints and large amount of payment, such as those provided by fitness centres and the beauty industry, so that consumers may unconditionally receive a refund of the paid fees and cancel the contracts during the cooling-off period with a view to protecting consumers’ rights, thereby indirectly dampening the incentive to engage in unfair and high-pressure marketing practices, and ultimately safeguarding practitioners of the relevant trades as well”.

Apart from unfair trade practices, distance selling such as telemarketing and mail order is also an area of concern in some of the jurisdictions researched. The need to afford extra protection for consumers in distance selling will be later discussed in this chapter. Although the popularity of these sales channels in Hong Kong may not be as high compared to the other jurisdictions, due to the fact that local culture is very much centred around the physical act of shopping, these methods remain to be some of the traditional sales channels adopted by some local businesses, for example, some clubs in Hong Kong sell their souvenirs through advertising in club magazines.

1.3 Terms of reference and rationale

On the international scene, a mandatory cooling-off period has already proved to be a useful consumer protection tool. Throughout the years, the Council continuously and strenuously advocated in favour of introducing a mandatory cooling-off period for better consumer protection in Hong Kong by working with different industry organizations and helping them develop codes of practice containing provisions of cooling-off period. Previous submissions had been made to the Government, urging it to implement a statutory cooling-off regime.

It is against this backdrop that the Council decided to conduct an in-depth study researching into the use of a mandatory cooling-off period to further enhance consumer protection, culminating in the publication of this Report. In this legal research, the Council studied existing local legislations, and industry practices, examined local consumer and trader behaviours, researched legislations in comparable overseas jurisdictions, analysed the benefits and costs of enactment of such a policy in Hong Kong and took into consideration various concerns raised by businesses.

The study advocates the introduction of a mandatory cooling-off arrangement for consumer contracts in Hong Kong and makes recommendations in respect of the

⁵ Legco Minutes of Meeting on 23 May 2016

scope of application and consequential operational arrangements. Please note that the drafting of statutory provisions is outside the scope of this Report and the Council respectfully defers to the Government and law drafters on this aspect.

The Government previously indicated that the introduction of a mandatory cooling-off period should be carefully considered and that it would await the findings of the study prepared by the Council. It is hoped that this Report can further stimulate public discussions, enabling voices from different sectors to be heard and different perspectives to be taken into account, thereby providing further insights to the Government for its consideration of the introduction of a mandatory cooling-off period as a means of consumer protection in Hong Kong.

Inevitably, a mandatory cooling-off regime touches on diverse and controversial fundamental issues as well as operational matters⁶. The Council considers it important to establish the rationale behind the introduction of such a regime and to see which mischief this hopes to cure. By establishing this, the scope of application of the proposed cooling-off regime is then set.

To steer the present study in a focused manner, the Council targeted two objectives, namely (i) combating unfair trade practices; and (ii) providing an opportunity for consumers to examine the products. The reference to improper, unfair or unscrupulous trade practices in this Report carries a broad meaning in a sense that it not only covers those malpractices prohibited under the TDO such as aggressive commercial practices and misleading omissions, but also other less clear-cut or even borderline conduct or trade practices involving improper or dubious elements such as prolonged sales pitches and asking consumers to turn off mobile phones during the selling process etc.

The need to address the first objective has been set out above. The use of unfair trade practices greatly undermines one of the fundamental consumer rights in any civilised society - the right and ability to make a free and voluntary choice - and this is why this right must be safeguarded. By introducing a mandatory cooling-off period to allow consumers to cancel purchases which were made involuntarily or under undue pressure, besides pursuing civil action, aggrieved consumers would be afforded an additional, timely and effective means of redress, which, in turn, should act as a deterrent to traders who habitually engage in such tactics.

The Council is aware that in real-life situations, a consumer's purchase decision may result from a combination of factors, and unfair trade practices may not be the sole reason for impugning a transaction. Incidentally, a cooling-off period which aims at deterring unfair trade practices may also enable consumers to reverse short-sighted or ill-considered decisions in complex transactions, giving consumers a second chance to reflect and reconsider on retail purchases made

⁶ Commerce and Economic Development Bureau, Reply to Legco question, 24 February 2016

impulsively. However, the Council wishes to point out that these other uses or functions of the cooling-off period would not form the primary focus of this study.

The second objective for the introduction of a cooling-off regime is to provide protection to consumer transactions concluded by distant means, e.g. mail order and telemarketing. Unlike shopping at the trader's physical store, consumers shopping by distance communications usually cannot physically inspect the products before concluding the purchase. They are therefore more vulnerable to misleading information or simply misunderstanding the features of such product. As a result, the decision to purchase may not be a fully informed one. Providing a cooling-off period would allow consumers shopping by distance communications to cancel the transaction if they find that the products do not match their expectations.

Certain types of consumer transactions are more complex in terms of the risks or the amount of money involved, the length of commitment or by the very nature of the goods or services being supplied. Examples include the sale of first-hand properties, financial and insurance products and the provision of professional services. These consumer transactions take place in highly regulated industries and as a result of the complexity involved, specific industry considerations have to be given when formulating a suitable cooling-off regime to meet the needs and characteristics of each particular type of transaction. Ensuring compliance of these regulated traders and providers of services and the enforcement of any cooling-off periods for these transactions naturally and necessarily fall under the remit of the industry-specific enforcement agency or regulator. Furthermore, the Council's research also shows that regulated transactions are commonly excluded from any general mandatory cooling-off legislations in overseas jurisdictions.

As for providing consumers with an opportunity to reverse decisions which, with hindsight or second thought, turn out to be ill-considered and or impulsive, this would be far too wide a proposal and one which might arguably encourage impulsive purchase behavior. That said, traders are always free to, and indeed encouraged to, whenever appropriate, provide voluntary cooling-off periods to their customers according to current market trends and conditions.

1.4 Methodology and structure

In compiling this Report, the Council conducted research on the scope and operational arrangements of cooling-off legislations in different jurisdictions including the United Kingdom ("UK"), Australia, the United States of America ("USA"), Mainland China and Singapore. To cater for the local market practice and consumers' needs, analysis was carried out on consumer complaint statistics and traders' concerns on the introduction of a mandatory cooling-off period were examined and taken into account. Reference was also made to existing cooling-off policies of certain industries and consumer complaints arising therefrom have been reviewed. Based on the findings of this research and focusing on the two aforesaid

objectives, this Report sets out its proposal on the scope of application of a mandatory cooling-off period and its operational arrangements. For the sake of clarity, goods and services are generally referred to as products in this Report and references to days are to calendar days unless otherwise specified.

This Report is divided into 7 chapters. Chapter 2 summaries the existing cooling-off regimes in Hong Kong. It also analyses the Council's complaint statistics for several industries and sets out the challenges faced by the law enforcement agencies in their enforcement of the fair trading sections of the TDO. Chapter 3 discusses the benefits and risks of the imposition of a mandatory cooling-off regime. This is followed by a review of the Mainland and overseas cooling-off legislations in chapter 4. In chapters 5 and 6, the Council makes recommendations as to the scope of application and the operational arrangements of the proposed mandatory cooling-off regime respectively. Finally, chapter 7 specifically focuses on the suitability of a cooling-off period for e-commerce transactions.



Chapter 2 - A Review of the Current Situation in Hong Kong

Chapter outline

Notwithstanding the absence of a legislated mandatory cooling-off period in Hong Kong, currently certain sectors and traders already offer a cooling-off period to their customers on a voluntary or self-regulatory basis to enhance consumer confidence and/or foster customer loyalty. This chapter sets out which industries in Hong Kong have instituted cooling-off periods and their terms and conditions, and analyses the limitations of voluntary cooling-off and sets out the reasons why mandatory cooling-off has an important role to play. This chapter also highlights some complaint figures and common features of consumer complaints relating to unfair trade practices.

Currently, there are several industries providing a cooling-off period of different durations for certain products to consumers, e.g. insurance, telecommunications, finance and tourism etc. In response to competition or as a global policy, certain traders offer a cooling-off period to their own customers whether expressly in their terms and conditions or as a part of their customer service. As to be expected, each of them stipulates his own terms or rules governing the scope of application and operational arrangements of the cooling-off period so provided, giving rise to potential confusion and misunderstanding on the part of the consumers.

2.1 Industry-specific cooling-off periods

Research of various industries in Hong Kong reveal that the following industries have instituted their own cooling-off periods for certain products.

Insurance

The insurance industry is regulated principally by the Insurance Ordinance (Cap. 41) and the Insurance Authority ("IA"), a statutory body set up on 7 December 2015. On 26 June 2017, the IA took over the regulatory functions of the then Office of the Commissioner of Insurance, which was a Government department, and it is expected that the IA will take over the regulation of insurance intermediaries from the three Self-Regulatory Organizations ("SROs") and implement a new statutory regulatory and licensing regime by mid-2019. The three SROs are the Insurance Agents Registration Board established under The Hong Kong Federation of Insurers ("HKFI"), The Hong Kong Confederation of Insurance Brokers and the Professional Insurance Brokers Association⁷.

⁷ See <https://www.ia.org.hk/en/aboutus/role/history.html>

In 1996, the HKFI implemented a cooling-off period for all life insurance products on a self-regulatory basis as a consumer protection initiative. If life insurance policyholders wish to change their minds during the cooling-off period, they could cancel the policy and obtain a refund of the premium paid, subject to a market value adjustment (if applicable). This means that policyholders have an opportunity to re-consider their decision to purchase a life insurance product which is a long-term commitment. Currently, the duration of the cooling-off period is 21 days after the delivery of the policy or issue of a notice to policyholder or policyholder's representative, whichever is earlier.

In March 2018, the Government announced the details of the Voluntary Health Insurance Scheme and the code of practice with which participating insurance companies must comply. Under the scheme, the participating insurance companies will provide a cooling-off period to their policyholders. Similar to life insurance products, the cooling-off period is 21 days after the delivery of the policy or issuance of a notice to the policyholder or policyholder's representative, whichever is the earlier⁸.

Telecommunication

As for the telecommunication industry, apart from being regulated by the Office of the Communications Authority, some local industry associations, such as the Communications Association of Hong Kong ("CAHK"), uphold of the standard of service and ethics among its industry members.

In 2010, CAHK promulgated the Industry Code of Practice for Telecommunications Service Contracts ("CAHK Code")⁹. Since May 2015, all major fixed and mobile network operators in Hong Kong have implemented the CAHK Code on a voluntary basis. According to the CAHK Code, a cooling-off period of not less than 7 days should be provided for unsolicited contracts concluded at a consumer's home. However, it provides that:-

"A cooling-off period does not apply in the following circumstances:-

- (1) where a customer is not required to be registered as a customer for enjoyment of the service (such as where the customer purchases a pre-paid SIM card for mobile services or a pre-paid calling card, or the service provider provides a free Wi-Fi card to the customer for trial);
- (2) where the service is subsequently subscribed in addition to the main service under the same existing contract; or

⁸ See HKSAR Government Press Release dated 1 March 2018

⁹ See http://www.cahk.hk/News/310/Industry_CoP_Telecom_Service_Contract.pdf

- (3) where the contract is extended, the contract term is renewed or the contract is replaced unless the extension, renewal and replacement (as the case may be) is concluded during an unsolicited visit to the customer's home.

... a cooling-off period shall cease to apply upon the occurrence of any of the following events:-

- (1) once the service has been provisioned;
- (2) once the service provider commences the physical provisioning of the service (including by arrangement with a third party);
- (3) once the network terminating unit, customer premise equipment or user device or any promotional gift supplied in connection with the service has been collected by or delivered to the customer;
- (4) 3 days before the scheduled completion date of the number porting as agreed by the customer; or
- (5) after a quality control confirmation call in respect of the contract concerned has been made provided that:-
 - (a) the service provider shall inform the customer clearly, and the customer acknowledges his awareness, that the quality control confirmation call will terminate the cooling-off period; and
 - (b) the quality control confirmation call is made more than one hour after the unsolicited contract has occurred...."

Given that the scope of application of the CAHK code is only limited to contracts concluded during an unsolicited visit to a consumer's home, together with other stringent eligibility criteria, it is not easy for consumers to enjoy the cooling-off protection under it. In any event, the tightening of security control over residential estates in recent years made it difficult for the sales staff of the telecommunication operators to gain access to consumers at home on an unsolicited basis and this has contributed to a reduction of these services being marketed and sold via this channel.

Finance

The finance industry is also regulated. The principal regulators are the Hong Kong Monetary Authority ("HKMA") and the Securities and Futures Commission ("SFC").

As required by the HKMA, since January 2011, authorized institutions ("AIs") have adopted the practice of providing Pre-Investment Cooling-Off Period ("PICOP") to the sales of non-listed¹⁰ derivative products to certain groups of retail customers such as elderly customers and first-time buyers with high asset concentration. Under the PICOP arrangements, after an AI has ensured that a relevant product is

¹⁰ Not listed on an exchange in Hong Kong.

suitable for an eligible customer and adequately disclosed material information of the product, the AI should allow the customer at least 2 calendar days to understand the product, consider the appropriateness of the investment and, if necessary, consult with family members, friends or third parties. The price(s) and terms of the transaction will be fixed on the day when the customer gives instruction to the AI to confirm placement of a purchase/subscription order, i.e. upon the end of the PICOP. The AI should not allow the customer to confirm the order instruction before the end of required PICOP¹¹ under any circumstances. Since May 2013, the product scope of PICOP has expanded to non-listed¹ debentures with special features, i.e. extendable; exchangeable; convertible (including contingent convertible); and/or with non-viability loss absorption feature.

The SFC issued the Code on Unlisted Structured Investment Products in 2010¹². According to the code, issuers of any unlisted structured investment products authorized by the SFC with a scheduled tenor of more than 1 year must provide investors with a cooling-off period of at least 5 business days after the placing of the order for the relevant structured product. This right to unwind the transaction is subject to various prescribed conditions e.g. the cancellation must be in respect of the whole of the order.

Any refund to the investor must be equivalent to the principal amount less a market value adjustment and any handling fee (if applicable) plus a refund of sales charges/commissions. In any event, the refund amount is capped at the principal amount (plus the sales charges/commissions, if not already subsumed in the principal amount). The issuer has to ensure that the refund is provided to investors as promptly as practicable after the exercise of this right by the investor.

Direct selling

The Direct Selling Association of Hong Kong Limited (“DSA”) incorporated in 1979 is a trade association of person-to-person marketing companies in Hong Kong. Currently, it has 10 member companies. On a self-regulatory basis, the DSA issued a code of conduct for its member companies and their direct sellers. Although the code does not directly bind the direct sellers, but as a condition of membership in the member company’s distribution system, the direct sellers are required by their companies with whom they are affiliated to adhere to the rules of conduct meeting the standard of the code. According to the said code, member companies and the direct sellers are required to offer a cooling-off period allowing their customers to withdraw from the order within a minimum of 7 days. Such right of withdrawal, whether conditioned upon certain events or not, has to be provided in writing¹³.

¹¹ See <http://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2010/20100520e1.pdf>

¹² See http://www.sfc.hk/web/doc/EN/intermediaries/products/handBooks/Eng_SIP.pdf

¹³ See <http://www.hkdsa.org.hk/englishvision/codeofconduct.html>

Beauty

Hong Kong consumers place great emphasis on personal grooming. This led to an increase in demand and popularity of beauty services in Hong Kong. The Council observed that the beauty sector is a very diverse industry and covers all sorts of traders and operators involved in different types of services with very different trade practices. It comprises a significant number of small to medium sized enterprises and some large scale chain of beauty centres. For the purposes of encouraging self-regulation and protecting consumer rights, the Council worked with more than 10 representatives of the beauty industry to develop a Beauty Industry Code of Practice which was issued in June 2006. Among other consumer protection measures, the said code recommends beauty services providers to offer a cooling-off period to consumers. Diverse membership and trade practices means that it is difficult to encourage participation and regrettably, the Council is not aware of any quantitative data in respect of the implementation of this voluntary cooling-off period in the beauty industry to date, if at all.

2.2 Trader-specific cooling-off periods

In addition to the cooling-off periods implemented by the above regulators or industry organisations, specific groups of traders have also introduced cooling-off periods as follows.

Beauty

Some individual beauty salons currently provide a cooling-off period on a voluntary basis. However, information gathered from our complaint cases reveals that traders tend to impose unfair or unreasonable terms in the contracts to deter consumers from exercising their cooling-off rights. Below are some examples:-

- (1) Some salons only allow their customers 24 or 48 hours to cancel their transactions;
- (2) There are different rates of deduction in terms of handling fees depending on the different credit cards used for payment. In some cases, in addition to the deduction of handling fees from the refund, a separate administrative fee of 10% will be imposed even for cash payments.
- (3) No cooling-off period after commencement of services; and
- (4) A cooling-off period only applies to "new" customers.

Recently, 87 beauty salons joined a voluntary scheme introduced by a concern group established by a district councilor aimed at improving industry image and boosting consumer confidence. According to the charter of the scheme, beauty

salons should, among other things, provide a cooling-off period of not less than 7 days to consumers¹⁴.

Fitness

The fitness industry is another industry which attracts voluminous consumer complaints concerning undesirable sales practices. It should be noted that in Hong Kong, there is no major trade association or regulatory body for this industry. However, some chain fitness centres do offer a cooling-off period to their customers on a voluntary basis. Although there appears to be uniformity for the duration of the cooling-off period (mainly 7 days), the cancellation right is subject to different terms and conditions as individually prescribed by the different fitness centres and they vary enormously. To illustrate, listed below are the relevant terms of the membership contracts of 2 fitness centres¹⁵:-

Example 1: Fitness Centre A

"..... (1) If customers started to enjoy the service within the cooling-off period, the transaction will be considered as satisfied and confirmed.

(2) Customer is required to bear related administration fee for amendment or cancellation of the transaction, ranging from 2% to 7.2%.

(3) Customer is not eligible for the 7-day cooling-off period if the [gift] is received within the cooling-off period, the service purchased is non-amendable, non-cancellable or non-refundable....."

Example 2: Fitness Centre B

"Member shall have the right to terminate this Agreement and the Membership hereunder by making a written request to the [Gym] within 7 days from the date of the Agreement provided always that the Member has not attended any of the classes and/or training sessions as enrolled under the Agreement or utilized any services, facilities and/or equipment at the centre as operated by the [Gym] before or within the 7 days cooling-off period and the [Gym] shall refund all payments as made by the Member to the [Gym] hereunder subject to a deduction of 5% of such amount as paid being administrative fee....."

¹⁴ See <https://hk.news.appledaily.com/local/daily/article/20180108/20267768>

¹⁵ The membership contracts were provided by consumers who lodged complaints with the Council and therefore may not reflect the latest version.

Fast Moving Consumer Goods

Despite the absence of legal or regulatory requirement, currently, a number of retailers of fast moving consumer goods already provide unconditional cancellation rights to their customers on a voluntary basis, e.g. Marks & Spencer and Zara. Depending on their respective policies, consumers are allowed to return goods without any reason within up to 1 month after the purchase. Some offer an even longer period of time for the return and refund. Consumers therefore need to pay attention to the refund policy and the terms and conditions of each individual retailer to ascertain what their cancellation rights are in each case.

2.3 Limitations of the existing cooling-off policies

In view of the existing cooling-off policies as mentioned above, one might wonder whether mandatory cooling-off period is necessary or whether free market economy should prevail and traders be allowed to retain their autonomy in providing voluntary cooling-off period as and when they consider necessary or appropriate. In either case, it is heartening to see the voluntary provision of cooling-off period in various sectors or by individual traders despite the absence of a mandatory cooling-off regime in Hong Kong. It shows that cooling-off period is not only a feasible consumer protection measure but also a sensible commercial initiative to boost customer confidence and engender customer loyalty.

Nevertheless, the Council believes that there exists practical reasons and needs to require the implementation of a mandatory cooling-off period for certain types of prescribed consumer transactions as voluntary cooling-off has limitations from the perspective of consumer protection.

It is noted that some of the above-mentioned cooling-off policies are implemented through encouragement or intervention by either an authoritative regulator or a major/dominant trade association in the particular industry or sector. Examples include the insurance and finance sectors. In the absence of such a powerful body, securing a high level of participation of member traders would be a big challenge and uniform implementation of the policy would be almost impossible to achieve. As such, the effectiveness of the cooling-off policy would be severely undermined. In this connection, the Council is not aware of any published review or statistics evaluating or demonstrating the effectiveness or impact of the above-mentioned cooling-off policies.

As suggested by its name, any voluntary cooling-off schemes depends on the initiative, self-discipline and the voluntary will of traders. Unscrupulous traders who deliberately employ high-pressure or unconscionable or undue sales tactics are unlikely to offer any cooling-off periods to consumers. Hence, it is anticipated that no matter how prevalent voluntary cooling-off period is across a certain industry or the whole retail market, mandatory cooling-off has a key role to play to safeguard consumer interest.

Besides, without regulation, traders or industries are free to each formulate their own cooling-off policies. As can be seen from the examples given above, this results in wide variations in the terms and conditions of the cooling-off periods, such as different durations of cooling-off period, ranging from only 24 hours to over a month. This causes confusion to consumers and, in the extreme, can defeat the purpose of offering this protection in the first place, for example, when the duration of the period is unreasonably short, like 24 hours. Without regulation, the cancellation right could also be subject to different conditions which, without transparency or clear explanation, might mean that the consumers could easily be deprived of this.

According to the cooling-off policies of some fitness centres (see above), consumers will lose their cancellation rights as soon as they receive a gift or utilise any service or equipment during the cooling-off period. As it is often the case that the membership contract commences immediately upon the signing of the contract and the customers are sometimes not alerted to these terms, some consumers have unknowingly lost their cancellation rights merely by briefly using the treadmill or lifting some weights in the gym. The egregious aspect of this is the fact that such use was, on some occasions, at the invitation of the salesperson who deliberately set out to defeat the consumer's rights to a cooling-off period. This type of complaint is not unique to the fitness industry. Similar situations occur in the beauty industry as consumers are often lured in to buy and immediately use new treatments after getting undressed or having finished some basic treatments.

Even if a cooling-off period is provided and the consumers are entitled to refund on an unconditional basis, some traders impose substantial administrative charges to deter the exercise of the cancellation right. For example, the timeshare company recently named by the Council due to its high pressure sales tactics provided a cooling-off period but imposed an administrative fee at the rate of 25-30% of the total membership fee. One complainant who signed a contract of \$97,600 would need to pay \$24,400 as administrative fee. This was unreasonable and disproportionately high.

It should also be noted that since the voluntary cooling-off policy is always drafted by the traders, it is unsurprising that these policies may sometimes be unfairly biased in their favour, not necessarily taking consumer rights or protection into account.

Furthermore, in order to close the deal, unscrupulous traders might try to banish any hesitation on the part of the consumer by informing the customers that they offer a cooling-off period, telling them that the purchase could easily be cancelled within a specific time if they wished, however, deliberately withholding any mention of the applicable terms and conditions, such as the administrative charge to be imposed or explaining that the right of cancellation would be lost as soon as any part of the services purchased was consumed. Without a mandatory cooling-off

regime requiring traders to be upfront and transparent about their cancellation terms, the application of a cooling-off period would merely be lip-service.

One could also envisage that in situations where aggressive commercial practices had been employed to conclude the transactions, unscrupulous traders would “silently” include the cooling-off policy in the purchase contract without informing the consumers. When being accused of committing aggressive commercial practices or using duress or undue influence to conclude the transactions, they would then defend their position by relying on the fact that the right of cancellation which was on offer was not exercised to demonstrate their claim that the consumer voluntarily made the purchase during the sales process.

Notwithstanding the above, voluntary cooling-off is, beyond doubt, a valuable means of protecting consumer interests. Traders, especially those outside the current mandatory cooling-off regimes, should still be encouraged to provide a cooling-off period on a voluntary basis. Even for traders who will be covered by the proposed mandatory cooling-off regimes, they are always free and indeed should be encouraged to provide an even more favourable cooling-off period than the legal requirements, e.g. a longer cooling-off period, a waiver of the administrative fee etc. which in turn would make them more competitive and more attractive to their customers.

Despite the presence of a voluntary cooling-off policy, the manner in which it is implemented may sometimes give rise to consumer disputes and dissatisfaction due to misunderstanding or wrong assumptions of the cooling-off policy. For example, some consumers may not bother to read the terms and conditions and presume that the cooling-off period would apply unconditionally. Therefore, clear and unequivocal information requirements and operational arrangements which can be imposed under a mandatory cooling-off scheme would be invaluable to help minimise these situations from arising. These will be discussed in detail in chapter 6.

2.4 Call for combating unfair trade practices

As mentioned in chapter 1, the use of unfair and high pressure sales practices to achieve sales goal is a matter of grave concern to the Council and this is echoed by different voices in the community. The amended TDO created new offences, in particular those targeting aggressive commercial practices, to more effectively combat unfair trade practices at source. While the amended TDO and vigorous enforcement by the enforcement agencies have provided much strengthened protection for consumers against unfair trade practices, consumer complaints about unscrupulous trade practices remain commonplace. The table below shows the Council’s complaint statistics of 5 industries which are frequently involved in the prepaid mode of consumption in the past 5 years.

Table 1

Year	No. of complaints				
	Beauty services	Fitness clubs	Timeshare	Telecom services	Wedding services
2013	1082	472	27	6409	122
2014	1140	520	17	5953	143
2015	1378	577	19	3779	115
2016	1240	1667	28	3003	154
2017	1148	554	94	3231	103
Total	5988	3790	185	22375	637

Broadly speaking, the Council received more than 1,000 complaints every year relating to the beauty industry. For the fitness industry, there were about 500 complaints per year, except for 2016 when a large number of complaints were received due to the sudden closure of California Fitness. The number of complaints in the telecommunication industry is much higher but it has dropped significantly in the past 5 years. For timeshare and wedding services, the number of complaints is relatively small compared to the other 3 industries.

The table below sets out the number of complaints received by the Council relating to sales practices for 2013-2017. Cross referencing this table with the one above, it can be noted that sales practices complaints form a major proportion of the annual complaints for the beauty, fitness and timeshare industries. Since 2014, about one-third of the complaints of the beauty industry relates to sales practices. The proportion is higher for the fitness industry and the highest for timeshare. Other than in 2016, at least 40% of the complaints received every year in the fitness industry relates to sales practices. For the timeshare industry, sales practices complaints formed almost 90% of the total number of complaints for that industry in 2017 and this is very alarming. On the other hand, the share of sales practices related complaints for telecommunication services and wedding services are relatively low, as compared with the other 3 sectors.

Table 2

Year	No. of complaints relating to sales practices (share of total complaint cases)				
	Beauty services	Fitness clubs	Timeshare	Telecom services	Wedding services
2013	225 (21%)	268 (57%)	16 (60%)	551 (9%)	13 (11%)
2014	407 (36%)	342 (66%)	12 (71%)	516 (9%)	20 (14%)
2015	515 (37%)	431 (75%)	14 (74%)	321 (8%)	16 (14%)
2016	444 (36%)	328 (20%)	23 (82%)	275 (9%)	29 (19%)
2017	373 (32%)	221 (40%)	82 (87%)	409 (13%)	19 (18%)
Total	1964 (33%)	1590 (42%)	147 (79%)	2072 (9%)	97 (15%)

The table below provides the total amounts involved for sales practices related complaints in the 5 industries. In general, the total amount involved is much higher in the fitness and beauty industries, ranging from a few millions to more than 10 million. From an individual consumer's perspective, the detriment is greatest for timeshare as the amount involved per case is the highest, i.e. more than \$70,000 per case in 2016. This is not surprising as the consumer contracts of timeshare products often involve substantial and long term financial commitments and prepayments. Though not as high as timeshare, the sum involved for each case in the fitness and beauty industries is also substantial (i.e. more than \$30,000 on average) and should not be overlooked. This is particularly so in the beauty industry as the amount has risen from about \$20,000 per case in 2013 to more than \$36,000 per case in 2017. As for telecommunication services and wedding services, the figures are generally much smaller when compared with the beauty, fitness and timeshare sectors. Although the amount involved for each wedding services complaint is not insignificant, the impact is not as great as others given the relatively small numbers of complaint recorded.

Table 3

Year	Total amount involved in sales practices related complaints (average amount per case)				
	Beauty services	Fitness clubs	Timeshare	Telecom services	Wedding services
2013	\$4,549,775 (\$20,221)	\$10,163,450 (\$37,923)	\$732,506 (\$45,782)	\$898,529 (\$1,631)	\$281,119 (\$21,625)
2014	\$13,543,664 (\$33,277)	\$11,844,582 (\$34,633)	\$538,691 (\$44,891)	\$492,125 (\$954)	\$216,238 (10,812)
2015	\$17,338,076 (\$33,666)	\$13,877,562 (\$32,199)	\$676,432 (\$48,317)	\$426,101 (\$1,327)	\$512,586 (32,037)
2016	\$16,241,948 (\$36,581)	\$14,767,149 (\$45,022)	\$1,620,184 (\$70,443)	\$258,568 (\$940)	\$468,388 (16,151)
2017	\$13,800,146 (\$36,998)	\$6,845,005 (\$30,973)	\$3,694,460 (\$45,054)	\$414,302 (\$1,013)	\$193,917 (10,206)
Total	\$65,473,609 (\$33,337)	\$57,497,748 (\$36,162)	\$7,262,273 (\$49,403)	\$2,489,625 (\$1,202)	\$1,672,248 (\$17,240)

To sum up, despite the decline in the number of complaints in the fitness and beauty industries, consumer dissatisfaction over the unscrupulous practices cannot be underestimated in light of their prevalence and the high stakes involved. The sales practices being complained of included unauthorised charging of consumers' credit cards, keeping consumers in enclosed premises without access to outside communication, prolonged sales pitches, making physical or mental threats, causing harassment or embarrassment by selling during the course of treatment when customers are scantily clad and feeling vulnerable etc.

A common feature found from a review of the complaints is that prepayment, whether in the form of a lump sum payment or by Instalment Payment Plan¹⁶ ("IPP"), is often involved. Aggrieved consumers would usually take action (e.g. lodging a complaint to the Council or C&ED, commencing civil action) to set aside the transactions and seek refund. The amounts involved ranged from several thousands to several hundreds of thousands of dollars for a single purchase. Another feature is that the service contracts in question did not involve the delivery of service on a one-off basis. Instead, they usually involved bulk purchases and a contract term or validity period of at least 6 months or even an infinite term.

¹⁶ IPP is a loan agreement between the bank and the cardholder, under which the bank advances a one-off loan to the cardholder and pays the full amount to the retailer, while the cardholder undertakes to repay the amount to the bank by instalments through the credit card applied.

Another industry causing the Council concern is the timeshare sector. As mentioned above, the Council's complaint figures concerning this industry appear to be less alarming when compared to those of the beauty and fitness industries. However, the unscrupulous trade practices reported by the complainants and the degree of consumer detriment suffered as a result of entering into these agreements is no less severe. Consumers typically would receive cold calls and be invited to attend the traders' premises to collect some free gifts in person. At the traders' premises, consumers would then be instructed to turn off their mobile phones and surrender their identity cards and credit cards in order to "register for the free gift", or put their personal belongings away to somewhere beyond their reach so as not to be easily accessible. They usually would have to first attend an hour-long promotion introducing them to the timesharing schemes on offer and then representatives of the timeshare company would conduct a sales pitch for the various club memberships on offer. The room would also typically have loud background music. If the consumer declined to subscribe, the sales representatives would escalate the pressure and took turns to persuade the consumer to commit and this process could last over several hours sometimes until late in the evening or until midnight. As a result, consumers, being utterly worn out by then, would usually give in and sign the contract in order to leave the premises.

Confronted with and surprised by the high pressure sales tactics, the consumers' freedom of choice was largely curtailed. Under these circumstances, the consumers usually sign the contract reluctantly in order to be allowed to leave or retrieve their ID cards and credit cards, and their personal belongings. Hence, the resulting purchase contract, even if documented properly, would not represent "a meeting of minds". Currently, consumers could seek redress through civil action under various legal principles, mainly in tort, contract and statute, such as duress, undue influence, mistake, unconscionable contract, false imprisonment, assault and battery, etc. However, many consumers would not pursue civil action due to the uncertainty of the chance of success coupled with the burden of the potential legal cost involved.

The TDO amendments effected in 2013 introduced new offences relating to unfair trade practices, including the offence of aggressive commercial practices¹⁷. There has been some successful prosecutions of this offence. For example, in March 2015, 3 beauticians were convicted of engaging in aggressive commercial practices in the course of selling a body treatment package. According to the C&ED¹⁸, the 3 beauticians, on the pretext of examining the consumer's chest, told her that she had lumps which could mutate into cancer and persuaded her to purchase a body treatment package. Although the consumer expressed her reluctance towards purchasing any treatment packages, they continued the sales pitch for over 1.5 hours. The consumer found their constant persuasion annoying but was scared and worried that she might have cancer, and finally unwillingly agreed to purchase the body treatment package. Two of them were sentenced to 3-month imprisonment and a 200-hour community service order was made against the remaining one. In another case, a beautician and a beauty consultant were each sentenced to 200 hours of community service for forcing a customer to purchase beauty services¹⁹.

In April 2017, a manager of a fitness club was convicted of the offence of aggressive commercial practices and was sentenced to 160 hours of community service. According to media reports, the manager shouted at the victim, a 20-year old young lady, and prevented her from leaving in order to sell her a 24-month club membership.

There are also instances where traders were acquitted after trial. In one case, the Court acquitted a sales representative of a beauty salon who allegedly conducted a sales pitch of 2 hours long and applied undue influence causing a 78-year old lady customer to buy beauty treatments costing around \$30,000. The Court noted that the customer had made notes of the discount details, inferring that she might have been clear-minded at the time and therefore voluntarily entered into the transaction.

There are 2 other cases in which the Court acquitted the defendants (sales representatives of beauty salons) based on, or partly based on, some inconsistencies between the evidence given by the consumers in the witness box and the previous statements they made when complaining to the Council or the enforcement agencies.

¹⁷ Section 13F(2) of the TDO provides: "A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances—(a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and (b) it therefore causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise."

¹⁸ C&ED Press Release dated 2 April 2015

¹⁹ C&ED Press Release dated 7 February 2018

While there were successful prosecutions, experience shows that the enforcement of the fair trading provisions of the TDO is not without challenge. In criminal proceedings, the standard of proof is “beyond reasonable doubt”. So, if there is any reasonable doubt that the defendant is guilty of the offence, he should be acquitted. By nature, criminal offences require a high evidential burden for prosecution to prove and cases without sufficient evidence cannot be pursued in accordance with the prosecution guidelines. Also, some of the complaints are non-actionable, meaning that they are withdrawn by the complainants whether it is after settlement with the trader or not, or there are instances when complainants are unwilling to assist in the investigation. As a result, the number of cases being taken all the way to prosecution is limited.

One major challenge encountered when taking enforcement actions is that high pressure selling is often conducted inside enclosed premises or traders’ premises. Typically, the consumer could only rely on his own evidence to prove that the trader adopted high pressure sales tactics, while the trader would be able to call its own staff members to act as witnesses and produce other evidence such as video recording or photographs to rebut such allegations. Furthermore, giving evidence in the witness box in court can be a challenging and intimidating task at the best of times and not every consumer is able to give evidence in an articulate or coherent manner, especially those who are more vulnerable and disadvantaged. Sadly, it is usually this group of vulnerable and disadvantaged consumers who are the likely targets of delinquent traders.

These aggrieved consumers, being left with no choice but to either pursue civil claims against the traders on their own or to simply “let go”, naturally, were left with a negative impression of or even strong discontent against the traders. In such situations, not only would the traders lose the aggrieved customers and incur extra cost and effort to acquire new ones, the industry in question as a whole would likely suffer damage to its reputation or even an overall drop in sales due to consumers’ mistrust.



Chapter 3 - Benefits and Costs of a Mandatory Cooling-off Period

Chapter outline

While cooling-off period is a useful consumer protection tool, inevitably the introduction of a mandatory scheme will bring with it consequential costs both to the consumers and the traders.

This chapter looks in detail into the justification for a mandatory cooling-off period both from the consumers' point of view and the community's as a whole and the costs of implementation of the scheme from the traders' perspective. By carrying out this balanced assessment, the Council has formulated a proposal for a mandatory cooling-off regime with practical and effective operational arrangements which will address traders' concerns. By limiting and fine-tuning the scope of application of the regime, traders' concerns can hopefully be mitigated.

In light of the limitations of the existing cooling-off policies offered by some sectors and traders to consumers as well as the continued prevalence of unscrupulous trade practices in some industries as discussed in chapter 2, the Council is of the view that a mandatory cooling-off period can play a vital role in protecting consumer rights in Hong Kong. Having said that, the Council recognises that this mandatory regime would come at a price for the traders, so their concerns about implementation, especially in relation to costs and operational arrangements should not be overlooked. By understanding their concerns, measures can be devised to ensure that the proposed cooling-off regime is both practical and reasonable.

3.1 Benefits

As mentioned in chapter 1, there are voices in the community calling for the imposition of a mandatory cooling-off period to protect consumers from unscrupulous trade practices especially in certain industries which are considered more problematic as evidenced by a comparatively higher recorded numbers of consumer complaints by the Council and the enforcement agencies. The power of the proposed cooling-off regime is its *mandatory* nature. Once implemented, unscrupulous traders are required by law to provide their customers with a cooling-off period on the terms and conditions as prescribed in the legislation. In contrast to a voluntary cooling-off, there is little or no room for them to restrict or defeat the exercise of cancellation right by consumers.

If a consumer unwillingly makes a purchase as a result of a sales representative's coercion or harassment, and the transaction falls under the scope of the mandatory cooling-off regime, he would automatically be afforded protection and has the right and the opportunity to reconsider his decision, possibly take advice from third

parties if necessary, exercise his own judgement and make a voluntary decision free from the trader's influence. In most cases²⁰, during the mandatory cooling-off regime, he could elect to cancel the purchase without giving reasons or proving any wrongdoing on the part of the trader. He would also be able to recover any prepayments made without raising a complaint or instigating court action. For the consumer, the benefits of a mandatory cooling-off period are very clear and unequivocal.

First of all, it ensures that the aggrieved consumer has a fair opportunity to consider and decide whether to make the purchase without any fear, pressure or undue influence exerted by the unscrupulous trader. A consumer's right to freedom of choice would be protected.

Secondly, it provides a relatively low-cost, quick and simple way for the aggrieved consumer to seek redress and obviates the need to resort to litigation or complaints to enforcement agencies. Harmonious customer relationship and business reputation would be thereby be preserved. Traders would also benefit from the costs savings resulting from not having to deal with customer complaints or even defending legal claims which could be instituted by aggrieved consumers. From a wider perspective, this could lead to an overall reduction in the social cost of complaint handling and dispute resolution.

Thirdly, the consumer's ability to cancel the purchase and recover prepayment during the cooling-off period could serve as a strong disincentive to traders choosing to engage in unfair and unscrupulous practices as it means that the ill-gotten gains would not be theirs to keep in any event. It is hoped that, in the long run, a mandatory cooling-off period would not only act as a deterrent but also encourage unscrupulous traders to change their behavior which will in turn, enhance consumer protection overall. For the traders who already carry on business in a professional and ethical manner, the introduction of such a regime should bolster consumer confidence and this should also translate into increased business opportunities. From a holistic perspective, this may also drive the development of voluntary cooling-off regime in sectors and regimes which are not covered by the mandatory scheme and help catalyse the spread of the benefits of ethical trading in the market. The image of Hong Kong as a quality shopping city would be enhanced.

3.2 Costs

There are always two sides to a coin. While there is scant debate on the benefits a mandatory cooling-off regime will bring to consumer protection, there is need to acknowledge and address the inevitable extra costs to the traders and the industries that the implementation of such a regime would entail. Firstly, if the

²⁰ In case the trader disputes the consumer's entitlement to cooling-off period or any fact associated with the effectiveness of the cooling-off period, the consumer may need to initiate civil action to settle the dispute.

delivery of goods or services is to be put on hold during the cooling-off period, this would cause delay and consumers could be frustrated if they are in urgent need of the products. Business opportunities might also be at risk.

Secondly, if traders are prohibited from receiving payment during the cooling-off period, their cash flow could be adversely affected. Such practice is adopted in Australia and Singapore and it would be further discussed in chapters 4 and 6. Even if there is no such restriction, it would still be prudent for traders not to book the transaction or profit until after the cooling-off period. That said, the extent of such impact would very much depend on the rate of cancellation. The Council believes that for ethical traders, it should be highly unlikely for them to face a high cancellation rate, if at all.

Thirdly, and again depending on the cancellation rate, the implementation of this scheme means that traders would incur extra administration and compliance costs in order to carry out all the obligations related to the provision of a cooling-off period. Traders could also be exposed to the risk of depreciation in the value of the goods being returned, depending on the length of this period.

Finally, there is the moral hazard of the implementation of a mandatory cooling-off period in that there is a risk that the cancellation right would be open to abuse by consumers. From the traders' perspective, with an unequivocal and no questions asked cancellation right being in place, some consumers would abuse the right and buy a product with the intention of using it during the cooling-off period, then returning it to trader before the expiry of the period, or deliberately purchasing several similar products and using the cooling-off period to decide which one they would want to retain and returning the rest.

Other consumers might just be tempted to be less prudent and more impulsive when entering into transactions, indirectly encouraged by the knowledge that they could always rethink their decision afterwards. All of these increased risks and costs would likely be reflected in higher prices of the products being sold to consumers.

In the Government's report on public consultation on legislation to enhance protection for consumers against unfair trade practices which eventually led to the amendment of the TDO in 2012, it was proposed that a mandatory cooling-off period be provided for contracts with a long duration and timeshare contracts. Below are the major concerns raised by the traders on that proposal:-

- An across-the-board mandatory cooling-off policy will impose disproportionate compliance cost on small-value transactions;
- It may affect the cash flow and operation of SMEs;
- There is uncertainty as to the effect of cancellation of the main contracts on ancillary contracts, e.g. IPP, product warranty;

- Traders should be allowed to charge a reasonable amount of administration fees when consumers cancel the contracts;
- It is unclear how the procedural requirements in the cooling-off legislation may apply to purchase transactions concluded verbally; and
- In effecting refund through credit card payment, it would be difficult for traders to ensure that customers receive the refund within the prescribed time limit.

In formulating the proposed mandatory cooling-off regime in this Report, the Council took into consideration the traders' concerns listed above to ensure that what is being proposed is practical and reasonable for all stakeholders, allowing the benefits of a mandatory cooling-off period to prevail without imposing undue and unfair burden on the traders.



Chapter 4 - Mandatory Cooling-Off Periods in Other Jurisdictions

Chapter outline

This chapter reviews the mandatory cooling-off regimes in a number of jurisdictions. They include the European Union (with particular reference to the UK by way of illustration), Australia, the USA, Canada, Singapore, South Korea, Mainland China and Taiwan. This chapter will also cover issues underlying the operation of a mandatory cooling-off regime, such as the scope of application, exemptions, the length of cooling-off period, information requirement, refund and return arrangements, treatment of ancillary contracts and enforcement matters.

This chapter gives an overview of the mandatory cooling-off regimes in the different jurisdictions such as the European Union (“EU”), with particular reference to the UK by way of illustration, Australia, the USA, Canada, Taiwan, Singapore and South Korea. These jurisdictions are selected for their similarities to Hong Kong in terms of their state of economic development, business environment, social and cultural background. With respect to enforcement, the focus is on jurisdictions which have similar legal systems to that of Hong Kong, including the UK, Australia and Singapore. Given that unfair trade practices run rampant in the beauty, fitness and timeshare industries, the Council reviewed sector-specific cooling-off legislation (if any) for these sectors in the various overseas jurisdictions.

4.1 European Union and United Kingdom

In the EU, the Consumer Rights Directives (2011/83/EU) (“the Directives”) imposed mandatory cooling-off provisions on consumer contracts negotiated away from business premises and by distance selling. The Directives were transposed into national laws in all member states in December 2013, including Germany and the UK²¹. It harmonized the key aspects of consumer rights and provided uniform rules in relation to the cooling-off arrangements across the EU. The Directives were fully implemented in the UK by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013 (“CCR 2013”). This Report makes reference to the CCR 2013 by way of illustration.

²¹ See https://ec.europa.eu/info/law/law-topic/consumers/consumer-contracts-law/consumer-rights-directive_en

Please note that although the UK is leaving the EU, the UK government has introduced an EU Withdrawal Bill to ensure that laws and regulations made over the past 40 years when the UK was part of the EU will continue to apply unless the UK government decides to change the law²².

Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013

Distance contracts

Under the CCR 2013, distance contract means “a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”²³. It includes catalogue, phone and online sales where the trader and consumer are not physically together.

Off-premises contracts

In general, off-premises contracts are contracts which are negotiated or concluded away from the trader’s business premises. It is defined as a contract between a trader and a consumer which is any of these²⁴ –

- (1) A contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
- (2) A contract for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
- (3) A contract concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premise of the trader in the simultaneous physical presence of the trader and the consumer; and
- (4) A contract concluded during an excursion organized by the trader with the aim or effect of promoting and selling goods or services to the consumer.

²² See <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

²³ Regulation 5

²⁴ Above

“Business premises” in relation to a trader means –

- (1) any immovable retail premises where the activity of the trader is carried out on a permanent basis, or
- (2) any movable retail premises where the activity of the trader is carried out on a usual basis²⁵.

Contracts not covered by the CCR 2013

Not all off-premises contracts and distance contracts are covered by the CCR 2013. Certain contracts are expressly excluded and listed below are some examples²⁶:-

- (1) Gambling contracts;
- (2) Construction and sale of immovable property;
- (3) Financial services such as banking, credit and insurance;
- (4) Package travel contracts;
- (5) Timeshare contracts²⁷;
- (6) Passenger transport contracts²⁸;
- (7) Purchases from vending machines; and
- (8) Single telecom connections (e.g. payphones and café internet connection).

Contracts with no cancellation right

In addition to the above, consumers are not given cancellation rights for a number of distance and off-premises contracts under the CCR 2013²⁹. Examples include:-

- (1) Off-premises contracts with value less than £42;
- (2) “Investment” type products such as vintage wines, subject to speculative purchase and where the price in the financial market may vary;
- (3) Bespoke and customized goods;
- (4) Goods which will deteriorate or expire rapidly;
- (5) Newspapers and magazines (but not subscriptions for such);
- (6) Contracts concluded at public auction;

²⁵ Above

²⁶ Regulation 6

²⁷ Sector specific cooling-off period is provided under the Consumer Protection (The Timeshare, Holiday Products, Resale and Exchange Contracts) Regulations 2010

²⁸ Regulation 27

²⁹ Regulations 27, 28 & 36

- (7) Goods received sealed for health protection or hygiene reasons once unsealed;
- (8) Sealed audio, video and software products once unsealed;
- (9) Goods once they have been inseparably mixed after delivery;
- (10) Contracts where the consumer has contacted the trader to effect urgent household repairs;
- (11) Contracts for accommodation, transport of goods, vehicle rental, catering or services related to leisure activities if the contract provides for a specific date or period of performance; and
- (12) Services which have been fully performed (i.e. completed).

Length of cooling-off period of a distance or off-premises contract

Unless otherwise exempted, consumers who enter into off-premises or distance contracts will have 14 days to change their minds and do not have to give a reason for doing so³⁰. Consumers must be provided with the prescribed cancellation form³¹ but do not have to use it as long as they make clear that they are cancelling. Where the cancellation right applies, it cannot be waived by parties' mutual agreement³².

Information requirement

The trader must provide to the consumer the information listed in Schedule 2 of the CCR 2013 before concluding a distance contract or off-premises contract³³ as follows:-

- (1) The main characteristics of the goods or services;
- (2) The identity of trader, including the trading name;
- (3) The contact information, such as the geographical address, telephone number, fax number and email address etc.;
- (4) The total price of the goods or services;
- (5) All delivery charges or any other costs (if applicable);
- (6) The arrangements for payment, delivery or performance and time of delivery;
- (7) The complaint handling policy (if applicable);

³⁰ Regulation 30

³¹ Schedule 3 of the CCR 2013

³² CCR 2013 Implementing Guidance published by the Department of Business Innovation & Skills, Dec 2013

³³ Regulations 10 & 13

- (8) The conditions, time limits and procedures for exercising the cancellation right contained in a standard cancellation notice/form;
- (9) Whether consumer is required to pay the costs of returning the goods after cancellation; and
- (10) If it is a service contract, whether consumer is required to pay the costs of service supplied during cooling-off period.

Failure to provide information specified in (8) above would result in the consumer's cancellation right being extended by up to a year³⁴. Furthermore, if a trader fails to inform the consumer information specified in (5), (9) and (10), the consumer need not bear those charges³⁵. A consumer may also claim against the trader for breach of contract in case of non-compliance³⁶.

Refund

If a consumer exercises his cancellation right, the trader must refund the consumer all that the consumer has paid, including any original delivery costs³⁷. That said, if a consumer has expressly requested a delivery method which will cost more than the least expensive common and generally acceptable method of delivery, then the trader is only obliged to refund the lesser delivery cost³⁸.

Reimbursement must be made without undue delay. If the contract is a sales contract and the trader has not offered to collect the goods, reimbursement needs to be made within 14 days of the trader receipt of returned goods; or if earlier, the day on which the consumer supplies evidence of having sent the goods. Otherwise, the trader must refund the consumer within 14 days from the day on which the trader is informed of the consumer's decision to cancel the contract³⁹. Such refund should be made using the same payment method the consumer used originally but the trader can come to an agreement with the consumer to use an alternative method⁴⁰.

The trader has a right to deduct an amount from the refund if the consumer has diminished the value of the goods by handling them beyond what is necessary to establish their nature, characteristics and function. The test applied is whether that

³⁴ Regulation 31

³⁵ Regulations 10, 13 & 36

³⁶ Above

³⁷ Regulation 34

³⁸ Above

³⁹ Above

⁴⁰ Above

consumer has handled the goods in a way beyond what might reasonably be allowed in a shop⁴¹.

Return of goods

Generally, it is the consumer's responsibility to send the goods back to the trader or hand them to the trader's authorised agent unless the trader has offered to collect the returned goods or in the case of an off-premises contract, the goods were delivered to the consumer's home when the contract was entered into and could not, by their nature, normally be returned by post⁴². The consumer must not delay his return of the goods to the trader and this should be done no later than within 14 days of his notification to the trader of his decision to cancel⁴³. Unless the trader has agreed to pay the return costs, the consumer must do so⁴⁴.

Supply of service

By the consumer's express request, a trader can start to deliver service to a consumer during the cancellation period. However, if the consumer later cancels the contract, he will have to pay for the service used during the time up to when he informed the trader of his decision to cancel⁴⁵. What the consumer pays will be in proportion to what has been supplied in comparison to the full contract price, or if it is excessive, on the basis of the market value of the service that has been supplied, calculated by comparing prices for equivalent services supplied by other traders⁴⁶.

Ancillary contracts

In the UK, an ancillary contract is one that relates to the main contract and can be provided by the trader or a third party with whom the consumer has an arrangement⁴⁷. Where a consumer cancels a contract, any ancillary contract will also be automatically terminated (i.e. effectively cancelled) without any costs to the consumer⁴⁸, other than costs specifically provided for in the regulation, such as the value of services consumed. The trader is obliged to inform other trader with whom the consumer has an ancillary contract that it is terminated.

⁴¹ Above

⁴² Regulation 35

⁴³ Above

⁴⁴ Above

⁴⁵ Regulation 36

⁴⁶ Above

⁴⁷ Regulation 38

⁴⁸ Above

Consumer Protection (The Timeshare, Holiday Products, Resale and Exchange Contracts) Regulations 2010 (“Timeshare Regulations”)

The Timeshare Regulations transposed into UK law the EU directives on this subject, creating a simplified and coherent framework for the regulation of the timeshare and long-term holiday products, as well as their exchange and resale. By setting out the legal requirements and restrictions in which timeshare companies need to follow in order to be compliant and for timeshare contracts to be fair and legal, the ultimate aim of these regulations is to enhance consumer confidence in the UK timeshare industry and eliminate the operations of rogue traders.

For the purpose of the Timeshare Regulations, the term ‘timeshare’ means any consumer product that enables the purchaser to use one or more places of overnight accommodation for more than one occupational period under a contract that lasts for more than one year; whereas a “long-term holiday product” gives the purchaser certain discounts or benefits in respect of accommodation under a contract that lasts for more than one year. A holiday club, for example, may give its members access to reduced price holidays at the resorts which participate in its scheme.

Buyers of timeshare or long-term holiday products are given rights of withdrawal under the Timeshare Regulations, so that they can cancel a contract within 14 days from the transaction date⁴⁹.

Enforcement

The UK's consumer protection regime was reformed following consultation in 2012. This altered both the institutional structure and the roles and responsibilities of consumer protection bodies. In particular, these reforms gave the Trading Standard Services (“TSS”) a leadership role in relation to the bulk of UK consumer law enforcement⁵⁰, including the CCR 2013 and Timeshare Regulations. Consumers who suspect a trader of breaching the consumer law may make a complaint to their local TSS. The local TSS will then investigate into the complaint and take appropriate legal action.

Under the CCR 2013, there are also provisions to empower TSS to seek an undertaking from traders who are suspected of contravening the requirements of the CCR 2013. If the trader refuses to comply, TSS may also apply for an injunction against any person who appears to be responsible for a contravention⁵¹. If the injunction order is not complied with, it is a contempt of court and the maximum penalty is an unlimited fine and two years' imprisonment⁵². TSS is obliged to notify

⁴⁹ Timeshare, briefing paper, House of Commons Library, 16 May 2017

⁵⁰ Consumer Protection: Enforcement Guidance, 17 August 2016, published by Competition and Markets Authority

⁵¹ Regulation 45

⁵² See <https://www.businesscompanion.info/en/quick-guides/distance-sales/consumer-contracts-distance-sales>

the Competition and Markets Authority, who has a supervisory function, of any undertaking made to it by a trader and the outcome of any injunction applications⁵³.

In addition to civil sanctions, the CCR 2013 and Timeshare Regulations create specific offences for failing to comply with the cooling-off requirements. Upon conviction, the offender is liable to pay a fine but no custodial sentence is imposed. In addition, the aggrieved consumer can take private legal action against the trader and seek compensation for the contravention of either the CCR 2013 or the Timeshare Regulations.

4.2 Australia

Australian Consumer Law

In Australia, cooling-off requirements are set out in the Australian Consumer Law ("ACL") which is a national law. These requirements are then incorporated into the law of each of the Australia's states and territories.

Unsolicited consumer agreements

The cooling-off period provided by the ACL only applies to "unsolicited consumer agreements" such as door-to-door sales or telephone sales. Under the ACL, an 'unsolicited consumer agreement' has four elements⁵⁴:

- (1) The agreement must be for the supply of goods or services to a consumer.
- (2) The agreement must have resulted from negotiations between a supplier and a consumer either in person (at a place other than the supplier's place of business) or by telephone.
- (3) The consumer must not have invited the supplier to approach or telephone him to go to that place for the purpose of entering into negotiations to supply goods or services.
- (4) The total price paid or to be paid under the agreement is over AUD\$100 or cannot be determined at the time the agreement is made.

Contracts that are not unsolicited consumer agreements

Under the ACL, certain agreements are not regarded as unsolicited consumer agreements and therefore the cooling-off provisions do not apply. These agreements include⁵⁵:-

⁵³ Regulation 46

⁵⁴ Section 69

⁵⁵ Regulation 81 of the ACL Regulations (a subsidiary legislation)

- (1) Non-consumer transactions;
- (2) Agreement which results when a consumer discontinues negotiations with a supplier but subsequently re-initiates negotiations with the same supplier;
- (3) Agreement entered into whilst another agreement remains in force, by the same supplier and consumer for the supply of same goods or services supplied under the another agreement; and
- (4) Agreement entered into by the same supplier and consumer for the supply of the same goods or services supplied under an earlier agreement. It only applies if the subsequent agreement is entered into within 3 months of the earlier agreement.

Length of cooling-off period

A consumer has 10 business days to cancel an unsolicited consumer agreement without penalty. The cooling-off period begins on the first business day after the agreement was made or, if the agreement was made by telephone, the 10-day period commences on the first business day after the consumer was given the documentation about the agreement⁵⁶. The cancellation right of an unsolicited consumer agreement cannot be waived by the consumer⁵⁷.

Information requirement

In general, the following key information has to be given by suppliers to consumers prior to the conclusion of the transaction⁵⁸:-

- (1) the total cost, or how this will be calculated if the total cost is unknown at the time of making the agreement;
- (2) any postal or delivery charges that consumer will have to pay;
- (3) the supplier's name and contact details (the physical business address, email and fax number) and where appropriate, the Australian Business Number or Australian Company Number;
- (4) the sale agent's name and contact details;
- (5) information about the cancellation right including a notice on the front page; and
- (6) a form of notice that consumer can use to cancel the agreement.

⁵⁶ Section 82

⁵⁷ Section 90

⁵⁸ Sections 78 to 81

Failure to provide the required information would result in an extension of cancellation period up to a maximum of 6 months⁵⁹.

Payment and supply of goods or services during cooling-off period

The supplier under an unsolicited consumer agreement must not (i) supply goods (unless the goods cost AUD\$500 or less⁶⁰) or services (with the exception of electricity or gas services⁶¹) to the consumer; or (ii) accept any payment, or any other consideration, in connection with those goods or services; or (iii) require any payment, or any other consideration, in connection with those goods or services; during the cooling-off period⁶².

Refund and return of goods

As suppliers are not allowed to accept payment during the cooling-off period, the issue of refund normally does not arise. In any event, if an unsolicited consumer agreement is terminated within the cooling-off period, the supplier must immediately refund to the consumer any payment: (i) that the consumer makes to the trader after the termination; and (ii) that is purported to be made under the agreement or a related contract or instrument⁶³.

If the consumer cancels the agreement during the cooling-off period, within a reasonable time, the consumer is required to either (i) return any goods to the supplier; or (ii) notify the supplier where they may collect the goods⁶⁴.

The consumer is not responsible for any damage or depreciation attributable to normal use of the goods or to circumstances beyond his control⁶⁵. However, if the consumer has failed to take reasonable care of the goods, then he is liable to pay compensation to the supplier for any damage to, or depreciation in the value of such goods.

Related contract

If a consumer cancels an unsolicited consumer agreement during the cooling-off period, any contracts collateral or related to the unsolicited consumer agreement is also void, i.e. treated as if it never existed⁶⁶. This includes any associated credit or finance agreements.

⁵⁹ Regulation 82

⁶⁰ Regulation 95 of Competition and Consumer Regulations 2010

⁶¹ Regulation 89 of the Trade Practices Amendment (Australian Consumer Law) Amendment Regulations 2010 (No.1)

⁶² Section 86

⁶³ Section 87

⁶⁴ Section 85

⁶⁵ Above

⁶⁶ Section 83. For certain credit arrangements, the consequence of terminating a main contract is governed by the National Consumer Credit Protection Act.

Enforcement and remedies

Enforcement of the ACL is carried out jointly by the Australian Competition and Consumer Commission, and the State and Territory consumer protection agencies. Chapter 4 of the ACL provides that certain breaches of the law are sufficiently serious and thus may be treated as criminal offences, for example failing to provide the required information to consumers and failing to make refund in accordance with the prescribed requirement etc. Offending traders would be subject to a maximum fine of AUD\$50,000 (for body corporate) or AUD\$10,000 (person other than body corporate). That said, the existence of criminal offences does not displace the ability of consumer protection agencies to seek civil penalties.

Where breaches are less serious, the consumer protection agency could seek the following civil penalties and remedies⁶⁷:-

- (1) Civil penalties (with maximum penalties of AUD\$50,000 for a body corporate and AUD\$10,000 for a person other than a body corporate);
- (2) Injunctions – a regulator may seek an injunction to stop the breach or to require the supplier to do certain things;
- (3) Disqualification orders – a regulator may apply to court for an order disqualifying a person from managing corporations for a specific period;
- (4) Non-punitive orders – an order obtained by a regulator for the supplier to redress harm suffered in the community due to contravention such as to establish a compliance or education and training programme to mitigate against future breach etc.;
- (5) Adverse publicity orders – an order requiring a supplier to publicly disclose certain information regarding the contravention aimed at deterring future contraventions and encouraging compliance;
- (6) Damages and compensatory orders – application by the consumer to the Court to compensate for loss or damage suffered as a result of contravention of the ACL; and

In addition to the above court-determined penalty or remedy, there is a myriad of other enforcement tools available, the most notable is that a regulator can accept court-enforceable undertakings, which, if breached, would allow the regulator to apply to the court for an order requiring the business to comply. Failure to comply with a court order may lead to fines or imprisonment for contempt of court.

⁶⁷ See chapters 4 and 5 of the Australian Consumer Law: A guide to provisions

Fair Trading (Code of Practice – Fitness Industry) Regulation 2003

The Fair Trading (Code of Practice – Fitness Industry) Regulation 2003 (“COP Regulation”) is a sector-specific regulation governing the trade practices of the fitness industry in Queensland. It is a subsidiary legislation made under the Fair Trading Act 1989. The COP Regulation applies to suppliers who are carrying on the business of supplying fitness services, which includes exercise consultation, an individual exercise programme, a group exercise programme, fitness programme or the provision of fitness equipment at a fitness centre⁶⁸. Fitness centre is defined as “an indoor facility owned, leased, or used by a supplier at which the supplier provides fitness equipment; and primarily conducts the business of supplying fitness service”⁶⁹. It does not apply to registered doctors, physiotherapists, sports training provided by a sporting club etc.

Under the COP Regulation, a 48-hour cooling-off period is mandatory for all new fitness centre memberships⁷⁰ during which time a consumer may terminate a membership agreement by written notice. The supplier must refund to the consumer all fees paid less any fee for fitness service supplied to the consumer during this cooling-off period and before cancellation plus an administration fee which is the lesser of AUD\$75 or 10% of the membership fee⁷¹. Refunds must be paid to the consumer within 21 days after termination of the membership agreement⁷².

The COP Regulations is enforced by the Office of Fair Trading in Queensland. Contravention is not a criminal offence and the regulator may accept an undertaking from the supplier that it will comply with the COP; seek an injunction or obtain a compensation order against the supplier from the court⁷³.

Timeshare scheme

In Australia, timeshare schemes are regarded as a financial products and the issue or sale of interests in timeshare schemes is regulated under the Corporation Acts 2001, subject to a complex regulatory regime supervised by the Australian Securities and Investments Commission (“ASIC”). An operator, promoter or responsible entity of a timeshare scheme may need a financial services business licence to carry on such business. A timeshare scheme must also be registered with ASIC as a managed investment scheme before the scheme can operate. As part of the standard licence conditions, a licensee is required to give a cooling-off period

⁶⁸ Regulation 4

⁶⁹ Schedule to the COP Regulation

⁷⁰ Regulation 14

⁷¹ Regulation 24

⁷² Above

⁷³ Regulation 5

to consumers. Depending on the applicable regulatory requirements, generally consumers will be entitled to a cooling-off period of 7 to 14 days for purchasing interests in a timeshare scheme⁷⁴.

4.3 USA

Federal Cooling-Off Rule

In the USA, the federal Cooling-Off Rule (“Cooling-Off Rule”) gives consumers a right to cancel door-to-door sales made at a place other than the place of business of the seller, such as the buyer’s home, workplace or dormitory, or a temporary workplace of the seller. Any waiver of the cancellation right is prohibited⁷⁵.

Door-to-Door Sales

Door-to-door sales is defined under the Cooling-Off Rule as a sale, lease, or rental of consumer goods or services where the seller personally solicits the sale (including those in response to or following an invitation by the buyer) and the buyer’s offer or agreement to purchase is made in a location other than the place of business of the seller, such as the buyer’s home⁷⁶. The purchase price of the sale must be at least US\$25 for a sale at the buyer’s home, or at least US\$130 for a sale made at another temporary location⁷⁷.

The meaning of the “place of business” is defined as the main or permanent branch office or local address of a seller. Hence, a sale concluded at temporary locations such as a hotel, convention center, or restaurant is subject to the Cooling-Off Rule⁷⁸.

Exclusion

There are various exceptions to the Cooling-Off Rule⁷⁹, such as:-

- (1) Sales under US\$25 made at the consumer’s home;
- (2) Sales under US\$130 made at temporary locations;
- (3) Goods or services not primarily intended for personal, family or household purposes;
- (4) Sales made entirely online, or by email or telephone;

⁷⁴ Regulatory Guide 160, timesharing scheme, June 2012

⁷⁵ §429 of the Cooling-off Rule

⁷⁶ See <https://www.consumer.ftc.gov/articles/0176-buyers-remorse-when-ftcs-cooling-rule-may-help>

⁷⁷ Above

⁷⁸ Above

⁷⁹ Above

- (5) Sales made as a result of prior negotiations at the seller's permanent place of business where the goods are sold regularly;
- (6) Sales made to meet an emergency situation;
- (7) Sales involving real estate, insurance, securities;
- (8) Sales involving motor vehicles sold at temporary locations if the seller has at least one permanent place of business; and
- (9) Arts or crafts sold at fairs or places like shopping malls.

Length of cooling-off period and method of cancellation

The Cooling-Off Rule provides consumers with a right to cancel "door-to-door" sales within 3 business days of entering into the transaction without giving any reason⁸⁰. The trader must provide two copies of cancellation form and a copy of the contract or receipt to the consumer at the time of sale⁸¹. Cancellation should be done by signing and dating one copy of the cancellation form and sending that back to the trader. If no cancellation forms are provided, a written cancellation letter suffices.

Refund and return of goods

The trader should refund all the payment made to the consumer within 10 business days following receipt of the cancellation form⁸². Within 20 days of the date of cancellation, the seller must pick up the goods from the consumer, or reimburse him for the cost of return⁸³. The consumer is required to return the goods in substantially as good condition as when received⁸⁴.

Fitness service/health club contracts

In the State of New York, Article 30 of the General Business Law imposes a 3-business day mandatory cooling-off period for health club contracts for services. These contracts include contracts supplying consumer services for instructions, training or assistance in bodybuilding, exercising, weight reduction, figure development, martial arts, or any similar course of physical training to be provided for the future use by a consumer of the facilities providing the foregoing instruction,

⁸⁰ Above

⁸¹ Above

⁸² Above

⁸³ Above

⁸⁴ Above

training or assistance; or membership in any group, club, association or organization for any of the above purposes⁸⁵.

However, not all contracts for health club services are subject to the imposition of a cooling-off period and certain contracts are carved out. For example⁸⁶:-

- (1) Membership in any group, club, association or organization which provides any of the foregoing services and is organized pursuant to the provisions of the not-for-profit corporation law;
- (2) Boarding accommodations;
- (3) Travel arrangements contracted for less than one year in advance;
- (4) Services by a college or university, a secondary school, an elementary school, a nursery school or kindergarten;
- (5) Contracts for services to provide instruction, training or assistance to acquire a vocation or skill conducted in a training school or by home study;
- (6) Contracts for programmes which provide instruction for improving tennis skills, and are of 8 weeks duration or less where the full fee does not exceed US\$250;
- (7) Contracts relating solely to the seasonal use of tennis facilities.

To exercise the cancellation right, a consumer should notify the seller in writing and deliver this notice by certified or registered mail to the address specified in the contract. Cancellation notification should also be accompanied by the contract forms and membership cards or any other evidence of membership. All moneys paid under the contract shall be refunded within 15 business days of receipt of the cancellation notice. If the consumer has executed any credit or loan agreement to pay for all or part of health club services, these documents will also have to be returned to the consumer within 15 days⁸⁷. Non-compliance attracts a civil fine of up to US\$2,500⁸⁸.

Timeshare scheme

In the USA, various state laws provide cooling-off protection for consumers who buy timeshare products. According to a research article, all but 4 states in the USA have specific timeshare regulations, rules or policies⁸⁹. The cooling-off period usually ranges between 3 to 7 days. Below are a few representative examples⁹⁰:-

⁸⁵ §621 of the Article

⁸⁶ Above

⁸⁷ §624 of the Article

⁸⁸ §629 of the Article

⁸⁹ B.A. Sparks et al. Journal of Business Research 67 (2014) 2903-2910

⁹⁰ See <http://www.arda.org/government-affairs/default.aspx>

- (1) California – 7 days;
- (2) Washington – 7 days;
- (3) New York – 7 business days;
- (4) Colorado – 5 days;
- (5) Massachusetts – 3 business days;
- (6) Texas – 6 days;
- (7) Pennsylvania – 7 days.

4.4 Canada

Direct Sellers Harmonization Agreement

In Canada, the Direct Sellers Harmonization Agreement (“Harmonization Agreement”) is a uniform template for unsolicited selling established by the Consumer Measures Committee⁹¹. It gives consumers across Canada a right of reflection and cancellation when they buy from door to door salespersons. The definition of a direct sales contract is set out in provincial legislations and not in the Harmonization Agreement⁹² and is defined as a consumer transaction that is entered into at a place other than the seller's place of business, or at a market place, an auction, trade fair, agricultural fair or exhibition⁹³.

The Harmonization Agreement provides consumers with a right to cancel a direct sales contract in writing any time within the 10-day period which is calculated from the day the consumer receives a copy of the contract or a statement of cancellation rights⁹⁴. A notice of cancellation is effective so long as it indicates the intention of the consumer to cancel the contract⁹⁵ and is sent or delivered to the seller.

The direct seller is obliged to provide certain required information in the contract, failing which the cancellation period could be extended to a year⁹⁶. Similar to the practice in the UK, the prescribed information includes, inter alia, the seller's name

⁹¹ The Consumer Measures Committee has a representative from the federal government as well as every province and territory. It provides a federal-provincial-territorial forum for national cooperation to improve the marketplace for Canadian consumers, through harmonization of laws, regulations and practices and through actions to raise public awareness.

⁹² Taking Ontario as an example, it is defined as a consumer agreement that is negotiated or concluded in person at a place other than (i) at the supplier's place of business, or (ii) at a market place, an auction, trade fair, agricultural fair or exhibition.

⁹³ Section 20 of the Consumer Protection Act (Ontario)

⁹⁴ Section 1 of the Harmonization Agreement

⁹⁵ Section 4 of the Harmonization Agreement

⁹⁶ Section 2 of the Harmonization Agreement

and contact information, description of goods and services, a statement of cancellation rights, the total amount and terms of payment of the contract etc⁹⁷.

In the event of cancellation, the direct seller must refund the consumer all monies received under the contract or a trade in value, whichever is the greater, within 15 days of cancellation⁹⁸. On receipt of the refund, the consumer must return the goods to the seller⁹⁹.

Although not expressly provided for in the Harmonization Agreement, a consumer is under a duty to take reasonable care of the goods under relevant provincial legislations. If this is not done, the direct seller is entitled to compensation¹⁰⁰.

Where credit is extended or arranged by the direct seller and the credit contract is separate from or attached to the direct sales contracts, the credit contract is conditional on the direct sales contract and when the direct sales contract is cancelled, that cancellation has the effect of cancelling the credit contract¹⁰¹.

Consumer Protection Act in Ontario

In Ontario, the Consumer Protection Act provides an unconditional cancellation right to consumers entering into direct sale agreements, time share agreements and personal development service contracts. The most common example of personal development service contracts is a gym membership agreement. Under the Act, "personal development service contract" is defined as:-

- (1) services provided for,
 - (a) health, fitness, diet or matters of a similar nature,
 - (b) modelling and talent, including photo shoots relating to modelling and talent, or matters of a similar nature,
 - (c) martial arts, sports, dance or similar activities, and
 - (d) other matters as may be prescribed, and
- (2) facilities provided for or instruction on the services referred to in (1) and any goods that are incidentally provided in addition to the provision of the services¹⁰².

⁹⁷ Section 6 of the Harmonization Agreement

⁹⁸ Section 5 of the Harmonization Agreement

⁹⁹ Section 5 of the Harmonization Agreement

¹⁰⁰ Section 96 of the Consumer Protection Act (Ontario)

¹⁰¹ Section 6 of the Agreement

¹⁰² Section 20

For a cooling-off period to apply, the value of the direct sale agreement and personal development service contract must exceed CAD\$50¹⁰³. There is an additional requirement that the personal development service contract must involve prepayment (e.g. contracts to *pay in advance* to join a fitness club or gym). Consumers who enter into a personal development service contract but without prepayment are not entitled to any cooling-off protection¹⁰⁴. Also, cancellation rights are not applicable if the gym or fitness centre is a non-profit making / charitable organization, owned by its members or through a cooperative¹⁰⁵ run or funded by the local government, or merely an incidental service as part of other goods or service supplied¹⁰⁶. The cancellation right cannot be waived by agreement¹⁰⁷.

Length of cooling-off period under the Act

A consumer may cancel a direct sale agreement, timeshare agreement and personal development service contract at any time from the date of entering into the agreement until 10 days after the consumer has received the written copy of the agreement¹⁰⁸. The cancellation notice may be oral or in writing and may be given by any means¹⁰⁹. If a consumer cancels an agreement during the cooling-off period, any related contracts, including credit agreements, are also cancelled, as if they never existed¹¹⁰.

Information requirement under the Act

Other than detailed descriptions of the goods/service purchased, contract price and terms of payment, all contracts with cancellation rights must include the following essential information¹¹¹:-

- (1) Contact information of the trader;
- (2) Details regarding the cancellation right and how to exercise the right; and
- (3) Obligations of the trader and consumer upon cancellation of the agreement.

¹⁰³ Regulation 27 and 34 of Ontario Regulation 17/05

¹⁰⁴ See <https://www.ontario.ca/page/joining-gym-or-fitness-club#section-2>

¹⁰⁵ A cooperative is a type of incorporated business that is owned by a group of people (known as members) with common needs and/or a common goal. See <http://www.cbo-eco.ca/en/index.cfm/starting/getting-started/starting-a-co-operative>

¹⁰⁶ See <https://www.ontario.ca/page/joining-gym-or-fitness-club#section-2>

¹⁰⁷ Above

¹⁰⁸ Section 35

¹⁰⁹ Section 92

¹¹⁰ Section 95

¹¹¹ Regulation 28

Failure to provide the required information would result in an extension of cancellation right for up to 1 year¹¹².

Refund and return of goods under the Act

Upon cancellation of the agreement, traders are required to provide refund to the consumer within 15 days of cancellation¹¹³. Consumers are required to take reasonable care of the goods and return the goods to the traders forthwith upon refund¹¹⁴. Traders are also responsible for picking up the goods or paying for it to be picked up if they want it back¹¹⁵.

4.5 Singapore

Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations ("CPFTR")

The CPFTR is a sector-specific regulation governing the practice of direct sale and the timeshare industry. It is a subsidiary legislation made under the Consumer Protection (Fair Trading) Act of Singapore. At present, direct sales contracts, long-term holiday product contracts, timeshare contracts or timeshare-related contracts¹¹⁶ are subject to the control of the CPFTR.

Exclusion

Certain contracts are excluded from the application of the CPFTR. They include¹¹⁷:-

- (1) non-consumer transactions;
- (2) acquisition of an estate or interest in any immovable property;
- (3) any lease of residential property;
- (4) any contract under which the total payments to be made by a consumer do not exceed SG\$50;
- (5) any direct sales contract if, prior to the visit during which the consumer entered into the contract or made an offer, the terms of the contract were read by or explained to the consumer in the absence of the supplier;

¹¹² Section 35

¹¹³ Section 96 and Regulation 79(1)

¹¹⁴ Section 96 and Regulation 80

¹¹⁵ See <https://www.ontario.ca/page/your-rights-under-consumer-protection-act>

¹¹⁶ See Regulation 2 for their definitions

¹¹⁷ Regulation 3

- (6) any direct sales contract resulting from prior negotiations between the consumer and the supplier which took place in circumstances other than the consumer's place of residence or place of business, or the place of residence of another person;
- (7) any direct sales contract entered into by a consumer-
 - (a) during a visit made by the supplier at the express request of another person to that other person's place of residence or business; or
 - (b) after an offer was made by the consumer in respect of the supply of the goods or services in the circumstances referred to in (a),

if the consumer attended the visit with the prior knowledge that the supplier would be present to engage in the supply of the goods or services to which the contract relates; and
- (8) financial products or financial services regulated under the Monetary Authority of Singapore.

Information requirement

Before entering into a regulated contract, each consumer shall be provided with a consumer information notice containing all the information specified in the 1st Schedule of the CPFTR¹¹⁸, which includes:-

- (1) a statement of the consumer's right to cancel the contract;
- (2) the supplier's information including name of supplier, supplier's reference number, code or other details to enable transaction to be identified, designated person to whom the notice of cancellation is to be given;
- (3) in case of time share contracts or long-term holiday product contracts, a product information notice containing the information specified in the 3rd Schedule to the CPFTR.

Failure to provide the consumer information notice would result in an extension of cancellation right (see below). If the product information notice is not included, the cancellation period could be extended for another 3 months.

Length of cooling-off period

Under the CPFTR, a consumer has a right to cancel a regulated contract within 5 days (excluding Saturdays, Sundays and public holidays) after¹¹⁹:-

- (1) the day on which the consumer entered into the contract;

¹¹⁸ Regulation 4(6)

¹¹⁹ Regulation 4

- (2) the day on which the consumer information notice was brought to his attention, if the consumer information notice was not brought to the attention of the consumer before or at the time he entered into the contract; or
- (3) where the regulated contract is a long-term holiday product contract, and neither the information in respect of accommodation which the consumer will acquire under the contract, nor the technical means of accessing such information (e.g. password), was provided to the consumer before or at the time he entered into the contract, the earlier of the following:-
 - (a) the day on which such information is provided to the consumer; or
 - (b) the day on which the technical means of accessing such information is provided to the consumer.

Any purported waiver of the cancellation right under the CPFTR shall be void¹²⁰.

Prohibition of payment in certain contracts during cooling-off period

A supplier must not (either in person or through another person) request or accept any consideration from the consumer during the cooling-off period for long-term holiday product contracts, timeshare contracts or timeshare-related contracts¹²¹.

Refund and return of goods

Where payment during cooling-off period is not prohibited and a contract is cancelled, any sum which the consumer has paid under the contract to the supplier must be repaid to the consumer by the trader within 60 days after the consumer has given notice of cancellation to the trader¹²². Traders cannot recover any sum from the consumers other than compensation which is set out below.

A consumer who has, before cancelling a direct sales contract, acquired possession of any goods shall be under a duty, upon the cancellation, to return the goods to the trader. However, the consumer is not under a duty to return (i) perishable goods; (ii) goods which by their nature are consumed by use and which, before the cancellation, were so consumed; (iii) goods supplied to meet an emergency; or (iv) goods which, before the cancellation, had become incorporated in any land or thing not comprised in the contract¹²³. In these circumstances, the consumer can still cancel the contract but instead of returning the goods, he is under a duty to

¹²⁰ Section 13 of the Consumer Protection (Fair Trading) Act

¹²¹ Regulation 3A

¹²² Regulation 5

¹²³ Regulation 6

pay reasonable compensation for the supply of the goods before the cancellation¹²⁴.

Where a consumer cancels a regulated contract, the consumer has to pay reasonable compensation for the services supplied under the contract before the cancellation¹²⁵.

When a contract is cancelled, any other contract arranged by the supplier and entered into by the consumer for the purposes of the contract prior to the cancellation will not be enforceable against the consumer ¹²⁶ , i.e. effectively cancelled.

Enforcement

In Singapore, the cooling-off period under the CPFTR is a civil regime. Non-compliance would not result in any criminal liability. The Consumers Association of Singapore (“CASE”) is the first point of contact for consumers and tourists to handle complaints.

Aggrieved consumers may file complaints to CASE if their cancellation right is prejudiced by unfair practices of the trader. CASE will then assist in obtaining redress and/or compensation through negotiation and/or mediation. Errant retailers may enter into a Voluntary Compliance Agreement with CASE, whereby they will agree in writing to stop the unfair practices, and compensate affected consumers or tourists¹²⁷.

Errant retailers who persist in unfair practices will be referred to the Standard, Productivity and Innovation Board of Singapore, more commonly known as SPRING Singapore for investigation and follow-up actions. SPRING Singapore is an administering agency and has investigative and enforcement powers to take timely actions against recalcitrant retailers. Specifically, it has power to gather evidence against persistent errant retailers; file injunction applications with the courts; and enforce compliance with injunction orders issued by the courts¹²⁸. In addition, aggrieved consumers in Singapore can pursue a claim in court and seek compensation from the traders.

¹²⁴ Above

¹²⁵ Regulation 7

¹²⁶ Regulation 5

¹²⁷ Above

¹²⁸ CASE Press Release dated 13 September 2016

4.6 South Korea

Door-To-Door Sales Act and Act on Consumer Protection in Electronic Commerce

The Door-To-Door Sales Act regulates unsolicited selling away from business premises and unsolicited telemarketing sales. It provides a 14-day cooling-off period to consumers who entered into unsolicited door-to-door transactions and telemarketing sales¹²⁹. Traders are required to provide (in writing) certain essential information including name, contact details, matters concerning the cancellation right and procedures etc. to the consumers before concluding these transactions¹³⁰.

For electronic communications, the Act on Consumer Protection in Electronic Commerce provides a 7-day cooling-off period for consumers' online purchases¹³¹. Broadly speaking, online traders are subject to similar regulatory requirements in terms of cooling-off period as in that stipulated in the Door-To-Door Sales Act.

Upon cancellation, the consumer has the responsibility to return the goods to the trader. The trader should then refund the price of goods to the consumer within 3 business days from the date on which the goods are returned¹³². The cost of returning the goods is to be borne by the trader¹³³ in door-to-door sales, and by the consumer in online sales¹³⁴. However, cancellation is not permitted where (i) the goods are destroyed or damaged by consumers; (ii) the value of the goods is significantly diminished by the use or partial consumption by the consumer, or by the lapse of time; or (iii) where the packaging materials of certain goods are damaged¹³⁵.

Any contractual terms diminishing the rights of the consumers under the cooling-off provisions is deemed not to have any effect¹³⁶.

The Fair Trade Commission is the enforcement body of consumer protection affairs in South Korea. It has powers to investigate complaints against suspected non-compliance of consumer law and regulations. The Commission is empowered to order traders to take appropriate corrective measures to rectify any acts of violations¹³⁷. If traders fail to take corrective measures as directed, the Commission

¹²⁹ Article 8

¹³⁰ Article 7

¹³¹ Article 17

¹³² Article 9

¹³³ Above

¹³⁴ Article 18 of The Act on Consumer Protection in Electronic Commerce

¹³⁵ Article 8

¹³⁶ Article 45

¹³⁷ Article 42

has power to order traders to suspend its business or impose a fine¹³⁸. Furthermore, non-compliance with the Commission's order constitutes an offence which is punishable by imprisonment¹³⁹.

4.7 Mainland China

Consumer Protection Law

Article 25 of the Consumer Protection Law imposes a mandatory cooling-off period of 7 days where traders sell goods to consumers by means such as internet, television, telephone or mail order¹⁴⁰. It also stipulates that the cooling-off period is not applicable to the sale of the following goods, namely:-

- (1) Made-to-order goods;
- (2) Perishable goods;
- (3) Digital products which are downloaded or unsealed by consumers;
- (4) Delivered newspaper and periodicals; and
- (5) Goods unsuitable for return by their nature as confirmed by consumers at the time of purchase, such as gold or other commodities.

The State Administration for Industry and Commerce of the People's Republic of China published a guidance ("SAIC Guidance") in respect of the application of a cooling-off period for online purchases in January 2017. The SAIC Guidance also applies to distance purchases by other methods, such as by telephone and by post¹⁴¹. It sets out the operational details of the cooling-off arrangements in distance selling. Notably, three types of goods are considered unsuitable for return by their nature¹⁴², and they are:-

- (1) Goods which would affect the personal health or safety, or would result in a change of quality if unsealed, such as food and medicine etc.;
- (2) Goods largely devalued once activated or used on a trial basis, such as computer and digital products etc.; and
- (3) Goods which have been declared defective or close to expiry date at the time of purchase.

¹³⁸ Articles 42 and 44

¹³⁹ Article 53

¹⁴⁰ Notably, the cooling-off period does not extend to supply of service contracts.

¹⁴¹ Article 37 of the SAIC Guidance

¹⁴² Article 7 of the SAIC Guidance

Under the SAIC Guidance, goods which are returned by consumers should be in a good condition¹⁴³ and the traders must refund the price of goods to the consumer within 7 days of receipt of the returned goods¹⁴⁴ less a handling fee where the purchase was made as a credit card transaction¹⁴⁵. The SAIC Guidance also sets out prescribed circumstances when the trader may deduct delivery charges from the refund¹⁴⁶. Unless otherwise agreed, it is the responsibility of the consumer to pay for the cost of return¹⁴⁷. Any waiver of consumer rights provided under Consumer Protection Law is prohibited¹⁴⁸.

4.8 Taiwan

Consumer Protection Act

In Taiwan, the Consumer Protection Act provides a 7-day cooling-off period in respect of distance sales and 'door-to-door' sales. This cancellation right cannot be waived¹⁴⁹.

Distance sales

Distance sales means the transaction is made via television broadcast, telephone, facsimile, catalogues, newspapers, magazines, the internet, flyers, or any other similar channels, where the consumer does not have any opportunity to review the goods or services¹⁵⁰.

The following types of distance sales contracts are exempted¹⁵¹:-

- (1) Supply of goods which are liable to deteriorate, with fairly short shelf life, or expire rapidly;
- (2) Supply of goods or services made to the consumer's specifications or clearly personalized;
- (3) Supply of newspapers, magazines and periodicals;
- (4) Supply of sealed audio, video recording or computer software which have been unsealed after delivery;

¹⁴³ Article 8 of the SAIC Guidance

¹⁴⁴ Article 13 of the SAIC Guidance

¹⁴⁵ Article 16 of the SAIC Guidance

¹⁴⁶ Article 18 of the SAIC Guidance

¹⁴⁷ Above

¹⁴⁸ Article 26 of the Consumer Protection Law

¹⁴⁹ Article 19

¹⁵⁰ Article 2

¹⁵¹ See Regulations on Reasonable Matters as Exceptions to Rescind the Distance Sales

- (5) Supply of digital content which is not supplied on a tangible medium, or online services which would be fully performed once begun, if consumer's prior consent is given;
- (6) Supply of sealed personal hygiene products which have been unsealed after delivery; and
- (7) Supply of international airline passenger services.

If the goods are damaged by mishandling on the part of the consumer, the consumer is not entitled to return the goods¹⁵².

Door-to-door sales

"Door-to-door sales" means a sale of goods or services which the traders or his representatives solicit the sale, and the consumer's agreement or offer to purchase is made at the consumer's residence, workplace, public places or any other places¹⁵³.

Length of cooling-off period

Under the Consumer Protection Act, consumers of distance sales or door-to-door sales are allowed to return the goods or rescind the contract within 7 days upon receipt of goods or services¹⁵⁴ and the cancellation must be in writing¹⁵⁵.

Information requirement

In accordance with Article 18 of the Consumer Protection Act, traders must provide consumers with various required information in writing. They include, inter alia:-

- (1) Name of the trader and contact information with which the consumer can get quick and effective communication;
- (2) Description of the goods or services, such as price, payment date, payment method, delivery date etc.;
- (3) The right to cancel the contract within the stipulated cooling-off period and how to exercise the cancellation right; and
- (4) The consumer complaint handling procedure.

¹⁵² See https://www.cpc.ey.gov.tw/News_Content.aspx?n=495361E84D2038BD&sms=269B2A0B3B272499&s=2A95988413D60345

¹⁵³ Article 2

¹⁵⁴ Article 19

¹⁵⁵ Above

If a trader fails to inform a consumer of his cancellation right, the 7-day cooling-off period would not commence until the information is provided, with a maximum period of 4 months. For distance sales (e.g. those made via internet), a trader must provide the consumer with recoverable and savable information in an electronic format.

Refund and return of goods

The trader must arrange refund to a consumer within 15 days from the next day of collection of the goods or receipt of the cancellation notice in respect of a service contract¹⁵⁶. Unless otherwise agreed, it is the obligation of the trader to collect the goods from the consumer within 15 days from the next day of receipt of the cancellation notice¹⁵⁷.

4.9 Summary and relevance of the Mainland and overseas legislations to Hong Kong

In summary, none of the jurisdictions reviewed in this chapter imposes a mandatory cooling-off period which applies across the board for all industries and for all transactions. In the main, cooling-off protection is afforded only in selected situations, for example, to consumers who purchase goods or services sold away from trade premises or through distance selling such as mail order purchases, telephone and internet sales; purchases of timeshare contracts, or fitness memberships¹⁵⁸. Certain transactions, such as those for financial services, transport services and property transactions are exempted. Cooling-off protection is also not extended to specific circumstances, for example, small value transactions, fully performed services, urgent household repairs and tailored-made goods etc.

These legislations offer protection by imposing clear and stringent information disclosure requirements on traders and setting out detailed provisions governing the implementation of how refund and cancellation are to be achieved, comprehensively listing out rights and obligations of both the traders and consumers under different situations¹⁵⁹.

The study shows that in the UK, Australia and Singapore¹⁶⁰, in order to ensure compliance, civil sanctions and remedies are provided for in the legislation. Correspondingly, a public enforcement body is empowered to carry out such enforcement through different means ranging from accepting undertakings from traders for suspected violation of the law, applying to the Court for injunctions, imposing financial penalties or making orders to require traders to implement

¹⁵⁶ Above

¹⁵⁷ Above

¹⁵⁸ See Appendix A for the relevant legislations and types of transactions covered

¹⁵⁹ See Appendix B for operational arrangements

¹⁶⁰ See Appendix C for summary

remedial measures. These legislations also expressly provide for a private right to the consumer to seek redress against the trader in case of non-compliance.

In some jurisdictions such as the UK and Australia, non-compliance of the cooling-off requirements may also constitute criminal offences. In such instances, criminal conviction does not involve any custodial sentence, merely a payment of a fine. Given the type of penalty involved for criminal sanctions, it would not be surprising if the enforcement bodies in those applicable jurisdictions are more inclined to take civil enforcement actions against delinquent traders as there is a lower burden of proof in civil proceedings.

The review and referencing of the current cooling-off legislations in other relevant jurisdictions helped Council formulate what should be included in a mandatory cooling-off regime in Hong Kong. Of the jurisdictions reviewed, the Council believes the legislations in the UK and Australia are of considerable and material value, given their comprehensiveness and the similarity of the legal systems between Hong Kong, the UK and Australia.

Having said that, any overseas experience even if successful, should not be indiscriminately transplanted into Hong Kong without regard to the local culture, conventions and circumstances in terms of trade and consumer customs, usages and practices, general consumption patterns and specific areas in which unfair trade practices prevail. To ensure that the proposed mandatory cooling-off regime as set out in chapters 5 and 6 is practical and feasible for Hong Kong, the multitude of constituents mentioned above has been taken into account and given consideration during the formulation of recommendations proposed in this Report.



Chapter 5 - Proposed scope of the application of the mandatory cooling-off regime

Chapter outline

Having regard to the international legislations as well as local trade customs and practices, this chapter first sets out the guiding principles in formulating a suitable mandatory cooling-off regime for Hong Kong. The Council then makes recommendations on the scope of application of the regime, and explain the justifications and its intended coverage. In summary, the Council recommends introducing a mandatory cooling-off period for the following 5 types of consumer contracts, namely:-

- (1) Unsolicited off-premises contracts;
- (2) Distance contracts (other than online purchases);
- (3) Fitness services contracts;
- (4) Beauty services contracts; and
- (5) Timeshare contracts.

In previous chapters, the Report reviewed and analysed the implementation of the existing cooling-off regimes in Hong Kong and identified the potential benefits and concerns of introducing a mandatory cooling-off regime in Hong Kong. In chapter 4, it is noted that although no jurisdiction has an across-the-board mandatory cooling-off regime, many overseas jurisdictions have enacted cooling-off legislations, albeit with different scopes, and have adopted a wide variety of operational arrangements.

The Council is of the view that Hong Kong should develop its own model of mandatory cooling-off regime to suit its local consumption culture and trade practices required to be addressed. This chapter outlines the Council's proposed scope of application of the mandatory cooling-off regime and the underlying principles. Details of the operational arrangements will be discussed in the next chapter.

5.1 Guiding principles for consideration

Given the implications of the introduction of a mandatory cooling-off period and the repercussions both legally and otherwise this will have on the divergent interests of both the traders and the consumers, it is important that the formulation of this regime's framework adheres to clear guiding principles. While the principle of contractual freedom should not be lightly eroded, the proposed statutory intervention of this right through the imposition of a cooling-off period would

serve to enhance consumer protection against unscrupulous trade practices, and boost consumers' confidence in consumption. The ultimate goal of the proposal is to strike a proper balance between increasing consumer protection and maintaining business efficacy. When devising the proposed framework of a cooling-off period, the Council paid heed to the following principles:-

- (1) Freedom of contract should be respected to the fullest extent permitted;
- (2) The regime should be fair and reasonable to both consumers and traders;
- (3) The cooling-off arrangements should be structured in a way which does not impose unduly onerous burden on normal business operations especially for small or medium sized businesses; and
- (4) The cooling-off arrangements should be, as far as practicable, consistent and applicable to all contracts falling within the cooling-off regime in order to minimise potential confusion to traders and consumers.

5.2 The proposed scope of application

The Council recommends that mandatory cooling-off arrangements be introduced to the following five types of consumer contracts. This recommendation is made with due regard and consideration of i) the review of the prevailing practices in other jurisdictions with a mandatory cooling off regime, ii) the guiding principles outlined above; and iii) the local consumption environment for consumer protection.

- (1) Unsolicited off-premises contracts;
- (2) Distance contracts (other than online purchases);
- (3) Fitness services contracts;
- (4) Beauty services contracts; and
- (5) Timeshare contracts.

5.3 Exemptions

As it is the case that the application of a cooling-off period could be counter-productive in certain circumstances, and indeed, not all types of consumer transactions need to have cancellation rights, the Council believes that like other jurisdictions, there are justifications for certain exemptions and exclusions.

After examining the applicable exemptions in other jurisdictions, it is proposed that a cooling-off period should not apply to contracts for the following subject matters:-

- (1) Financial services such as banking, credit, insurance etc.;
- (2) Property transactions, such as the sale of immovable property and tenancies;

- (3) Passenger transport services such as flight/train/bus/ferry tickets;
- (4) Professional services such as legal services, accounting services, and healthcare services such as plastic surgery and physiotherapy etc.;
- (5) Utility services, including the supply of gas, electricity and water; and
- (6) Public services provided by the Government and public bodies.

Most of the above transactions are already governed by specific ordinances and subject to well-established and specific regulatory regimes in Hong Kong and in any event fall outside the ambit of the TDO. If a mandatory cooling-off period for any of these contracts is considered justified and necessary, this would be best tackled by the relevant regulatory body. As for the provision of utilities and public services, this usually involves reliable supply and under strict regulatory oversight. Thus, no significant consumer complaints were observed.

In addition to the above, the Council also considers that it is inappropriate to apply a cooling-off period to following contracts:-

- (1) purchases involving not more than, say \$500;
- (2) custom-made goods;
- (3) food and drinks;
- (4) books and magazines;
- (5) goods received sealed for health protection or hygiene reasons once unsealed;
- (6) sealed audio, video and software products once unsealed;
- (7) audio, video, computer software or other digital content products which are not supplied on a tangible medium;
- (8) supply of accommodation, transport of goods, vehicle rental services, catering and services related to leisure activities, if the contract provides for a specific date of performance;
- (9) where the consumer has contacted the trader to effect urgent household repairs;
- (10) supply of services which have been fully performed; and
- (11) one-off fitness services or beauty services with specific date of performance. For example, make-up service on wedding date and a single session of beauty treatment or physical training class.

Allowing consumers to return/cancel low value goods/services will inevitably disproportionately increase the compliance and administrative costs for businesses and may open up opportunities for consumer abuse. Review of overseas legislations show that small value transactions are usually excluded from the

cooling-off regimes for the exact same reason. The table below summarises what constitutes small value transactions in different countries:-

Table 4

Jurisdiction	Minimum contract price	HK dollars equivalent ¹⁶¹
UK	£42 ¹⁶²	\$460
Australia	AUD \$100	\$610
USA	US\$25 (for sales made at home)	\$195
	US\$130 (for sales made at temporary locations)	\$1,014
Singapore	SGD\$50	\$300
Canada	CAD\$50	\$310

The Council is of the view that for Hong Kong, a minimum contract price of say \$500 could be considered but recommends that the Government makes reference to the overseas examples listed above and take into account local economic indicators and circumstances when determining the appropriate amount for the cooling-off regime in Hong Kong. In addition, the Council suggests that a mechanism should be put in place in the legislation to provide flexibility allowing for future revision if and when necessary.

Cancellation and/or return is also inappropriate if the value of goods is prone to rapid depreciation (e.g. food and drinks) or have no secondhand market (e.g. custom-made goods). Allowing digital content products to be returned after being unsealed or downloaded would most likely encourage consumer abuse of the cancellation right which in turn would cause harm to the legitimate interests of the suppliers. Consumers may immediately use the software after download. Furthermore, it is unrealistic and impracticable to expect consumers to “delete” the downloaded digital content product from their personal device after cancellation on a honour-system basis.

The conclusion of a contract involving performance on a specific date requires the allocation of capacity and resource on the part of the trader. When a right of cancellation is exercised by the consumer, especially at the last minute, it may be difficult for the trader to find alternative consumers to fill the allocated slot thereby causing loss of revenue to the trader. This applies to the case of the booking of holiday packages, cultural or sporting events. Other examples include the provision of make-up service on wedding days or the provision of catering at birthday parties.

¹⁶¹ According to the exchange rate as at 9 March 2018

¹⁶² For off-premises contracts only

This therefore makes this category of contracts unsuitable for inclusion in the cooling-off regime.

Similarly, a right of cancellation is not suitable in the context of the provision of urgent household repairs as this would inevitably involve the trader having to make special arrangements (e.g. rescheduling his other work) and reallocate resources at a last minute to accommodate the request, causing operational disruption to his normal course of business and possible consequential loss of revenue.

As for the cancellation of a contract involving the supply of services which has been fully performed, any cancellation exercised at this stage would most likely be impracticable as it might not be easy to unwind the transaction. For some situations, cancellation is patently unfair to the trader.

5.4 Unsolicited off-premises contracts

Rationale for inclusion

Generally speaking, it is rather common in overseas jurisdictions to regulate unsolicited selling away from traders' premises. It is recognised that when consumers are not expecting to enter into a purchase agreement, e.g. at a consumer's home, in the workplace or on the street, the risk of high pressure sales resulting in poor choices by consumers is much greater¹⁶³.

In an off-premises sales scenario, consumers may potentially be under higher psychological pressure to purchase, and as a result, could end up making hasty and/or unwise decisions which they regret afterwards. Alternatively, the element of surprise associated with being unexpectedly approached by a salesperson on the street could contribute to impulse purchasing.

Consumers are even more vulnerable in situations where they do not have the option of walking away from the scene, for example, where the sale takes place at the consumer's home. A consumer who is surprised by a home visit from a trader will not have had the opportunity to shop around and cannot judge whether the trader is offering a good deal. Studies into this type of selling in the UK show that some of these consumers end up purchasing goods or services that do not meet either their needs or their budget just so that they can get rid of the salesperson and get them out of their homes¹⁶⁴. Anecdotal evidence from Australia also suggests that door-to-door agents often "selectively" target vulnerable consumers, such as the elderly, the unemployed, students, and the low income group¹⁶⁵. For

¹⁶³ Section 3.1 of the research paper "Cooling-off Period in Victoria: their use, nature, cost and implications", Consumer Affairs Victoria, January 2009

¹⁶⁴ Office of Fair Trading, Doorstep selling, A report on the market study, May 2004

¹⁶⁵ Research into the Door-to-Door Sales Industry in Australia, ACCC, August 2012

these reasons, a greater degree of regulatory intervention in this area is deemed necessary.

Coverage

Unsolicited off-premises contracts are those unsolicited consumer contracts concluded away from a traders' business premises in the presence of the trader and the consumer. For the purpose of the proposed cooling-off regime, whether the place is the traders' business premises is a question of fact and assessment is done on a case by case basis, taking into account all relevant circumstances including the nature, location, setting and permanence of the premises.

Despite the temporary nature of exhibition booths and pop-up stores, they should be regarded as the traders' business premises and be treated no differently from a permanent physical store. The rationale of this categorization is that most of the time, these booths and pop up stores offer the consumers a shopping experience similar to that of a permanent physical store. Consumers approach these places voluntarily with no element of surprise involved. Furthermore, consumers usually have the opportunity to make comparisons in a trade fair or at an exhibition. In contrast, mobile premises set up in the street with pull-up or roller display banners should not be regarded as business premises under the cooling-off regime and any unsolicited consumer contracts concluded at mobile premises as described above should be given cooling-off protection.

For illustrative purposes, unsolicited off-premises contracts should cover the following scenarios:-

- (1) A consumer transaction concluded during an uninvited visit to the consumer's home or workplace;
- (2) During an uninvited visit to a consumer's home, the consumer signs an order form (i.e. makes an offer) and the trader accepts the order later;
- (3) A consumer receives a "cold-call" from a direct seller and permits its representative to come to his home for product demonstration. The consumer purchases the product during the home visit;
- (4) A salesperson gives an unsolicited sales pitch to the consumer in the street or at other places away from the trader's shop and the consumer signs a contract with the salesperson in the street; and
- (5) A trader's representative approaches a consumer in the street and persuades the consumer to buy a product. The representative then immediately takes the consumer back to the trader's business premises which is usually nearby for the purpose of negotiating and entering into the transaction. In order for the contract to be considered an unsolicited off-premises contract, it must be concluded immediately. The contract would not be regarded as immediately concluded if the consumer leaves the trader's premises after having been

invited there, leaves without signing the contract but subsequently returns to the trader's premises at his own initiative and concludes the transaction.

5.5 Distance contracts

Rationale for inclusion

When making purchases at physical stores, consumers are able to look at, handle and examine the product they intend to buy and judge whether it meets their requirements. Having the opportunity to examine the goods allows the consumer to gather considerable information before making the decision to purchase. In the context of distance sales, such as mail order or telemarketing, the consumers conclude the contract "blind", and any purchase decisions would be heavily reliant on the information provided by traders. This means that consumers are more susceptible to misleading information or deceptive practices.

Coverage

The specific application of a cooling-off period for online purchases (including contracts concluded by way of electronic communications) will be discussed in detail in chapter 7. The Council's recommendation here is for the mandatory cooling-off regime to be introduced to consumer transactions concluded by distance communication (other than electronic communications), and that is, by telephone, fax or mail order, without the simultaneous physical presence of the consumer and trader and under an organised distance sales or service-provision scheme, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded¹⁶⁶.

The intention of limiting the application to an "organised distance sales or service scheme" is to exclude traders who sell a product at a distance on a one-off or a non-regular basis. For example, a trader with a physical store may take a phone order from a long-term customer on an exceptional occasion, and it should not be obliged to provide cooling-off period provided that such practice is not the usual sales channel adopted by the trader. This is to avoid any disproportionate administrative burden on those traders. Contrast this with traders who operate regular distance selling businesses – their contracts fall within the proposed cooling-off regime.

The Council proposes that the following scenarios should come under the cooling off regime:-

¹⁶⁶ Similar definition is adopted in the EU/UK

- (1) A trader delivers a homeware catalogue to a consumer's home and the consumer places an order by telephone, fax or mail;
- (2) A consumer views a product on TV and orders by telephone, fax, and mail; and
- (3) A consumer subscribes or renews a telecommunications service contract over the telephone.

Distance contracts should not apply to the following situations:-

- (1) A trader who sells a product by distance communications on a one-off basis;
- (2) A contract which is negotiated at the business premises of the trader but finally concluded by telephone; and
- (3) A contract initiated at a distance by telephone but finally concluded at the business premises of the trader.

5.6 Fitness services contracts and beauty services contracts

Rationale for inclusion

In recent years, the Council observed a surge of complaints involving unfair sales tactics in the fitness and beauty industries. The problem received widespread publicity and attracted extensive discussions in the community. Some of these unscrupulous practices are listed below:-

- (1) Promoting beauty packages when the consumer is undergoing treatment and in a compromised position and threatening to withhold treatment if the consumer refuses to buy extra packages;
- (2) Conducting prolonged sales pitch and preventing the consumer from leaving the premises;
- (3) Keeping the consumer's personal belongings until and unless the consumer agrees to the purchase;
- (4) Swiping the consumer's credit card without consent or swipe a different amount, or adding purchases without consent; and
- (5) Using abusive language or group pressure to intimidate the consumer if he refuses to buy.

The above malpractices caused consumers to feel that they have no choice but to yield to the salespersons in order to leave the premises or to be able to continue with the treatment in progress. In cases involving unauthorised charging of credit cards or the commencement of a new beauty treatment package, consumers, in particular the more vulnerable ones, signed and allowed the contract to be made, despite unwillingly, under the misconception that they were under an obligation to do so or that they had no right to withdraw in any event. On certain occasions,

consumers even ended up buying an unreasonably large volume of beauty treatments or personal trainer classes which could not or could hardly be used within the contractual validity period. In the case of fitness club memberships, some consumers were induced to join membership or service schemes with unreasonably long-term durations.

Review of the Council's complaint statistics also highlighted the fact that some of the complainants are mentally handicapped or are suffering from mental illness. They entered into these beauty or fitness services contracts, not really understanding what they agreed to, spending beyond their means and purchasing products or services not in line with their needs. They were also encouraged to overstretch their finances, e.g. using credit card IPP, or calling card issuing banks to raise credit limits. There are also cases where consumers were induced into making repeated purchases amounting to over \$1 million during a couple of visits to the beauty salon or the fitness centre in question. While on occasions, these purchases were the result of the salespersons' manipulation of the consumers' weaknesses, it was also possible that the salespersons were genuinely unaware that the consumers in question were unfit to make these purchase decisions. It was not until the consumers left the traders' premises and returned home that their family members discovered the purchases made and subsequently filed complaints against the traders.

The problem of unfair sales tactics in the fitness and beauty industries is such a pressing concern that as mentioned in chapter 1, the Panel of Economic Development of the Legislative Council passed a non-binding motion at its meeting on 23 May 2016¹⁶⁷ as follows:-

"That this panel urges the Government to introduce legislation on imposition of mandatory cooling off periods, and accord priority to implementing a statutory cooling-off period for pre-paid services involving a lot of complaints and large amount of payment, such as those provided by fitness centres and the beauty industry, so that consumers may unconditionally receive a refund of the paid fees and cancel the contracts during the cooling-off period with a view to protecting consumers' rights, thereby indirectly dampening the incentive to engage in unfair and high-pressure marketing practices, and ultimately safeguarding practitioners of the relevant trades as well"

The formulation of a sector specific cooling-off regime for the fitness and beauty industries involves delineation of these industry boundaries which is no easy task in the absence of a licensing system. Research into other jurisdictions with mandatory cooling off regimes reveals that there is limited overseas experiences from which the Council can draw reference. This is particularly so for the beauty industry as it provides a wide range of services subject to rapid market development. A vague or broadly drawn industry boundary may cover businesses not intended to be the target. On the other hand, a rigid definition may not be

¹⁶⁷ Legco Minutes of Meeting on 23.5.2016

able to capture all the targeted services and also does not provide room to accommodate any emerging new services as a result of the development of this market. This will then inevitably result in disputes and circumvention of the cooling-off rules by traders and this will eventually lead to the undermining of the effectiveness of the regime.

5.7 The meaning of fitness services

Although drafting the legal definition of fitness services is a matter for the Government and law drafters, for reference, the Council proposes that “fitness services” may include the following:-

- (1) The provision of advice, instruction, training or assistance in bodybuilding, exercise, yoga and weight management at a fitness centre; and
- (2) The provision of fitness facilities at a fitness centre.

Fitness services can be supplied to consumers individually or as a group, by appointment or walk-in according to a fixed schedule, unsupervised or supervised by trainers/instructors. In the context of the proposed regime, the cooling-off period only applies to fitness services provided at a fitness centre.

“Fitness centres” mean indoor facilities primarily used or intended to be used for providing fitness facilities and services. Fitness services supplied by sporting clubs for the playing of, or training for a sport, the clubhouses of residential properties, educational institutions (such as universities) established by law, registered schools and licensed hotels are not covered.

“Fitness facilities” means equipment used in the supply of fitness services, and include free weights, machine weights, treadmills, exercise bikes, rowing machines and other similar apparatus.

5.8 The meaning of beauty services

Based on the research in chapter 4, the Council is not aware of there being any statutory definition of “beauty services” from its survey of the Mainland and overseas cooling-off legislations. Nevertheless, it is proposed that “beauty services” may include any procedure used or intended to be used to maintain, restore, correct, modify, or improve the physical appearance of the human body. It is noted that such a broad meaning may create uncertainties. However, given the wide variety of services provided by the beauty industry ranging from general beauty therapies such as facial and body treatments, skin resurfacing, hair care, nail care, body contouring, metabolism improvement and weight reduction, to medical beauty procedures like high frequency focused ultrasound (commonly known as HIFU) and botox injections which involve invasive techniques, it is considered that a sufficiently wide meaning is necessary in order to cover both general beauty

services and medical beauty services¹⁶⁸. Having said that, it does not mean that all beauty services contracts are required to provide a cooling-off period. As explained below, only those contracts which satisfy the prescribed requirements would be subject to a mandatory cooling-off period. Furthermore, it is accepted that beauty services should not cover some special situations like plastic surgery or orthodontic treatment where the application of a cooling-off period is inappropriate.

Coverage

After defining the industry boundaries, the next essential question to be asked is whether all service contracts in the fitness and beauty industries require the imposition of a mandatory cooling-off period. If not, what types of contract require cooling-off protection?

Review of the Council's complaint statistics showed that traders are more likely to adopt unfair or aggressive trade practices detrimental to the consumers' interest in cases where contracts have a long duration or large prepayment amounts are involved. As the stakes are high, traders have stronger incentives to use unfair trade practices to lure or pressure consumers into entering these contracts. While some sales tactics employed are commercially legitimate, such as offering a greater discount or other value-added services to "prepaid" consumers, consumers, especially the more vulnerable ones, often find themselves being put under huge psychological pressure when they have to resist the high-pressure sales tactics in some situations. The introduction of additional protective measures to safeguard consumers who enter into these "long term" or "prepaid" contracts is warranted.

To tackle this problem proportionately and, at the same time, prevent causing undue burden on the fitness and beauty industries, it is proposed that a mandatory cooling-off should only be imposed on fitness services and beauty services contracts with a duration of not less than 6 months or contracts involving prepayment. Although a shorter duration (say 3 months) may narrow the room for circumvention and achieve a greater deterrent effect, it would also increase the administrative burden on law-abiding businesses. The Council is of the view that 6 months is an appropriate period and this should strike a right balance between consumer protection and minimising administrative burden of business. For the avoidance of doubt, a cooling-off period should still apply even if the contract does not involve a fixed duration or an expiry date. Consumers who choose a "pay as you go" option whenever they visit a gym or a beauty centre will not be affected.

Prepayment (or advance payment) refers to the payment made by the consumers for goods or services before receiving the same. By its ordinary and natural meaning, prepayment means money, or goods for money's worth, provided to a

¹⁶⁸ For avoidance of doubt, the professional services exemption does not apply to medical beauty services.

trader in advance of receiving the purchased goods or services. A prepayment could be for the entire balance, or just a proportion of the total price¹⁶⁹. It could also be a deposit to secure the performance of a contract. The Council notes that in fitness industry, it is a common practice for consumers to pay a monthly fee on the first day of each month and use the facilities during the month. In order not to unduly affect the operation of fitness centres, it is suggested that such practice, i.e. solely charging a monthly fee every month, in fitness industry should not be regarded as prepayment for the purpose of the mandatory cooling-off period.

Subject to the exemptions discussed above, the Council recommends that the following scenarios be included under the proposal, such as:-

- (1) A consumer joins the gym on a 12-month membership and pays the membership fees on a monthly basis (i.e. without prepayment);
- (2) A consumer purchases prepaid personal training lessons provided by a fitness centre with a validity period of 12 months;
- (3) A consumer purchases a beauty package with prepayment. The package does not provide an expiry date; and
- (4) A consumer makes a lump sum prepayment for a hair removal package. The package provides that all sessions should be completed within 3 months from the date of contract.

5.9 Timeshare contracts

Rationale for inclusion

Timeshare is a tourism product by nature and in simple terms, it gives the purchaser a right to stay at designated accommodation on a time-interval basis. Timeshare products and their contracts are complex and often involve long and substantial financial commitments by the consumer involved. Purchasers may also need to share other on-going expenses associated with the property such as management or maintenance fees. The Council's complaint statistics reveal that in one extreme case, the complainant committed to pay HK\$500 per month for 17 years with his contractual liability ending in 2035. Information asymmetry is also an issue as it is also often the case that the conclusion of a contract takes place in a different jurisdiction from the one where the property is located. Traders selling the products usually have far more information than the consumers who are therefore not in a position to properly judge the true value of the contracts. For instance, consumers may not have a clear understanding of the surrounding environment of the holiday resort and the available transportation facilities or lack thereof and these factors could affect the value of property. Many jurisdictions where timeshare sales occur

¹⁶⁹ A similar definition is adopted by the UK Law Commission in the report "Consumer prepayments on retailer insolvency".

regulate the transactions through a mandatory cooling-off period¹⁷⁰. Examples include the UK, Australia, the USA, Canada and Singapore.

Literature review also suggests that in many parts of the world, timeshare companies usually rely on a highly structured sales process and the sales of timeshare products are often characterized by high-pressure sales tactics. This indeed has tarnished the timeshare industry's reputation¹⁷¹. Locally, the Council received 12 and 14 timeshare complaints involving improper sales practices in 2014 and 2015 respectively. Unfortunately, there appears to be a resurgence of complaints against timeshare companies since 2016. Last year, the Council received 82 complaints against traders in the timeshare sector. This is almost four times the number of complaints in 2016. The total claim amount involved has also increased from \$540,000 in 2014 to \$3,700,000 in 2017, i.e. about \$45,000 for each complaint case.

In order to denounce such mal-practices in the timeshare industry and to inform consumers of and educate them on the pitfalls involved in entering into such contracts, the Council carried out a name and public reprimand exercise in September 2017 against a timeshare company. Typically, according to one of the complaints, the trader gave a cold call to the complainant and invited him to participate in a survey. After a few weeks or months, the trader contacted the complainant again on the pretext of offering him a free vacation resort coupon by way of thanks for his earlier participation. To collect the coupon, the complainant was required to attend a seminar which was conducted in a room filled with loud music and heavy beats. When the complainant declined to sign a timeshare contract, different staff members took turns to pressurise him into yielding, a process that lasted several hours. Throughout this process, the trader kept the consumer's identity card and credit card, originally obtained from him on the pretext of needing the information for registration for the free coupon. Review of the complaint statistics revealed that the modus operandi of the delinquent traders is to conduct these seminars in the evening, usually after work hours and they will keep the consumer there till late evening and on some occasions, even beyond midnight, until the consumer gives in and signs the contract before allowing him to leave the premises.

Coverage

To protect consumers against unscrupulous practices in the timeshare industry, and in line with major jurisdictions, the Council proposes that a mandatory cooling-off period should be imposed on timeshare and long term holiday products ("LTHPs") contracts. Drawing reference to the UK Timeshare Regulations, the term 'timeshare'

¹⁷⁰ See chapter 4. Also B.A. Sparks et al. *Journal of Business Research* 67 (2014) 2903-2910

¹⁷¹ B.A. Sparks et al. *Journal of Business Research* 67 (2014) 2903-2910

means any consumer product that enables the purchaser to use one or more places of overnight accommodation for more than one occupational period under a contract that lasts for more than 1 year; whereas "LTHP" gives the purchaser certain discounts or benefits in respect of accommodation under a contract that lasts for more than 1 year. During the cooling-off period, the consumer has time to research and learn more about the holiday resorts on offer. The consumer can also check from different sources if there is any mismatch between what they thought they heard in the presentation and what they subsequently discover. This may enhance information transparency by encouraging the timeshare company to provide more information to the consumer during the sales process. The consumer can then reconsider the decision and withdraw from the contract if they decide that timeshare products do not suit their holiday needs. This could reduce the incentives for errant traders to 'force' a sale on the spot.

In the next chapter, the Council discusses major operational aspects of the mandatory cooling-off regime which include the length of the cooling-off period, information requirement, the exercise of cancellation right by the consumers, the treatment of ancillary contracts, refund arrangements, return of goods, waiver and enforcement matters.



Chapter 6 - Proposed operational arrangements of the mandatory cooling-off regime

Chapter outline

This chapter addresses the various practical issues in relation to the implementation of a mandatory cooling-off regime. They include the length of the cooling-off period, information requirement, the exercise of cancellation right by the consumer, the treatment of ancillary contracts, refund arrangements, return of goods, waiver and enforcement matters. In considering the aforesaid matters, it is the Council's objective to formulate a fair, reasonable and workable framework, taking into account both the interest of the consumers and any potential impact on the traders.

In chapter 5, the Council recommends that a mandatory cooling-off period be imposed on 5 types of consumer contracts. This chapter provides proposals for major operational arrangements considered necessary to support this statutory cooling-off regime. Nevertheless, this Report may not be able to address every single issue that may occur during a cancellation process given the wide range of factual matrix involved in consumer transactions. When formulating these proposals, the Council observes and maintains the principles mentioned in the preceding chapter so that a fair, reasonable and workable cooling-off regime is in place in Hong Kong¹⁷².

6.1 The duration of the period

When deciding on the appropriate length of a cooling-off period, one must look at the problems it is attempting to solve and the costs of delaying the transaction. Insofar as combating unfair trade practices and providing an opportunity for inspection of goods are concerned, the cooling-off period should be reasonably long enough to (i) allow the consumer to calmly rethink the purchase away from the high pressure sales environment; or (ii) inspect the goods purchased to see if they fit the description and meet the quality as presented by the trader.

According to the Council's research in chapter 4, the duration of cooling-off period in overseas jurisdictions varies from 3 to 14 days (please refer to Appendix B for details). In Mainland China and Taiwan, that period is 7 days. While the EU currently provides the "longest" cooling-off period (14 days) as compared to the other overseas jurisdictions, it should be noted that when the mandatory cooling-off period was first introduced in the 1990s, that period was only 7 days. The duration

¹⁷² See section 5.1

was only recently increased to 14 days pursuant to the EU's Consumer Rights Directive 2011.

Bearing the above in mind, it is proposed that the length of cooling-off period in Hong Kong should not be less than 7 days for the following reasons:-

- (1) This is in line with the length of cooling-off period in other major jurisdictions;
- (2) Consumers should be encouraged (if so decided) to exercise the cancellation right as soon as practicable. First, this should help mitigate traders' loss arising from potential depreciation of the value in the goods or fluctuation of the market price as time goes by. Secondly, it would minimise the potential impact on business operation and thereby mitigate the concern of transferring compliance costs from traders to consumers;
- (3) For the purpose of combating unfair trade practices, 7 days should be a reasonable timeframe for consumers to reconsider their decisions free from undue influence by traders;
- (4) A prolonged cooling-off period may encourage consumers to use the product before returning it. The cost to traders could be very high as a product that is returned after being used or tried is no longer new and is therefore substantially reduced in value; and
- (5) As consumers are expected to return the products in a good condition, a long cooling-off period could arguably increase the risk of damage of the goods which may have an adverse impact on consumers.

For service contracts or timeshare contracts, the Council recommends that the cooling-off period should end 7 days after the day on which the contract is entered into. If the contract is a sales contract (for goods, or both goods and services), the cooling-off period should end 7 days after the day on which the goods come into the physical possession of the consumer or the person identified by the consumer to accept delivery.

Please note that this recommendation of a 7-day period is a minimum requirement. Traders should feel free to provide a more competitive cooling-off policy to consumers if they think it is appropriate.

6.2 Information requirement

Consumers have to be made aware of their cancellation rights within the cooling-off period before they could benefit from it. Therefore, to provide consumers with a meaningful opportunity to exercise this right of cancellation, traders should provide certain essential information to consumers before the completion of the transaction.

Review of the Mainland and overseas practices shows that traders generally have the following obligations regarding the provision of information to consumers:-

- (1) To set out all the required information in writing and make it easily available to the consumers before the transaction is entered into;
- (2) To provide or make available to consumers a standard cancellation form so that they can exercise their cancellation right;
- (3) To provide consumers with a copy of the contract or a confirmation of the contract upon its conclusion (in face-to-face setting), or within a specific period of time after conclusion of the contract (in distance settings).

In overseas jurisdictions, failure to comply with certain information requirements would result in an extension of the cooling-off period - up to 1 year in the UK; 6 months in Australia; and 3 months in Singapore.

Making reference to overseas practices, the Council proposes that traders should provide the following key information to the consumers before entering into a contract with mandatory cooling-off:-

- (1) The main characteristics of the products;
- (2) The identity of the trader in addition to the trading name;
- (3) The trader's contact information, such as the geographical address, telephone number, fax number and email address etc.;
- (4) The price of the product(s);
- (5) If applicable, the administrative fee (see section 6.4 below) and express delivery charge (see section 6.4 below);
- (6) The arrangements for payment, performance and time of delivery (if applicable);
- (7) Information on complaint handling and the complaint handling policy, if applicable;
- (8) Details of the cancellation right contained in a standard cancellation form, such as time limit, required procedures and responsibilities after cancellation;
- (9) For sales contracts, a note to inform the consumer that he is required to pay the costs of returning the goods after cancellation (see section 6.5 below);
- (10) For sales contracts, a note to inform the consumer that he will have to bear any deduction in the value of the goods due to improper handling by the consumer during the cooling-off period (see section 6.4 below); and
- (11) For service contracts, a note to inform the consumer that he is required to pay the costs of services supplied during the cooling-off period (see section 6.4 below).

For contracts concluded in a face-to-face setting, it is proposed that traders should provide the above information to consumers in writing before entering into the contract. In distance contracts, traders should provide the required information in

a way appropriate to the means of communication used before concluding the transaction. For example, during a sales call, the salesman may verbally inform the consumer of the required information before concluding the transaction. However, if it is impractical to provide all the required information during the call, the trader may provide this by different means available to the consumer such as email directing the consumer to an official web link which contains the required information, and he should expressly draw the consumer's attention to his cancellation right. In practice, most often, a telephone salesman will inform the consumer that these detailed information can be found on the trader's website. Alternatively, the salesman could email the information to the consumer. In any case, ample time should be provided for the consumer to go through the information before concluding the transaction.

For all contracts with a mandatory cooling-off period, it is further proposed that the trader should provide a copy of the contract, or confirmation of the contract to the consumer as soon as practicable after the conclusion of the transaction. What constitutes "as soon as practicable" will be assessed and determined by the Court on a case-by-case basis. However, in a distance contract setting, this should not take more than a few working days.

If the trader fails to provide item (8) of the required information i.e. details of consumer's cancellation right, the cooling-off period would not commence until the consumer receives the information, subject to a limit of 3 months after the transaction. Whenever applicable, if the trader fails to provide items (5), (9), (10) or (11), the consumer is then not liable to pay for the respective fees/costs.

If any disputes arise in relation to the traders' compliance with the information requirement, the burden is on the traders to prove that they have done so¹⁷³. Traders are therefore encouraged and advised to keep good business records. It is noteworthy to observe that some traders, particularly the telemarketing companies, have already put in place voice recording systems to safeguard both parties' interests.

6.3 Exercise of the cancellation right

Collective wisdom is that it is advisable for consumers to exercise their cancellation right in writing to avoid disputes. Consumers are encouraged to use the standard cancellation forms provided by traders.

In order to minimise unnecessary disputes, the Council recommends that consumers should, if so decided, cancel the contract within the cooling-off period in writing. This is particularly important as the burden is on the consumer to prove that he did cancel the contract within the cooling-off period. To facilitate this process, the Council recommends that the trader provides a standard cancellation

¹⁷³ Same as the UK

form (expressed in a form set out in the legislation) to the consumer before concluding the transaction or if it is provided on the website, the trader should ensure that the cancellation form is easily accessible by consumers. Depending on the language of the contract, the standard cancellation form should be in Chinese and/or English. The consumer can then use that form to exercise his cancellation right. However, in situations where no cancellation form is provided by the trader, the consumer should also be allowed to use the form as prescribed by legislation to exercise his cancellation right. This prevents abuse on the part of the trader to deliberately not provide the form, or use an excessively complicated or confusing form to try and frustrate the consumer's attempt to exercise his cancellation right.

Based on complaint statistics collated by the Council, it may not always be a straightforward exercise for traders to confirm the "intention" of cancellation by consumers. The use of a standard cancellation form would minimise confusion and reduce unnecessary arguments between consumers and traders. It also obviates the need for consumers to draft the cancellation notice which may contain ambiguous wordings which could be used against them. For vulnerable consumers who are unable to write, such as the physically handicapped and the illiterate, consumer education should help bring awareness to them of the existence of such cancellation right so as to minimise any potential prejudice they may suffer as a result of not being able to give the cancellation notice in writing.

The Council further proposes that for cancellation to be effective, the communication (in writing) should be delivered by hand, or sent by post, fax or a form of electronic communication. It should be noted that the key is when the communication is sent, not whether or when it is received by the trader. In case of dispute, the burden of proof should be on the consumer to show that the cancellation notice was sent to the trader before the expiry of the cooling-off period.

6.4 Refund arrangements

In formulating the refund arrangement, the following issues were considered:-

- (1) Whether traders should be allowed to accept payment during cooling-off period?
- (2) If yes, what is the time limit and method for refund?
- (3) Whether traders should be allowed to deduct any fees from the refund? If so, what fees are allowed?

Whether traders should be allowed to accept payment during the cooling-off period?

In the majority of the jurisdictions reviewed, traders are allowed to accept payment during the cooling-off period. There is not much to be gained by prohibiting traders from accepting payment during this time apart from dispensing with the

issue of refund which may reduce the administrative costs of traders when consumers exercise their cancellation right.

However a prohibition to accept payment seems to be an unnecessarily draconian intervention of the trader's business. Not only will this adversely affect the cash flow of the trader, if traders are required to deliver goods during the cooling-off period without payment, this would unnecessarily increase their commercial risks. Fraudster may be tempted to order the goods, take delivery with no intention of paying the traders. On balance, it appears that there is no sufficient justification to prohibit traders from accepting payment during the cooling-off period.

What is the time limit and method for refund?

Based on the Council's research in chapter 4, the duration for refund varies from 10 to 60 days (please refer to Appendix B for details). Most jurisdictions impose a time limit of 10 to 15 days, including the UK (14 days), USA (10 business days¹⁷⁴) and Canada (15 days). Singapore has the longest refund period (60 days).

In terms of refund method, traders in the UK and Mainland China are required to use the same means of payment as the consumer used in the purchase transaction, unless otherwise agreed by the consumer. For other jurisdictions, there is no express provision as to the exact method of refund.

In view of the above, the Council recommends that the time limit for refund should not be more than 14 days. For service contracts or timeshare contracts, traders should reimburse the consumers within 14 days from the day after the trader has been informed of the consumer's decision of cancellation. For sales contracts (for goods, or both goods and services), traders should make a refund within 14 days from the day after receipt of the returned goods. The advantage of this proposal is that the trader's position will be fairly protected. They do not have to worry about consumers not returning the goods after obtaining a refund and this period should also provide ample opportunity for the trader to inspect the returned goods to see if there is any damage.

As for the method of refund, the Council recommends that the trader reimburses the consumer using the same payment method and currency as the consumer used in the purchase transaction, unless otherwise agreed by the consumer. In practice, currency would unlikely be a concern since it is rare for local transactions to be conducted in a foreign currency.

Credit card refund

Among the different payment methods, the Council understands that credit card refund causes particular concern to the traders. The concern involves compliance

¹⁷⁴ Business day

with the time limit for refund as the refund may only appear in the next billing statement depending on the practice of individual banks.

To allay this concern, one should look at when the trader instructs its acquirer¹⁷⁵ to reverse the card transaction, not when the consumer actually receives the refund. As long as the trader has given timely instructions for the refund, it should not be his responsibility to monitor or check the status of refund processing among the banks. Hence, it does not matter when the refund is actually received by the consumer for the purpose of considering whether the trader has complied with the refund obligation. If necessary, consumers are advised to contact their card issuers to check the status of refund.

It is noted that a similar practice is adopted in the UK, i.e. traders are required to refund consumers within 14 days by using the same payment method which the consumer used for the purchase transaction. To the Council's knowledge, there is no evidence to suggest that it is impracticable for the UK traders to comply with the relevant requirement, i.e. effecting a refund via credit card within the 14-day time limit. After all, the principle is that the trader has performed all it could have done to effect the refund.

For cash-like payments including bank transfers or payment by cheque, the same principle should apply. If, for whatever reasons, it is impracticable to arrange refund by the same payment method, for example, to refund cash to consumers in view of geographical inconvenience, it remains open for the trader and the consumer to negotiate and agree on a suitable refund method as they see fit.

Whether traders should be allowed to deduct any fees from the refund?

Generally speaking, traders are required to make a full refund of the entire payment received to consumers. But there are certain exceptions. In Queensland (Australia), the COP Regulations provides that fitness services suppliers may deduct an administrative fee from the refund, subject to a cap of AUD\$75¹⁷⁶ or 10% of the membership fee (whichever is lower) upon cancellation of a membership agreement by consumers. In Mainland China, traders are allowed to deduct credit card handling charges from the refund. Locally in Hong Kong, the CAHK Code provides that a service provider may charge incidental costs reasonably and properly incurred as a result of the exercise of cooling-off right by the consumer¹⁷⁷. Also, the SFC's Code on Unlisted Structured Investment Products provides that an issuer may deduct a reasonable, fixed or ascertainable handling fee from the refund to the investor upon the exercise of cooling-off right by the consumer.

¹⁷⁵ The acquirer is responsible for processing consumer's card payment in accordance with its agreement with the trader.

¹⁷⁶ Around HK\$480

¹⁷⁷ See para 5.3 of the Code

Taking into account the prevailing international practices and local codes and regulations, it is proposed that traders be required to make a full refund to consumers subject to the exceptions provided below.

Administrative fee

Based on information gathered from complaints received by the Council, payment by credit card is far more popular for high value transactions, including the 5 types of contracts which is to be the subject of the proposed mandatory cooling off regime. In the context of credit card transactions, acquirers will charge traders a service charge based on the card transaction value¹⁷⁸. This charge consists of various components including system costs, operational costs as well as processing fees¹⁷⁹ charged by the credit card associations. The level of service charge is based on a sliding scale determined by many factors, such as sales volume of the trader, the bargaining power between the acquirer and the trader, as well as the ratio of usage of different card types by the trader. According to the Council's understanding of the banking industry, depending on the negotiation and agreement between the acquirer and the trader, usually, this charge ranges between 1.80% and 3.00%, but for small scale traders, this figure can go up to 4.5%.

As for IPP, although it is technically a loan between the bank and the cardholder, the bank also has a business relationship with the trader and the bank would similarly impose a service charge on the trader depending on the transaction nature as well as the trader's background and trading history. This service charge varies according to the length of the repayment period ranging from 6 to 24 months. In general, the longer the repayment period, the higher the rate charged. The usual market rate for IPP ranges from 2.5% to 6.5%.

In view of the above, the Council believes there is a legitimate argument in favour of deducting a small fee from the refund to the consumers in order to cover the transaction costs in accepting credit card payments. To this end, the Council agrees with the following observations made by the Consumer Affairs Victoria¹⁸⁰:-

"(1) If traders are fully compensated for any costs they incur if a consumer exercises their cooling-off rights, including the costs of conducting the sale, there would be few incentives for traders engaging in high-pressure sales tactics to change those tactics;

(2) On the other hand, any uncompensated costs to traders of consumers exercising their cooling-off rights are likely to be recouped by higher product prices, a cost which all consumers would bear;

¹⁷⁸ HKMA Supervisory Policy Manual – Credit Card Business

¹⁷⁹ Commonly called interchange fee

¹⁸⁰ Section 5.4 of the research paper "Cooling-off Period in Victoria: their use, nature, cost and implications", Consumer Affairs Victoria, January 2009

(3) If there is no cost to consumers for cooling-off, there is more risk that some consumers could exploit the right to cool off; and

(4) Overall, a balanced charge for consumers who exercise their right to cool off is likely to be low compared with the value of the goods, and would not completely offset all the costs to traders of consumers exercising their rights. Such a charge would not discourage consumers from exercising their rights, would still provide incentives for traders to change their behaviour, and would discourage consumers from abusing the right to cool off."

With a view to catering for the transaction cost in accepting credit card payments on one hand, and to ensure a simple and straightforward refund arrangement on the other hand, it is proposed that if the contract being cancelled involved payment by credit card, traders should be allowed to deduct an all-inclusive administrative fee (subject to a cap) from the refund to consumers, on condition that the fee is identified and disclosed prior to the conclusion of the transaction. Having regard to the prevailing market practice, it is suggested the cap should be no higher than 3% of the credit card transaction amount.

While it is noted that some fees may also be incurred by traders in accepting other payment methods, such as store value facilities and mobile payments, the Council is of the view that the development of e-wallet in Hong Kong is still at its early stage and is evolving. The HKMA has only been issuing store value facilities licences since August 2016. At present, they are often subject to a store value limit and/or transaction limit. As a general observation, consumers prefer to use these payment methods for daily transportation or purchasing small value items in retail shops. For high or higher value transactions, credit card remains the major payment method preferred by local consumers for the time being. In any event, it is unusual for traders who are likely to be subject to the mandatory cooling-off regime to accept these payment methods. Hence, the Council believes it is not necessary to specifically provide for these types of administrative fees at this stage. Nevertheless, it is acknowledged that there may be a need to revisit the issue of administrative fee in the future when there is a material change in the payment habits of the Hong Kong consumers.

For cash/cash-like payments such as payment by cheque and by bank transfer, the major costs involved is staff costs. This is regarded as the indirect costs of running a business and usually forms part of the overall administrative costs of traders. That being the case, it is inappropriate to allow the trader to quantify such costs as chargeable administrative costs in this context. Indeed if traders are allowed to deduct this, there is a risk of creating a loophole for unscrupulous traders to make illegitimate profits by exaggerating this item of staff costs and undermine the effectiveness of the cooling-off period. The Council's view is that there is no sufficient justification to allow deduction of those indirect costs at this stage.

Express delivery charge

In overseas jurisdictions, traders are generally not allowed to recover delivery cost from the refund. In the UK, traders are allowed to deduct delivery costs only if the consumer expressly chose a kind of delivery costing more than the delivery method offered by the trader, such as express delivery service. The Council is of the view that the UK approach fairly balances the interests of traders and consumers, and thus proposes that this practice should be adopted and that traders should only be allowed to deduct delivery charge from the refund if the consumer expressly chooses express or special delivery and the amount was identified and disclosed to the consumer prior to the completion of the transaction.

Deduction in value of goods due to improper handling during the cooling-off period

As a matter of fairness, there is little dispute that if the value of goods has been depreciated due to improper handling (including excessive usage) by the consumer during the cooling-off period, traders should be entitled to a reasonable amount of compensation. Two issues need to be highlighted. First, what is meant by "improper handling"? Second, what constitutes reasonable compensation? From a legal perspective, this is likely to be a contentious area as assessment of any compensation can only be done on a case by case basis no matter how clear the legislation is drafted.

For the first issue, the Council proposes that Hong Kong should follow the UK practice. It is recommended that "Improper handling" should mean any handling beyond what is necessary to establish the nature, characteristics and function of the goods. In other words, the question to be asked is whether a consumer has handled the goods in a way beyond what might reasonably be allowed in a shop. For example, a consumer should be permitted to "inspect" the vacuum cleaner in the same way as they might do in a shop to ensure it fits the description. Refund should not therefore be deducted if it is reasonable for the consumer to remove the packaging to inspect the item. However, using the vacuum cleaner repeatedly goes beyond what is needed to ascertain its nature, and this constitutes "improper handling". Money can therefore be deducted to reflect diminished value of the returned goods. UK practice on this subject also excludes consumer 'testing' the function of the vacuum cleaner since, if it proves to be faulty, the consumer has a right to return the goods under common law and the Consumer Rights Act even if he is not given a cancellation right. In any event, the trader is usually prepared to exchange the faulty goods for a new one in these situations.

With respect to the second issue, the Council proposes that the amount of reasonable compensation should be determined on a case by case basis taking into account all relevant circumstances, for example, the severity of damage, the possibility of repair and cost of repairing, the cost of replacement if repair is impracticable, the presence of a secondary market and the second-hand price (if

applicable) etc. It is therefore neither practicable nor desirable to lay down an exhaustive list of factors to be considered by the court.

The Council further proposes that the burden is on the trader to prove and quantify the reduction in value of the goods caused by mishandling on the part of the consumer. To save time and legal costs, any dispute on the amount of compensation is best left to be resolved by alternative dispute resolutions such as mediation or conciliation.

For the sake of clarity, please note that free gifts provided by traders to entice and encourage consumers to enter into a transaction should not be regarded as goods supplied under the sales/service provision contract. Therefore, traders are not allowed to deduct the value of free gifts from the refund. As a matter of good practice, the Council recommends that traders provide such gifts after the expiry of the cooling-off period (7 days) so that any unnecessary arguments in relation to the return of gift or deduction in value upon cancellation of contract can be avoided.

Supply of services within the cooling-off period

In most of the jurisdictions studied, traders are allowed to supply services to consumers during the cooling-off period (see Appendix B for details). Consumers have to pay for the services used up to the time when the trader is informed of the decision to cancel. In case of a sales contract involving goods and services, the consumer can still cancel the contract but will have to pay for the service element of the contract which has already been provided. An example used in the UK is that if a consumer cancels the contract and returns an installed dishwasher at his home, he will have to pay for the installation service provided. The payment should be in proportion to the full contract price. This general practice is fair and reasonable to both traders and consumers, and the Council recommends that this be adopted in Hong Kong.

Some consumers raise the fact that when they seek to cancel the contracts, traders insist on using the "original price" for calculating the value of the services consumed, instead of a pro-rata price on the full contract price or the so-called the "package price". Most of the time, the "original price" is much higher than the pro-rata price or "package price" under the contract. As a result, a disproportionately high fee would be deducted from the refund, even though the consumer has only used a tiny portion of the services purchased during the cooling-off period. Under the Council's proposal, the trader must use the full contract price to calculate the payment for the consumed services on a pro-rata basis in order to avoid arbitrary or disproportionately high fees being imposed on the consumer. If the trader considers the application of this rule in specific circumstances does not provide a fair or satisfactory outcome, there is plenty of room for the trader to devise suitable commercial arrangements to safeguard his interest. For example, a trader may defer supply of some or all services until expiry of the cooling-off period (7 days).

6.5 Return of goods

Similar to the refund arrangement, 2 issues are involved in considering the return of goods by consumers. They are:-

- (1) What is the time limit for consumers to return goods? and
- (2) Who will bear the cost of return?

What is the time limit for consumers to return goods?

In principle, consumers should return the goods as soon as practicable after cancellation. Any delay would likely increase the chance of dispute and will cause prejudice to the traders' interest. The duration for returning goods varies across different jurisdictions surveyed, ranging from 7 days (Mainland China) to 20 days (USA). In the UK, consumers need to return goods within 14 days after cancellation. In some jurisdictions, there is no stipulation of a specific time limit but require consumers to return goods within a reasonable time (Australia) or upon cancellation (Singapore).

With reference to the practices in the surveyed jurisdictions, the Council considers that it is fair and reasonable to require consumers to return the goods to traders within 14 days after cancellation. Based on the Council's observation from complaint statistics, consumers often complain that traders set unreasonable restrictions on how the return of goods is to be achieved. For instance, some traders require consumers to return the goods in person to a specific location within a designated period during office hours.

To address this problem, the Council recommends that consumers be allowed to choose whichever method of return (i.e. by post, courier or hand) they see appropriate. If the address for return is far from the consumer's home or workplace, or the opening hours of the trader is inconvenient for the consumer, the consumer should be allowed to take the option of returning the goods by post. In case of oversized goods, they should be allowed to be returned by courier. For smaller/fragile items, consumer may prefer to return the goods by hand.

Who will bear the cost of return?

The Council proposes that unless otherwise agreed, the cost of returning the goods should be borne by consumers. The reasons for such a recommendation is as follows:-

- (1) Under the Council's proposed "refund" arrangement, traders are generally not permitted to deduct any delivery charges from the refund to consumers. As a matter of fairness, the cost of returning goods should be borne by the consumer.
- (2) Requiring consumers to bear the cost of return could help deter abuse of the cancellation right.

- (3) Logistically, it is more straightforward for consumers who are in physical possession of the goods to make the return arrangements, depending on their preference and individual circumstances. If traders are required to bear the cost of return, this may create unnecessary complications which can cause further delay in the return process. For example, traders may be required to make an appointment to collect the goods from the consumer's home. Alternatively, consumers may need to have prior consensus with traders on the cost and method of return. For example, if the consumer prefers to return by hand, how would the fare charge be calculated? This would likely invite unnecessary disputes and conflicts.

6.6 Ancillary contracts

An ancillary contract refers to a contract that relates to the main contract of the supply of goods and/or services between the trader and the consumer but it is subsidiary to it. In particular, it is defined in the UK legislation as "*a contract by which the consumer acquires goods or services related to the main contract, where those goods or services are provided (a) by the trader, or (b) by a third party on the basis of an arrangement between the third party and the trader*"¹⁸¹. This contract can be between the consumer and the trader or a third party with whom the trader has a prior arrangement.

Following the UK practice, the Council proposes that if the consumer cancels a main contract within the cooling-off period, any ancillary contracts should also be terminated automatically. When this happens, the trader has the responsibility to notify any other trader who has an ancillary contract with the consumer. Similar to the case for the main contract, the consumer may need to pay for the value of services consumed. If the ancillary contract being cancelled involves a credit card payment, the trader may deduct an administrative fee of not more than 3% of the credit card transaction value, provided that this fee must be identified and disclosed to the consumer prior to the conclusion of the ancillary contract. For the avoidance of doubt, the exclusion of financial services contracts from the cooling-off regime does not apply if they are ancillary contracts.

In principle, responsibility for effecting refund should follow the original flow of funds. If the money for the ancillary contract was paid to the main contract trader, that the main contract trader should reimburse the consumer and recover the monies from the third party trader. If the money was paid directly to the third party trader, it is the responsibility of the third party to refund the money to the consumer.

Ancillary contracts cover contracts such as IPP, extended warranties, top-up repairs or maintenance service contracts associated with the purchase of goods. In practice, the most common form of ancillary contracts in Hong Kong for the purpose of the proposed mandatory cooling-off regime will be the IPP.

¹⁸¹ Regulation 38 of the CCR 2013

Although by nature, IPP is a loan between the bank and the consumer, it is considered that the above refund arrangement is equally applicable. The trader may, upon a consumer's exercise of his cancellation right, arrange refund to the bank pursuant to the commercial arrangements agreed between them. As between the bank and the consumer, the bank may adjust the outstanding balance of the consumer's credit card account after taking into account the administrative fees and the value of used services (if any).

An ancillary contract does not include any separate and independent contracts entered into between the consumer and third party without involvement of the trader. Therefore, if there is no prior arrangement between the trader and the third party, then the contract is not ancillary to the main contract and will not be automatically terminated under the cooling-off arrangements. For example, a consumer may independently obtain a loan from a moneylender to finance the purchase of beauty services without any involvement/ knowledge of the beauty parlour. If the consumer cancels the beauty services contract within the cooling-off period, the loan agreement with the moneylender remains valid and effective.

6.7 Curtailment of the cancellation right

In respect of curtailment, the issue to be considered is whether consumers should be allowed to waive, restrict or modify their cancellation right by mutual agreement with traders. In all the jurisdictions studied, there appears to be a uniform consensus that this right cannot be waived or restricted.

However, there are arguments in favour of allowing such waiver. Proponents may argue that the waiver in fact respects and reflects the will/intention of the parties, and it introduces flexibility which may bring benefits to the consumers. For example, if legitimate traders were to offer a lower price for goods/services with no cancellation rights, consumers who are familiar with the subject goods/services and do not require this protection would then be able to benefit from these reduced prices.

However, from a consumer protection perspective, allowing consumers to waive or curtail the cancellation right would significantly undermine the level of protection as a whole and this could arguably defeat the original purpose of providing a statutory cooling-off period to consumers. Unscrupulous traders might take unfair advantage of this and use different tricks to induce, mislead, or pressurize consumers into waiving or restricting their cancellation rights.

As mentioned in previous chapters, consumers sometimes lose their cancellation right as a result of the unfair tactics employed by traders. For example, in instances where traders provide voluntary cooling-off in their service contracts, consumers may not be made aware of the terms in the contract which stipulates that cancellation cannot be triggered once services have commenced or there has been acceptance of a gift offered by the trader. Unscrupulous sales representatives would then use various ruse to induce the consumer to start the service

immediately after entering into the transaction, or “force” the consumer to accept the gift provided by the trader in order to frustrate the consumer’s right to cancellation.

In view of the general practices on an international level, and considering the potential prejudice which will flow to the consumers if waiver, restriction or modification of the cancellation right is allowed, the Council proposes that the right of cancellation cannot be waived, curtailed or restricted by mutual agreement between the consumer and the trader.

6.8 Enforcement

In general, the enforcement landscape in overseas jurisdictions is much more complex and comprehensive when compared to Hong Kong with different regional and national enforcement bodies being responsible for ensuring compliance of different aspects of their cooling-off regime. The delineation of their powers, jurisdictional limits and responsibilities are not applicable to our local situation.

Chapter 4 reviews the enforcement regimes of the UK, Australia and Singapore which have similar legal systems to Hong Kong. Broadly speaking, in all these jurisdictions, a civil compliance-based mechanism is established by legislation under which the enforcement agency is empowered to accept undertakings from traders in suspected breach of the law. Where necessary, the enforcement agency has power to apply to the court to seek injunctions, impose financial penalties, or make an order to require the delinquent trader to take remedial measures or pay compensation to aggrieved consumers. The legislation also expressly provides a private right to consumers to take civil action against traders to recover compensation for failing to comply with the relevant law. Under common law, if a trader breaches a court order (e.g. injunction), he may be subject to financial penalty or even imprisonment (for more serious cases) for contempt of court.

In line with the prevailing international approach, and taking into account the principle of proportionality, it is proposed that the mandatory cooling-off regime in Hong Kong should be a civil one established by legislation. The penalty for non-compliance would also be civil in nature.

The Council also proposes that a designated public body/authority be established or appointed to take charge of investigations in case of suspected breach or to instigate civil actions against non-compliant traders when needed. This body should also be empowered to seek undertakings from traders, or apply to the court for injunction as necessary or even as a last resort, in order to stop or refrain the trader from continuing a serious breach of the legislation. If a trader fails to comply with a court order, he would be committing a contempt of court which would attract criminal sanctions under the existing laws. Undertakings and court injunctions will be published in the public domain, thereby producing a punitive and deterrent effect. The legislation should also expressly provide a private right to the consumer to take civil proceedings against the trader to recover

compensation for loss suffered as a result of the trader's failure to comply with the law.

The introduction of a mandatory cooling-off period represents an important milestone in the enhancement of consumer protection in Hong Kong. But this implementation is only the beginning. The Government should closely monitor this implementation and review the effectiveness of the regime to assess its effectiveness, taking into account the experience gained and problems encountered. If there is evidence to show that traders continue to blatantly disregard consumers' cancellation rights, this will indicate that civil sanctions are not adequate and serious consideration should then be given as to whether there is a need to criminalize certain major breaches of the cooling-off legislation.

6.9 Looking forward

Over the years, consumers and traders have expressed divergent views on the necessity of a mandatory cooling-off regime. The Council notes that the existing voluntary cooling-off regimes in some industries fail to adequately address different unfair trade practices especially high pressure selling and as a result, consumers have high expectations that the introduction of a mandatory cooling-off period could offer better protection. On the other hand, businesses are concerned about the inevitable increase in compliance costs and the possibility of potential abuse by consumers. The diverse issues surrounding the introduction of a cooling-off period are complex and have significant implications on both consumers and traders alike. In order to formulate a suitable mandatory cooling-off regime in Hong Kong, benefits and repercussions affecting the different stakeholders must be carefully considered, and proper balance should be struck and due weight given to the interests of consumers, businesses and the society as a whole. After prudent and careful deliberation, the Council believes that there is sufficient justification in terms of consumer protection, consumer confidence and development of a fair and healthy market environment to propose the introduction of a mandatory cooling-off period for prescribed types of consumer transactions in Hong Kong. This regime needs to be supported by necessary and appropriate legislative intervention. To sum up, the Council puts forward the following major recommendations:-

Scope of application

- (1) A cooling-off period should be provided for the following 5 types of consumer contracts:-
 - (a) Unsolicited off-premises contracts;
 - (b) Distance contracts (other than online purchases);
 - (c) Fitness services contracts;

- (d) Beauty services contracts; and
- (e) Timeshare contracts.

Length of cooling-off period

- (2) The cooling-off period should be no less than 7 days. For service and timeshare contracts, the period should end 7 days after the day on which the contract is entered into. For sales contracts (for goods, or both goods and services), the period should end 7 days after the day on which the goods come into the physical possession of the consumer or the person nominated by the consumer to accept delivery.

Information provision and the exercise of cancellation right

- (3) Traders should provide certain key information to consumers before entering into a contract, accompanied by a cancellation form. Failure to inform consumers of their cancellation right would result in an extension of the cancellation period, subject to a limit of 3 months after the transaction.
- (4) Consumers should have the right, if so decided, to cancel the contract by using the cancellation form provided by traders or the form as prescribed by legislation.

Refund arrangements

- (5) For service and timeshare contracts, the trader should make refund within 14 days from the day after the consumer informs the trader of his decision to cancel. For sales contracts (for goods, or both goods and services), the trader should make refund within 14 days from the day after receipt of the returned goods. The trader should reimburse the consumer using the same payment method and currency as the consumer used for the initial transaction, unless otherwise agreed by the consumer.
- (6) Provided always that the relevant information has been disclosed to the consumer prior to the conclusion of the transaction, the trader should be allowed to deduct from the refund the following:
 - (a) an administrative fee of not more than 3% of the credit card transaction value;
 - (b) any delivery costs if the consumer expressly chose a kind of delivery which cost more than the kind of delivery on offer by the trader, such as express delivery;
 - (c) a reasonable amount of compensation caused by the mishandling of goods by the consumer; and
 - (d) the value of service consumed during the cooling-off period.

Return of goods

- (7) The consumer should return the goods to the trader within 14 days after cancellation. The method of return can be selected by consumers as they see appropriate. Unless otherwise agreed, the cost of returning the goods should be borne by the consumer.

Ancillary contracts

- (8) Upon cancellation of the main contract, any ancillary contracts should be automatically terminated.

Waiver

- (9) Waiver, curtailment or restriction by mutual agreement between the consumer and the trader of the right of cancellation should not be permitted.

Enforcement

- (10) The mandatory cooling-off period should be a civil regime. A designated authority could be established or appointed as the enforcement agency, empowered to seek undertaking from businesses and to apply to the court for an injunction in serious breaches. A private right should also be created allowing the aggrieved consumer to seek redress against the trader to recover compensation and/or damages for breach of the cooling-off requirements.

The Council hopes that the above recommendations will stimulate and generate an informed and in-depth discussion among the different stakeholders in the community so that their views and concerns can be voiced and taken into account by the Government when it comes to finally formulating a fair and just mandatory cooling-off regime, a consumer protection tool which for many years the public has been calling for and is long awaited.

It is further hoped that the setting up of this regime will be another major move towards further improvement of the city's consumer protection, among other things, against unfair trade practices and this will more closely align Hong Kong's statutory consumer protection with that of other major jurisdictions.

Proposed Operational Arrangements of the Mandatory



Goods / Services

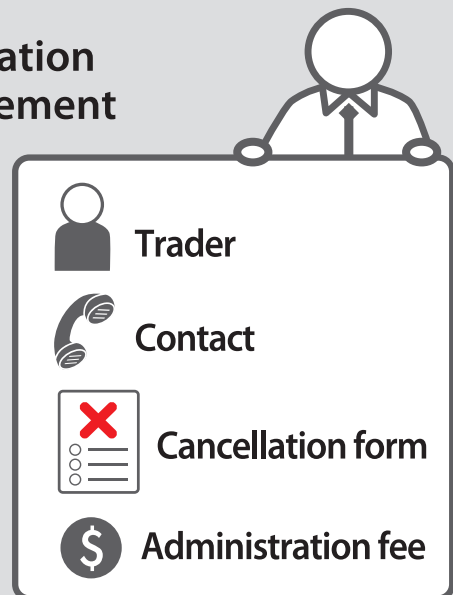


Purchase

Cooling-off
Period



Information
Requirement



Curtailment of
the Cancellation
Right



Cooling-off Period

Refund

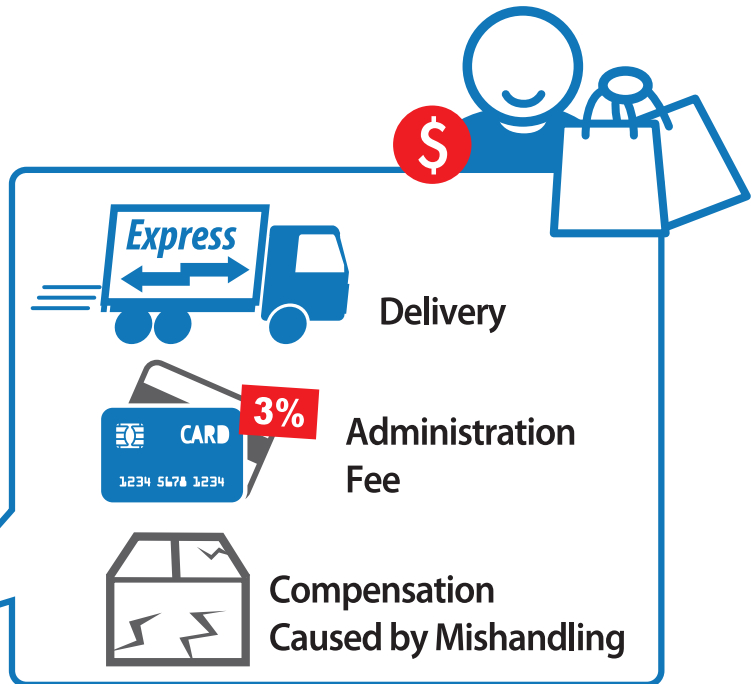
In Writing



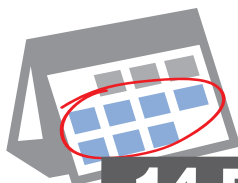
Return of Goods



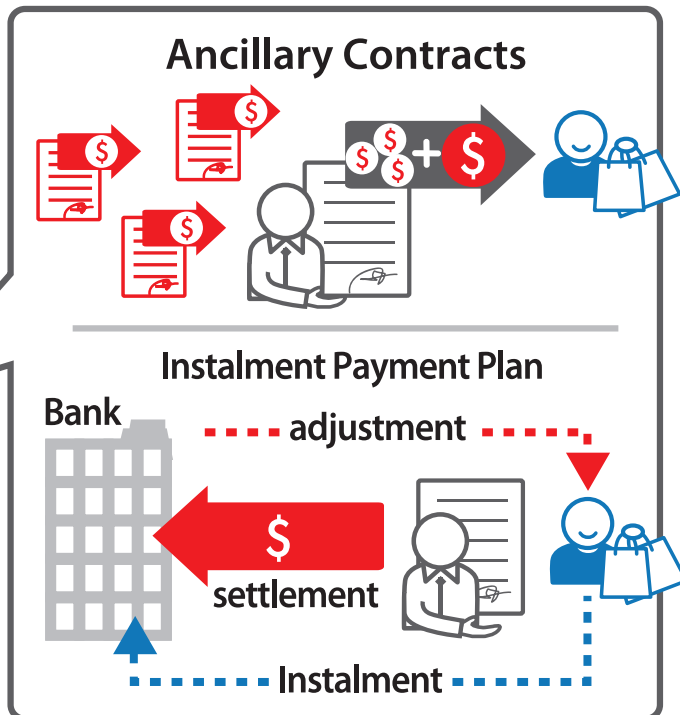
14 Days



Refund Arrangements



14 Days





Chapter 7 - Cooling-off period in E-commerce

Chapter outline

Enabled by technology, consumers nowadays can shop at anytime and anywhere, and in a truly global online marketplace. The recent growth of global e-commerce brings both benefits and risks to consumers. Based on a previous study by the Council, while consumers generally have a high satisfaction rate with their online shopping experience, concern over the product quality was one of the major reasons preventing consumers from going online and this may have the effect of slowing the growth in the development of e-commerce in Hong Kong.

This chapter examines the suitability of a cooling-off period for online purchases. By reference to the Council's complaint statistics and relevant overseas practices, the Report considers and discusses the pros and cons of providing a statutory cooling-off scheme for online sales in Hong Kong. It is hoped that this Report will stimulate further debate on the necessity of introducing a mandatory cooling-off period for online sales in Hong Kong.

The advancement of information and communications technology has led to a rapid growth of e-commerce in many parts of the world. Consumers can now easily make purchases from local or overseas online shops, platforms and marketplaces. They can place their orders anywhere via their personal devices such as smartphones and personal computers by emails and electronic messages, provided that they have access to the internet. According to the statistics published by the Census and Statistics Department ("C&SD"), the percentage of "persons aged 15 and over who had used online purchasing services for personal matters during the last 12 months" rose from 5.6% in 2001 to 27.8% in 2016¹⁸². Notably, the comparable penetration rate of online shopping in the UK, the USA and Mainland China was 81%, 78% and 67% respectively¹⁸³.

From a business perspective, the value of e-commerce sales in Hong Kong was estimated at \$401 billion in 2014, equivalent to 4.7% of total business receipts¹⁸⁴. By 2016, this figure increased to \$448 billion, equating to about 5.3% of the total business receipts of that year¹⁸⁵. There is no comparable data since then from the C&SD. Although e-commerce in Hong Kong is becoming increasingly more popular, there is still considerable room for development when compared to the Mainland and overseas markets.

¹⁸² Thematic Household Survey Report No. 62 in April 2017

¹⁸³ Online Retail: A study on Hong Kong Consumer Attitudes, Business Practices and Legal Protection published by the Council in November 2016

¹⁸⁴ Report on Survey on Information Technology Usage and Penetration in the Business Sector in 2015

¹⁸⁵ Report on Survey on Information Technology Usage and Penetration in the Business Sector in 2017

Although the C&SD Household Survey did not reveal the exact reasons behind the slow uptake of e-commerce in Hong Kong, high population density, large number of easily accessible outlets, and efficient transport infrastructure are certainly factors contributing to a slower momentum for participation in online shopping. In the Council's study report titled "Online Retail – A Study on Hong Kong Consumer Attitudes, Business Practices and Legal Protection" which was published in 2016 ("the Online Retail Report"), 98% of consumers who have shopped online found the experience of online shopping satisfactory. The study found that the "fear of leakage of personal data" and the "lack of confidence in the product quality" were the major reasons preventing shoppers from going online. Factors which motivate non-online shoppers to try shopping online include the "guarantee of after-sales refunds/returns", "better transparency of terms and conditions" and "more payment options".

Against the above background, and having regard to the growing trend of online shopping, there is demand for additional legislation in Hong Kong to better enhance protection of e-consumers. Among the various measures discussed and reviewed was the introduction of a mandatory cooling-off period for online sales. This Report analyses the pros and cons, and also the issues which need to be resolved before there can be an introduction of such a regime for e-commerce.

7.1 The Council's complaint statistics

Before considering the arguments in support of and against providing a mandatory cooling-off period for online purchases in Hong Kong, a useful starting point is to review the Council's complaint statistics. The table below shows the number of complaints received by the Council from 2013 to 2017 in relation to online shopping:-

Table 5

Year	Total no. of complaints	No. of complaints arising from online shopping (share of total complaint cases)	Total amount involved
2013	30006	3202 (11%)	\$11,384,828
2014	31048	5442 (18%) ¹⁸⁶	\$20,208,845
2015	27378	3466 (13%)	\$12,155,223
2016	25098	3202 (13%)	\$10,663,306
2017	24881	3928 (16%)	\$10,825,058

¹⁸⁶ Around 2,000 complaints were related to the pre-orders of a new smartphone.

With changing consumption behaviours, shopping online is rapidly becoming mainstream, bringing with it a myriad of consumer disputes. It can be observed that the number of complaints received in relation to online shopping significantly increased last year, and this represented about 16% of the total number of complaints received by the Council. Notably, there was a surge in complaints in 2014 (5442 cases). In that year, the Council received a vast number of complaints as a result of dubious trade practices of certain local telecommunications operators involving the pre-orders of a new smartphone. Around 2,000 consumer complaints resulted from this single issue.

The table below shows a breakdown of the top 10 online shopping complaints by industry. Among the various online purchases of goods and services, "travel matters/hotels" received the highest number of complaints, followed by "telecommunications services and equipment", "computer products" and "clothing and apparel". The result is not surprising given the global popularity of purchasing air tickets and hotel accommodation on the internet with Hong Kong consumers being no exception and the comparatively high transaction value involved.

Table 6

Industry	No. of Complaints in relation to online shopping					
	2013	2014	2015	2016	2017	Total
Travel matters/hotels	654	1051	1488	1001	1313	5507
Telecom services and Telecom equipment	343	2384	161	218	247	3353
Computer products	491	346	170	155	215	1377
Clothing and apparel	245	219	197	204	301	1166
Personal care products	169	172	147	265	178	931
Food and entertainment services	226	160	158	164	142	850
Beauty/ fitness/hairdressing	225	177	155	92	38	687
Electrical appliances	137	94	89	124	141	585
Storage and courier services	20	34	57	133	334	578
Food and drink	67	61	113	142	102	485

A breakdown by the nature of complaints showing the top 10 most common complaints is shown in the table below. Of particular concern is that complaints involving sales practices and suspected spurious products have jumped exponentially by 118% and 168% respectively in 2017. While not all of the complaints relating to online shopping could be effectively tackled by having a cooling-off period, disputes in relation to product quality, sale practices, counterfeit goods and false trade descriptions could potentially be addressed if such a scheme were to be introduced since consumers would have the opportunity to cancel the contracts within the cooling-off period.

Table 7

Nature of complaints	No. of Complaints in relation to online shopping					
	2013	2014	2015	2016	2017	Total
Sales practice	272	1943	375	199	434	3223
Delayed delivery	1358	1748	877	1043	999	6025
Price/charge dispute	454	568	643	700	893	3258
Service quality	307	461	588	599	568	2523
Product quality	301	229	231	236	343	1340
Contract variation/ termination	98	145	377	74	320	1014
Wrong model	78	69	101	41	50	339
Suspected counterfeit goods	27	37	66	41	110	281
Gifts / Discounted goods	37	26	57	78	72	270
Expired product	75	43	38	42	36	234

7.2 Supporting views

For contracts concluded in a face-to-face setting, consumers can view, touch and inspect the goods before concluding the contract. Sometimes, consumers can also check or test the goods (to a certain extent) in order to establish the nature, characteristics of the goods and how well it functions. The consumer is also afforded the opportunity to seek immediate clarification and additional information from the trader. But this is not the case for online shopping. Online shoppers do not have the opportunity to view or check the goods at the point of sale, nor is there any interactive face-to-face communication with traders. As a result, consumers will generally have to rely upon the information provided on the trader's website or other peer commentaries/reviews when making purchase decisions. Where the information provided by online traders is inaccurate or insufficient, the purchaser could make a wrong decision to his detriment. If a cooling-off period is in place, this will provide an opportunity for online shoppers to cancel the transactions if they find that the products do not correspond with their expectations.

In fact, the imposition of a cooling-off period should help bolster consumer confidence in the product, service and the trader and this in turn should increase the number of purchasers willing to engage in online shopping, thereby stimulating further development of e-commerce in Hong Kong. According to the Online Retail Report, 48% of non-online shoppers mentioned that provisions of guarantee of after-sales refunds and returns would encourage them to start purchasing online. Once the consumer has developed online purchasing habits, reinforced by positive

experience, a virtuous cycle could begin with the purchaser advocating online purchase to his friends and family.

As mentioned in chapter 4, mandatory cooling-off period for online purchases is available in the EU/UK, South Korea, Mainland China and Taiwan, although it is not imposed in other jurisdictions such as the USA, Australia, Canada and Singapore. According to Consumers International¹⁸⁷, mandatory cooling-off regimes for online transactions also exist in some Latin American countries such as Argentina, Brazil, Costa Rica and Ecuador. It is apparent from the Council's research findings that the imposition of a cooling-off period to online sales is gaining increased attention and popularity on the international stage.

7.3 Opposing views

From the consumer standpoint, it is to be expected that the introduction of a cooling-off period would be welcomed. For stakeholders from the business sectors, however, it is a different story. There may be views that there is no imminent problem with online purchase in Hong Kong that warrants the introduction of a mandatory cooling-off regime. According to the Online Retail Report, 79% of online shoppers expressed that they were confident or very confident in the online market. Similarly, satisfaction levels were high with 98% of consumers saying that they were either satisfied or very satisfied with the overall experience. Besides, as many online traders are small to medium sized enterprises, the imposition of a statutory cooling-off period could result in increased operational costs which would have a greater impact on them as compared to larger e-retailers.

It is beyond doubt that online retail is a highly competitive market. Competition is not limited by local territorial boundaries or business hours. The predominantly cross-border nature of online shopping, coupled with the advanced logistics, mean that giant international online traders have already entered into our local market, competing with the small to medium sized local traders. It could be further argued that in order to maintain competitiveness, local online traders would have to improve their customer services and after-sale services by offering consumer protection measures comparable to international competitors, such as a low-price guarantee and a cooling-off period etc. Hence, even in the absence of a mandatory cooling-off period, online shoppers should still be able to enjoy such forms of enhanced protection which naturally comes about through market competition.

Of note also is a recent study by the European Commission on the application of the Consumer Rights Directive¹⁸⁸ which has provisions explicitly aimed at online purchases. The study found that notwithstanding the increase of online sales after the implementation of the Directive, it is unclear whether such increase was caused

¹⁸⁷ Consumers International is the world confederation of consumer rights groups. It has over 200 member organizations coming from more than 100 countries.

¹⁸⁸ Study on the application of the Consumer Rights Directive final report, May 2017

by the implementation of the Directive. It should be further noted that the increase in consumer retail sales did not happen at no cost. Businesses criticized the Directive as it has subjected micro and small online retailers working with low profit margins to greater financial risks. Furthermore, there is evidence to suggest that compared with other sectors, online retail fashion could be severely affected by the introduction of a cooling-off period due to the potential higher cancellation rate by consumers. Therefore an introduction of a mandatory cooling-off period on online purchases could place an onerous burden on online fashion traders¹⁸⁹.

From a legal perspective, as there is no legal definition of “online purchases” in Hong Kong legislation, the imposition of a mandatory cooling-off period for online purchases is not straight-forward and involves challenging and complicated legal issues. For instance, what is the scope of application? Should overseas traders who actively market their goods/services to Hong Kong consumers be regulated? Should it include transactions conducted by electronic communications such as email or other electronic messages such as WhatsApp etc.? Similarly, should overseas consumers who make purchases from local traders be protected? How about online platforms and e-marketplaces, would they be subjected to the same level of regulation even though they are only intermediaries, and not the seller? How would the jurisdictional issues be addressed? How would disputes involving conflict of laws be resolved? Lastly, what about the practical difficulties of enforcement? Owing to jurisdictional differences, consumers who have bought goods or services from online shops based overseas may not be able to pursue civil actions against them. In general, local enforcement agencies do not have investigative powers and power to arrest outside of Hong Kong, and this could inhibit the collection of evidence and enforcement.

7.4 Conclusion

The Council has carefully considered the pros and cons of imposing a mandatory cooling-off period for online consumer transactions and is aware that this is a complex and controversial subject in Hong Kong. Although the Council’s research revealed that there is no universal approach towards the introduction of a mandatory cooling-off for online transactions, and in particular, jurisdictions with a popular e-commerce culture such as the USA, Australia, Canada, Singapore and Japan, do not impose mandatory cooling-off period on online retail, it is evident that this topic is in the spotlight on an international level and under scrutiny.

Given the different social-political environment and consumption culture involved, it is not surprising that different jurisdictions have adopted different practices towards consumer protection in e-commerce. At present, it remains unclear which approach would be more effective in Hong Kong as the e-commerce market in Hong Kong is still developing.

¹⁸⁹ Above

To sum up, the introduction of cooling-off for online would remain a controversial issue in the near future. Public views on this issue are likely to be divergent. On the one hand, proponents of online cooling-off demand that Hong Kong should catch up with other leading jurisdictions in consumer protection for e-commerce. On the other hand, some take the view that local consumers are generally satisfied with their online shopping experience at present and any imposition of a cooling-off period should not be a priority. Some might further argue that Hong Kong as a free economy, a better solution is to preserve this distinct advantage and allow online traders to develop different customer protection policies. It is recognised that before the Government undertakes any legislative work, it needs to consider the opinion of different stakeholders prudently and holistically.

In view of the benefits and risks of bringing e-commerce to everyday lives of consumers, the Council wishes to take this opportunity to raise public awareness of these issues discussed. As with all things, consumer protection in e-commerce needs to be considered in the round and the rights of consumers and the needs of the law abiding and legitimate online traders should be balanced. Without specific regulations for consumer protection in e-commerce, measures such as consumer education, encouragement of healthy market competition which leads to further improvement in customer services and increasing transparency of information provided by traders all work towards this goal.

Having regard to the controversial nature of the issues involved and the practical difficulties associated with the proposal, together with the pressing need to introduce cooling-off protection to high priority areas as presented in this Report, the Council recommends that at this stage, online transactions should not form part of the proposed cooling-off regime. Instead, continuous effort should be expended on monitoring global development on this subject so that those experiences can be used to inform and steer future proposals and set them on the right track. It is hoped that after the launch of this Report, information contained herein will apprise the community of the issues involved and this will in turn stimulate in-depth discussions into the need of a mandatory cooling-off period in Hong Kong for on online sales. Meanwhile, education efforts in the market including initiatives from the Council, should be continued.

Appendix A - Overview of mandatory cooling-off regimes in different jurisdictions¹

Jurisdiction	Legislation	Type of transaction
UK	Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013	Off-premises contracts Distance contracts (including online purchases)
	Consumer Protection (The Timeshare, Holiday Products, Resale and Exchange Contracts) Regulations 2010	Timeshare contracts Long term holiday product contracts
Australia (Commonwealth)	Australian Consumer Law	Unsolicited consumer agreements
	Corporation Acts 2001	Timeshare contracts
Australia (Queensland)	Fair Trading (Code of Practice – Fitness Industry) Regulations	Fitness services contracts
USA (Federal)	Federal Cooling-off Rule	Door-to-door sales
USA (New York)	General Business Law	Health club contracts
USA (various states)	Applicable state laws on timeshare	Timeshare contracts
Canada (Ontario)	Consumer Protection Act	Direct sales contracts Timeshare agreements Personal development service contracts
Singapore	Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations	Direct sales contracts Long-term holiday contracts Timeshare contracts Timeshare-related contracts
South Korea	Door-To-Door Sales Act	Unsolicited door-to-door sales and telemarketing sales
	Act on Consumer Protection in Electronic Commerce	Mail orders (including online purchases)
Mainland China	Consumer Protection Law	Distance sales (including online purchases)
Taiwan	Consumer Protection Act	Door-to-door sales Distance sales (including online purchases)

¹ The information provided in this Appendix is for reference purpose only. Whilst the Council endeavours to ensure the accuracy of the information hereof, no express or implied warranty is given by the Council as to the accuracy of the information.

Appendix B – Overview of the operation arrangements of mandatory cooling-off in different jurisdictions¹

Jurisdiction	UK	Australia (Commonwealth)	USA (Federal)	Canada (Ontario)	Singapore	Mainland China	Taiwan	South Korea
Legislation	Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013	Australian Consumer Law	Federal Cooling-off Rule	Consumer Protection Act	Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations	Consumer Protection Law	Consumer Protection Act	Door-To-Door Sales Act and Consumer Protection in Electronic Commerce
Duration of cooling-off period	14 days	10 business days	3 business days	10 days	5 days excluding Friday, Saturday and Sunday	7 days	7 days	7 - 14 days depending on the type of transaction
Minimum transaction value	£42	AUD\$100	US\$25 - \$130	CAD\$50	SGD\$50	N/A	N/A	N/A
Method of cancellation	Oral or written notice	Oral or written notice	Written notice	Oral or written notice	Written notice	No specific requirement provided in the legislation	Written notice	No specific requirement provided in the legislation
Supply of goods/ service during cooling-off period	Yes	Yes ²	Yes	Yes	Yes	Yes	Yes	Yes

¹ The information provided in this Appendix is for reference purpose only. Whilst the Council endeavours to ensure the accuracy of the information hereof, no express or implied warranty is given by the Council as to the accuracy of the information.

² Only if the goods cost AUD\$500 or less, or supply of electricity or gas services

Jurisdiction	UK	Australia (Commonwealth)	USA (Federal)	Canada (Ontario)	Singapore	Mainland China	Taiwan	South Korea
Deduction for improper handling of goods / service consumed	Yes	Yes	Not expressly provided in the legislation	Yes	Yes	Not expressly provided in the legislation	Not expressly provided in the legislation	Yes
Acceptance of payment during cooling-off period	Yes	No	Yes	Yes	Yes except long-term holiday contract, timeshare contract or timeshare-related contract	Yes	Yes	Yes
Time limit for refund	14 days	Not applicable	10 business days	15 days	60 days	15 days	15 days	3 business days
Method of refund	Same payment method and currency	Not applicable	Not expressly provided in the legislation	Not expressly provided in the legislation	Not expressly provided in the legislation	Same payment method	Not expressly provided in the legislation	Not expressly provided in the legislation
Penalty for cancellation	No	No	No	No	No	Handling fee for credit card transaction is allowed	No	No
Costs of return	Borne by consumers	Not expressly provided in the legislation	Borne by traders	Borne by traders	Borne by consumers	Borne by consumers	Borne by traders	Borne by traders
Duration for return of goods	14 days	Within reasonable time after cancellation	20 days	Forthwith once a refund is provided	Upon cancellation	7 days	15 days	Not expressly provided in the relevant legislation

Jurisdiction	UK	Australia (Commonwealth)	USA (Federal)	Canada (Ontario)	Singapore	Mainland China	Taiwan	South Korea
Ancillary contract	Terminated automatically	Void	Not expressly provided in the legislation	Void	Unenforceable against consumers	Not expressly provided in the legislation	Not expressly provided in the legislation	Not expressly provided in the relevant legislation
Curtailment / Waiver	No	No	No	No	No	No	No	No

Appendix C – Overview of the enforcement regimes in selected overseas jurisdictions¹

Jurisdiction	UK	Australia (Commonwealth)	Singapore
Legislation	Consumer Contracts (Information, Cancellation and Additional Charges) Regulation 2013	Australian Consumer Law	Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations
Enforcement bodies	Local Trading Standards	Australian Competition and Consumer Commission (national level), and various state/territory consumer protection agencies (state/territory level)	SPRING Singapore Consumers Association of Singapore
Nature	Civil and Criminal	Civil and Criminal	Civil
Enforcement tools	Undertaking Injunction Criminal prosecution	Undertaking, Injunction, Financial penalty, Compensatory order, Non-punitive order ² , Adverse publicity order ³ , Disqualification order ⁴ , Criminal prosecution	Undertaking Injunction
Maximum Penalty (Criminal)	Unlimited fine on summary conviction	AUD\$50,000 (body corporate) AUD\$10,000 (person other than body corporate)	Not applicable
Private action by aggrieved consumer	Yes	Yes	Yes

¹ The information provided in this Appendix is for reference purpose only. Whilst the Council endeavours to ensure the accuracy of the information hereof, no express or implied warranty is given by the Council as to the accuracy of the information

² Such as establishing a compliance program, education program and training program, and revising internal operation etc.

³ To disclose certain information

⁴ Disqualifying a person from managing the business