

For discussion on
29 May 2012

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

**Responses to Outstanding Issues and
Proposed Committee Stage Amendments**

Purpose

This paper informs Members of the Administration's responses to outstanding issues raised at previous meetings. It also seeks Members' views on the Committee Stage Amendments (CSAs) that the Administration intends to propose to the captioned Bill.

Outstanding Issues

Proposed New Section 18A

2. At the meeting held on 24 April, a deputation suggested, in the light of the type of loss or damage for which a claimant might recover by action as provided under the proposed new section 36, that consideration be given to amending the proposed new section 18A to the effect that the court could award compensation for non-financial loss as well (in addition to financial loss as is currently suggested).

3. Actions for loss or damages lodged under the proposed new section 36 will be handled by a civil court. On the other hand, the power to order a person convicted of a fair trading offence to pay compensation under the proposed new section 18A (which replicates section 73 of the Criminal Procedure Ordinance (Cap. 221) and section 98 of the Magistrates Ordinance (Cap. 227)) is to be designated to a criminal court.

4. We have considered the differences between compensation to be awarded by a criminal court and damages to be awarded by a civil court. It has been argued¹ that a compensation order should only be made where there is no question of liability. Such an order will not be appropriate if there is doubt as to the liability to compensate. So if an accused declines to accept that there is any loss, the court must give him the chance to test the basis for any such claim. The prosecution will then be required to place the appropriate evidence before the court. However, it is certainly not desirable for the criminal court to embark upon a complicated investigation.

5. We are of the view that it is inappropriate for a criminal court to be entrusted the power to award damages in the civil realm in the light of the points at paragraph 4 above.

Choice of law clause

6. In his letter of 15 March, the Assistant Legal Adviser (ALA) suggested that consideration be given to including a provision similar to section 7(2) of the Unconscionable Contracts Ordinance (Cap. 458) to pre-empt any attempt by traders to evade the operation of the Trade Descriptions Ordinance (Cap. 362) (including the proposed rights of private action under the proposed new section 36) or to oust the jurisdiction of the Hong Kong courts by artificially inserting a choice of law clause in the contract to apply the law of a jurisdiction other than Hong Kong.

7. Criminal sections of the Ordinance essentially govern conduct in Hong Kong irrespective of any choice of governing law for a related contract. As regards civil liability, we appreciate the views of the ALA and will propose a CSA to add a new paragraph under the proposed new section 36 to provide that any term in a contract which purports to exclude or restrict the right of a claimant under the proposed new section 36(1) to bring action against any person will be of no effect.

¹ *Sentencing in Hong Kong*, 6th ed., pp. 113 - 115, with reference to *R v White* [1996] 2 Cr App R (S) 58, 60; *Hyde v Emery* [1984] 6 Cr App R (S) 206; *R v Horsham Justices, ex parte Richards* [1985] 7 Cr App R (S) 158, 165; and *R v Kneeshaw* [1974] 58 Cr App R (S) 439, 443.

Power to demand the production of documents

8. In the same letter, in relation to the proposed new section 15(1)(ca), the ALA asked whether a person is able to resist production of such documents or books on the grounds of legal professional privilege or the privilege against self-incrimination or both.

9. The proposed new section 15(1)(ca) does not abrogate the common law privilege against self-incrimination or the common law legal professional privilege. First of all, the existing section 17(4) of the Ordinance already spells out the common law protection. Specifically in relation to the issue of self-incrimination, where a person merely produces to an authorized officer a book, a document or a record required to be kept under the Ordinance, there is no issue of self-incrimination because the act or the failure does not constitute answering any question or giving any information which might incriminate the person or confessing guilt. Provisions similar to the proposed new section 15(1)(ca) can be found in section 28 of the Security and Guarding Services Ordinance (Cap. 460), section 9 of the Notaries Public (Practice) Rules (Cap. 159, sub. leg.), section 19 of the Securities and Futures (Investor Compensation-Levy) Rules (Cap. 571, sub. leg.) and section 30A of the Mandatory Provident Fund Schemes Ordinance (Cap. 485).

Definition of “exempt person”

10. At the meeting held on 21 May, Members sought further information on the definition of “exempt person” inserted by clause 3(9) and the drafting of the proposed new Schedule 3 added by clause 23.

11. As defined, “exempt person” means a person who is acting in the capacity of a person described in an item of proposed new Schedule 3. Schedule 3 contains a list of persons whose professional conduct is regulated by a relevant regulatory body established or sanctioned by an Ordinance. Those persons are subject to the regulation imposed by the relevant bodies, by way of either codes of practice or subsidiary legislation. They are not subject to the regulation of the fair trading provisions (except section 7 which is pre-existing) of the amended Ordinance but only when they are acting in the capacity in which they are

registered. If an exempt person engages in a commercial practice not in the person's registered professional capacity, the person ceases to be an exempt person and the practice will be subject to the control of the Ordinance. To use an example quoted by a Member at the meeting, if the practice of a registered dentist promoting a service to a patient-consumer is taken to be part of the person's dental practice, the practice will be within the scope of regulation by the regulatory body, the Dental Council of Hong Kong. Any practice in which the exempt person is engaged in not in the person's registered professional capacity will be subject to the control of the Ordinance.

12. Unlike Schedule 4 (which concerns financial services products), professional practices as defined by the Ordinances referred to in Schedule 3 are generally not defined in terms of products provided. We believe that Schedule 3 (read in conjunction with the definition of "exempt person") already reflects our objective.

Broad framework of draft guidelines

13. Under the proposed new section 16BA(1) (inserted by clause 26), the Customs and Excise Department is empowered to issue guidelines on matters in relation to which the Department may exercise powers under the Ordinance. The proposed new section 16BA(6) further provides that the Department must consult any persons that it considers appropriate before issuing any guidelines or amendments of them. At previous meetings, we undertook to provide a broad framework of the draft guidelines such that we could have the early benefit of Members' views on the structure of the guidelines and the desired level of details.

----- 14. We attach at Annex A a draft framework of the Guidelines. The draft contains a statement of enforcement policy, and chapters on the scope of application of the fair trading provisions, the interpretation of important terms, the operation of an offence provision and the sanctions available. We wish to emphasize that the draft should not be taken as reflecting more than the Administration's preliminary views at this stage on the operation of the relevant provisions of the Ordinance (ultimately only the courts can decide whether or not a practice is in breach of the Ordinance). The draft is subject to further deliberation within the

Administration and, if necessary, to refinements, before it is formally put to stakeholders for consultation pursuant to the proposed new section 16BA(6). As we have said at the last Committee meeting, the Administration is prepared to consult the relevant Panel of this Council during the consultation if the Panel considers appropriate.

Implementation timetable

15. At the meeting held on 12 April 2012, Members asked that we should mention in the concluding speech of the Secretary for Commerce and Economic Development in the second reading debate the Administration's intended timetable for implementing the Bill after enactment.

16. Upon the enactment of the Bill, we will promptly go through the necessary procedures for implementing the Bill which include consultation with stakeholders on draft guidelines, staff training, publicity for traders to encourage compliance and consumer empowerment campaigns. Taking into account the lead time required for taking these steps, we strive to bring the Bill (if enacted) fully into operation within 2013. As requested by the Bills Committee, we will mention this in the Secretary's concluding speech during the second reading debate.

Proposed CSAs

17. We attach at Annex B a marked-up version of the Bill showing the proposed CSAs. The justifications for proposing the CSAs are set out in the table at Annex C.

Advice Sought

18. Members are invited to note our responses to the outstanding issues and comment on the proposed CSAs and, if appropriate, render support for us to move them at the Committee Stage.

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

**Customs and Excise
Department
Compliance and
Enforcement
Policy**

This is a draft prepared
for the Bills Committee's
reference.

Table of Contents

	Page
INTRODUCTION	3
ABOUT THIS COMPLIANCE AND ENFORCEMENT POLICY	3
GUIDING PRINCIPLES	3
ENFORCEMENT OBJECTIVES	4
ENFORCEMENT PRIORITY	4
ENFORCEMENT ACTION	5
ENFORCEMENT TOOLS	5

INTRODUCTION

The Customs and Excise Department (C&ED) is the principal agency responsible for enforcing the Trade Descriptions Ordinance, Chapter 362, Laws of Hong Kong (TDO) to protect consumer interests. Seeking to enhance protection for consumers, a set of legislative amendments to TDO came into effect on (date) (month) 2013. New criminal offences have been created to deter specified unfair trade practices which jeopardize consumer rights. In parallel, a civil **compliance-based mechanism** has been put in place to encourage compliance by traders and to stop unfair trade practices expeditiously. In gist, under the mechanism, C&ED is empowered to accept undertakings, as an alternative to prosecution, from traders whom the Department believes has engaged, is engaging or likely to engage, in conduct that constitutes an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I of TDO (collectively known as fair trading sections) to stop and not to repeat an offending act and, where necessary, seek injunctions from a court of law for the same purpose.

ABOUT THIS COMPLIANCE AND ENFORCEMENT POLICY

2. The key purpose of this statement of Compliance and Enforcement Policy is to set out the basic principles which guide C&ED in the selection of enforcement tools available under TDO in response to suspected contraventions of the fair trading sections, the objectives of enforcement and the factors that C&ED takes into account in prioritizing its enforcement resources in handling complaints. With this statement, C&ED seeks to enhance transparency in its enforcement and promote compliance with the fair trading sections in TDO.

GUIDING PRINCIPLES

3. The major principles underpinning our enforcement actions are **targeting, proportionality, consistency and transparency**. They are elaborated below -

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....

ENFORCEMENT OBJECTIVES

4. The objectives of our enforcement actions are to:
- ❖ prevent and stop trade practices in contravention of any of the fair trading sections of TDO
 - ❖ deter the occurrence of conduct that may be in contravention of any of the fair trading sections and promote compliance
 - ❖ raise community awareness of the requirements under the fair trading sections
 - ❖ punish offenders who engage in conduct that amounts to a serious contravention of any of the fair trading sections

ENFORCEMENT PRIORITY

5. To ensure that traders comply with the fair trading sections, we proactively carry out regular inspections to traders' premises and conduct targeted spot checks. Taking into account actual circumstances, we may conduct undercover operations and high-profile patrols against selected traders. On top of these operations, we examine every consumer complaint that we receive and direct the necessary resources to investigate matters that provide the greatest overall benefit for consumers, the trade and the community at large. For optimal and effective use of enforcement resources, we generally accord a higher priority to cases in which one or more of the following factors are present:

- ❖ conduct that involves significant public interests or concerns;
- ❖ conduct that is a repeated, orchestrated, organized or serious contravention;
- ❖ conduct that results or may result in significant consumer detriment;
- ❖ conduct that is targeted at disadvantaged or vulnerable consumer groups or causes or is likely to cause serious detriment to such groups;
- ❖ conduct that suggests a pattern of non-compliance by the trader or is indicative of a risk of future misconduct;
- ❖ conduct that involves a significant, new or emerging market issue;
- ❖ conduct that is or is likely to become widespread in an industry or across industries;
- ❖ the likelihood of bringing about worthwhile educative or deterrent effect.

6. Generally speaking, we need a reasonable amount of details before we can further examine or investigate a complaint. At times, we may need to invite a complainant to provide further details, over an interview or through other means, such that we can make a fair and grounded assessment of whether we can take further action in the light of the enforcement priorities stated above.

ENFORCEMENT ACTION

7. When we proceed to carry out enforcement action, we will clearly state to the trader:
- ❖ the conduct or commercial practice prompting us to take action;
 - ❖ the fair trading sections that we consider have been contravened, are being contravened or are likely to be contravened; and
 - ❖ the enforcement actions that we may take in general.

We will give the trader the time and an opportunity, reasonable in the circumstances of the case in question, to respond.

ENFORCEMENT TOOLS

Undertakings

8. Under section 30L of TDO, we may accept an undertaking as an alternative to prosecution from a trader whom we believe has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I of TDO¹.

9. An undertaking given by a trader is a commitment by the trader to stopping and not to repeating the conduct or commercial practice of concern. Section 30M of TDO provides that if an undertaking is accepted, an investigation may not be commenced or continued and that

¹ Section 4: Marking and provision of information, etc. order
Section 5: Information to be given in advertisements
Section 7: Offences in respect of trade description of goods
Section 7A: Offences in respect of trade description of services
Section 13E: Misleading omissions
Section 13F: Aggressive commercial practices
Section 13G: Bait advertising
Section 13H: Bait-and-switch
Section 13I: Wrongly accepting payment

criminal proceedings in a court of law may not be brought relating to the matter to which an undertaking relates². Section 30L(4) empowers us to cause an undertaking to be published. Section 30N provides for matters relating to the withdrawal of acceptance of an undertaking. We set out in the following paragraphs the circumstances under which an undertaking may be accepted, withdrawn and published.

Acceptance of an undertaking

10. Through the acceptance of an understanding, we seek to encourage compliance by a trader and resolve the matter more expeditiously. We will consider accepting from a trader an undertaking having regard to a non-exhaustive list of factors, including:

- (a) the nature³ of the alleged contravention and the regulatory impact of the undertaking compared to that of criminal prosecution;
- (b) whether the undertaking contains an acknowledgement by the trader that an alleged contravention has occurred;
- (c) the extent of co-operation that the trader has given in our investigation, including the provision of complete information about the contravention and any timely and appropriate remedial actions taken;
- (d) whether the trader is likely to comply with the undertaking - the history of complaints against or contraventions by and the general compliance record of the trader, including any relevant previous court proceedings, will be relevant;
- (e) whether the trader is prepared to include in the undertaking a commitment (with details) to putting in place a compliance programme for its staff;
- (f) whether enforcement measures have been taken against others with similar culpability in the same incident.

11. We will seek written consent from the Secretary for Justice (SJ) before accepting an undertaking.

Elements of an undertaking

12. While contents may vary, undertakings should be of substance and directly address the conduct in question and its consequences.

² Subject to the withdrawal mechanism in paragraphs 15 and 16.

³ For example, seriousness of the offence, extent of the consumer detriment, history of the offender, etc.

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13. An undertaking usually includes the following elements:
- ❖ an acknowledgment or admission from a trader that the conduct of concern constitutes or is likely to constitute a contravention of a fair trading section of TDO;
 - ❖ a positive commitment by the trader to ceasing the conduct and not to repeating it;
 - ❖ specific details of the corrective actions that will be taken by the trader to remedy the harm caused by the conduct; and
 - ❖ an acknowledgment by the trader that C&ED will make the undertaking accessible by the public, including placing it on C&ED's departmental website.

Compliance with an undertaking

14. In order to ensure that the terms of an undertaking are complied with by the trader who gives the undertaking, the trader should also undertake to cooperate with us where we conduct compliance inspections at his business premises.

Withdrawal of acceptance of an undertaking by C&ED

15. Section 30N sets out the circumstances under which we may withdraw the acceptance of an undertaking. Specifically, we may, with the written consent of SJ under section 30N, withdraw the acceptance of an undertaking.

16. Where the acceptance of an undertaking is withdrawn, the undertaking is no longer binding on the trader who gave it. We may commence or resume an investigation and instigate criminal prosecution relating to the matter to which the undertaking related. The statement of any facts contained in the undertaking may be admitted in any court proceedings relating to the matter to which the undertaking relates as conclusive evidence as to the facts stated therein against a trader who gave the undertaking. Prosecution of an offence relating to the matter in connection with the undertaking previously given may be brought at any time before the expiration of one year after the effective date specified in the withdrawal notice.

Injunctions

17. Where a trader is not willing to give an undertaking, we may, under section 30P(1)(a), apply to the District Court (or under special circumstances, under section 30S, to the Court of First Instance) for an injunction which orders a trader to stop and to take steps not to repeat the

conduct or commercial practice which, if not stopped, will likely result in harm to be done to more consumers at large.

18. Where we consider that the trader who gave an undertaking has breached any of its terms, we may apply also for an injunction under section 30P(1)(2).

Criminal proceedings

19. We may institute criminal proceedings against a trader in cases where there is a serious contravention of the fair trading sections of TDO, having regard to the following non-exhaustive list of aggravating factors:

- ❖ Whether the conduct continues over a long period of time or involves a series of conduct against the same victim or the same group of victims;
- ❖ The number of victims and quantum of financial loss or other detriment suffered by the victim(s)
- ❖ Whether the conduct is a fabricated one with prior planning;
- ❖ Whether the victims are particularly vulnerable;
- ❖ Prevalence of the conduct and its impact on the community, including the risk posed to public health and safety or to the environment;
- ❖ Whether there are elements in the conduct which caused or were likely to amount to harassment, anxiety or distress to victims;
- ❖ Any attempt by the trader to conceal his identity, whether directly or indirectly, such that we or the victims (or both) cannot easily identify or trace the trader;
- ❖ Lack of remorse;
- ❖ The trader's compliance history and conviction record(s);
- ❖ Whether the trader has obstructed us in taking lawful actions during our investigation.

Customs and Excise Department

XXXXXX 2012

General Guidelines

Implementing of the Fair Trading Sections of the Trade Descriptions Ordinance

Customs and Excise Department

This is a draft framework
prepared for the Bills
Committee's reference.

Table of Contents

INTRODUCTION

- 1. FAIR TRADING SECTION OF TDO – SCOPE OF APPLICATION**
- 2. AVERAGE CONSUMER**
- 3. FALSE TRADE DESCRIPTIONS OF GOODS AND SERVICES (to be added)**
- 4. MISLEADING OMISSIONS (to be added)**
- 5. AGGRESSIVE COMMERCIAL PRACTICES (to be added)**
- 6. BAIT ADVERTISING**
- 7. BAIT AND SWITCH (to be added)**
- 8. WRONGLY ACCEPTING PAYMENT (to be added)**
- 9. LIABILITY OF PARTIES INVOLVED**
- 10. SANCTIONS AND POWERS AVAILABLE TO THE CUSTOMS AND EXCISE DEPARTMENT**
- 11. CONSUMER REDRESS**

INTRODUCTION

I. The Customs and Excise Department (C&ED) is one of the key law enforcement and consumer protection agencies in Hong Kong. One of our key missions is to protect consumer interests by enforcing consumer protection legislation, including the Trade Descriptions Ordinance (Chapter 362 of the Laws of Hong Kong) (TDO). Seeking to enhance protection for consumers, a set of legislative amendments to TDO came into effect on (date) (month) 2013. New prohibitions and enforcement mechanism have been introduced to deter specified unfair trade practices that traders may deploy against consumers. C&ED is the principal agency to enforce TDO¹.

AIM OF THE GUIDELINES

II. This set of General Guidelines (the Guidelines) is issued by C&ED in accordance with section 16BA of TDO. The aim of the Guidelines is to set out the manner in which authorized officers of C&ED may exercise their powers in respect of sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H and 13I of TDO (collectively known as “fair trading sections”) and to provide guidance as to the operation of the provisions of TDO. The Guidelines also seek to provide guidance for traders in complying with the fair trading sections of TDO and for consumers in understanding how they are protected.

III. The Guidelines cannot and do not aim to mandate traders to conduct their business in a particular way. The Guidelines serve as a guide as to when a conduct may constitute a contravention of the fair trading sections. The examples referred to in the Guidelines seek to illustrate the coverage and possible effect of the fair trading sections and how the sections (and thus the prohibitions) may be enforced in practice. They do not cover every situation or practice which may amount to a contravention. It is impossible for C&ED to anticipate all possible developments and innovations in commercial practices. Accordingly, even if a particular matter, issue or conduct is not mentioned in the Guidelines, it does not necessarily imply that C&ED will not be concerned about that matter, issue or conduct. The Guidelines should not be regarded as a substitute for, or a definitive interpretation of, the fair trading sections and should be read in conjunction with them. Ultimately, only a court of law can

¹ Concurrent jurisdiction is conferred on the Communications Authority to enforce the fair trading sections in relation to commercial practices of specified licensees that are directly connected with the provision of telecommunications or broadcasting services under the relevant legislation.

decide whether or not a conduct is in contravention of the fair trading sections.

IV. The Guidelines themselves are neither legally binding nor subsidiary legislation *per se*. A person does not necessarily incur any civil or criminal liability only because the person contravenes any part of the Guidelines. However, if a court of law is satisfied that the Guidelines are relevant to determining a matter, an issue or a conduct in any legal proceedings, the Guidelines may be admissible in evidence, and proof that the person contravened or did not contravene the Guidelines may be relied on by any party to the proceedings as tending to establish or negate the matter, issue or conduct².

V. For the avoidance of doubt, these Guidelines are not applicable to the provisions of forged trade marks (section 9) and the proceedings relating to the importation of infringing goods to which forged trade marks are applied (Part IIIA) of TDO.

² Section 16BA(8).

1. FAIR TRADING SECTIONS OF TDO – SCOPE OF APPLICATION

1.1 Generally speaking, the fair trading sections apply to commercial practices involving the sale or supply of goods or services by traders to consumers. Nevertheless, the sections do not apply to immovable property, and services and goods supplied by institutions regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and the Securities and Futures Ordinance (Cap. 571). In addition, commercial practices engaged by a person acting in the capacity of a professional person listed in Schedule 3 to TDO are not regulated by the fair trading sections³.

What is “commercial practice”?

1.2 The term “commercial practice” is defined under section 2 of TDO as *“any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product”*.

1.3 Activities conducted by traders related to the sale or supply of goods or services to consumers, including promotion sales, offers of discounts, price reduction and advertising, fall within the meaning of commercial practice and are regulated by the fair trading sections. It is important to note that a commercial practice may occur not only before or during a transaction (if any), for example, the marketing, sale, supply and payment stages, but also after a transaction has been completed, such as the provision of maintenance and after-sales services by a trader to a consumer, including warranties and contract cancellation mechanisms. These commercial practices fall within the ambit of the fair trading sections.

Who is a consumer and who is a trader?

1.4 Section 2 of TDO defines “consumer” as *“an individual who, in relation to a commercial practice, is acting, or purporting to act, primarily for purposes that*

³ Except the offence of false trade descriptions in relation to goods.

are outside the person's trade or business". For the purpose of fair trading sections, a consumer is a natural person as opposed to a legal person which may be a company. In addition, whether or not an individual is a consumer will depend on whether or not the relevant activity is done primarily for the purpose that is outside the person's trade or business.

1.5 Section 2 also defines "trader" as "*any person (other than an exempt person) who, in relation to a commercial practice, is acting, or purporting to act, for purposes relating to the person's trade or business*". A trader therefore can be a natural person, a company or a body corporate. The assessment of whether or not an individual is acting as a trader in relation to a commercial practice will depend on whether or not the relevant activity is done **for purposes relating to his trade or business**. Thus, a person who sells goods or provides services to a consumer in the capacity of an employee or a sales representative of a company is taken as a trader for the purposes of the fair trading sections. In contrast, a person selling goods on the internet occasionally to dispose of unwanted personal items would not be likely to be held to be acting for purposes relating to his trade or business.

Do the fair trading sections apply to transactions between consumers?

1.6 Generally, fair trading sections do not apply to "consumer-to-consumer" transactions. For example, a person who sells his only car which has been used for private leisure purposes to another person who acquires it for the same purposes is not regulated by the sections.

Do the fair trading sections apply to transactions involving traders buying from consumers?

1.7 "Commercial practice" is defined as including practices that are "*directly connected with the promotion of a product to consumers or sale or supply of a product to or from consumers*". Hence, the fair trading sections also apply to what are commonly known as "buy-back arrangements" and arrangements under which traders acquire products from consumers. Sections 13E and 13F, on misleading omissions and aggressive commercial practices respectively, are relevant. To quote a few examples, a consumer who purchases a new automobile from a car dealer may trade-in his existing one; gold and jewelry retailers may purchase gold

articles from consumers; other traders including antique shops, retailers of second-hand goods, handbag and luxury goods shops may also purchase goods from consumers. The commercial practices deployed by traders in those instances are subject to the sections on misleading omissions and aggressive commercial practices.

2. AVERAGE CONSUMER

2.1 In determining whether a trader who engages in a commercial practice contravenes two of the fair trading sections, namely, section 13E on misleading omissions and section 13F on aggressive commercial practices, the impact on the economic behaviour of “the average consumer” is to be assessed. For further information on how sections 13E and 13F operate, please see Chapters 4 and 5 of these Guidelines.

2.2 The concept of average consumer has been adopted in several overseas jurisdictions. According to section 13D, the average consumer is regarded as “reasonably well-informed and reasonably observant and circumspect”. The average consumer is taken to have informed himself or herself about the quality and price of products and to make efficient choices. The average consumer is expected to take reasonable care of himself or herself, rather than be ignorant, careless or over-hasty. Whether a commercial practice amounts to a misleading omission or an aggressive commercial practice is to be judged in the light of the impact of the practice on the economic behaviour of the average consumer with these attributes.

Example

The presence of allergens is potentially annoying for certain group of consumers. Consumers who are susceptible to skin allergy care about the ingredients in cosmetic products. While the average consumer should care to find out the specific causation of the allergy, he or she is not expected to equate “No Additives” with “allergens free”. The average consumer is expected to read the ingredients stated on the package and if in doubt clarify with the salesperson to find out whether or not the ingredients which might cause allergy to him/her are present.

Example

A trader promotes an ice-cream bar by applying a “+ 10%” marking on the package. The marking has a different colour and occupies more than 30% percent of the total surface area of the wrapping. Reasonably circumspect consumers are taken to know that the size or area of a promotional marking on the package of a product may not correspond to a proportionate increase in the weight or quantity of that product.

Example

A chocolate advertisement showcases a frail old woman playing soccer on the pitch incompetently. Having eaten the advertised chocolate bar, she transforms into a strong male player who scores for his team instantly. The advertisement is obviously exaggerated and no reasonable consumer would ever believe such a chocolate bar could turn a frail elderly into an energetic youth. Where an ignorant consumer is misled by this advertisement, the advertisement would be unlikely to be taken as contravening the fair trading sections.

6. BAIT ADVERTISING

When advertising products at a specified price, traders should ensure that the products are available for a reasonable period and in quantities that are reasonable.

6.1 Section 13G of TDO prohibits a trader from advertising goods or services at a specified price if **there are no reasonable grounds for believing that the trader will be able to offer reasonable quantities of the goods or services at that price for a reasonable period**, taking into account the nature of advertisement and the nature of the market in which the trader carries on business. In other words, a trader who advertises goods or services for supply to consumers at a specified price should ensure that the goods or services are available in reasonable quantities and for a reasonable period.

6.2 The prohibition seeks to forbid traders from enticing consumers by advertising goods or services at an exceedingly attractive price but making them available for sale only for an unreasonably short period and/or in unreasonably small quantities. In short, the advertised product is the bait to lure consumers to come forward. When arriving at traders' premises or visiting traders' websites intending to buy the bait, consumers only find out that the advertised goods or services are no longer available (or perhaps have never been available). They end up wasting their time and, swayed by the spent shoe leather costs, may buy something that they might not have purchased if not for attracted by the bait.

6.3 A trader may commit an offence if he does not supply the advertised goods or services in reasonable period and quantities. Whether the period and the quantities are reasonable is determined in the light of the nature of the market in which the trader carries on business and also the nature of the advertisement.

Nature of the Market

6.4 In examining the nature of the market, we consider both the supply and demand sides in relation to the subject goods or services. The demand-side factors which we generally take into account include, but not limited to, the typical size of consumer demand for the same or similar goods or services that have been offered for sale by the same trader and traders in the same market, demand elasticity at different

prices and the extent of reach of the advertisement. We also take into account factors which are not reasonably foreseeable by traders and may have a substantial impact on the size of demand, e.g. a sudden drop in temperature prompting a great number of consumers rushing for down jackets. In relation to the supply side, we recognize that certain products are inherently limited in the quantities that could be made available to meet a sudden upsurge in market demand e.g. perishables and other goods the production of which is subject to capacity constraints. Further, we take into account constraints in replenishing supply that are beyond the trader's control.

6.5 We suggest that before putting up an advertisement or initiating a marketing promotion, traders should review their previous sales trends and promotion records and assess if the size of the stock they have in hand is sufficient to meet a reasonably projected consumer demand. If the actual demand is greater than that originally projected, traders should stop or withdraw the relevant advertisement or cease the related promotional activities such that no more unmet demand will be generated.

Nature of the Advertisement

6.6 As stated in paragraph 6.4 above, the size of the consumer demand for the advertised goods or services is generally subject to the extent of reach of the advertisement in question. The size of the readership that is reachable by a print advertisement on the front page of a widely circulated daily newspaper is naturally larger than that on an inside page of a local weekly. The reach of a TV commercial is expectedly farther than a bill posted on the front of a local store.

Example

Happy to Fly Airline is offering a special promotion \$299 on all flights to Malaysia during the coming Lunar New Year. This special promotion is advertised for a period of one week in multiple media and on the Internet. Compared with the prices charged by competing airlines for flights to the same destination during the same period, the promotional price is very attractive as it is about 70% less than those levied by competitors. Happy to Fly Airline conducted a similar promotion last year, setting the prices of tickets at about half of competitors'. Eventually, over 3,500 tickets were sold. The seats available this time however are only 500. Happy to Fly Airline may be held to be committing the offence bait advertising as there are no reasonable grounds for believing that it will be able to offer for supply the air tickets at the promotional price for a period that is, and in quantities that are, reasonable, in

the light of the nature of the market and that of the advertisement.

Example

A computer firm participates in the annual computer festival created media hype by offering its notebook computer for sale at an attractive price of \$2,000 when other firms sell the same model at \$5,000. Two weeks prior to the event, the firm starts to advertise the attractive offer in one local major newspaper and on the company's website. This is the second year the computer firm participates in the festival and last time, it advertized in a similar manner and sold 50 notebook computers of similar model at \$2,000 when the market price was \$4,000. On the first day of this event, a consumer goes to the shop and finds the firm has sold all its stock of 10 computers. The firm may be held to be committing the offence bait advertising as there are no reasonable grounds for believing that it will be able to offer for supply the computer at the promotional price for a period that is, and in quantities that are, reasonable, in the light of the nature of the market and that of the advertisement.

Situation where advertising is not considered as bait advertising

6.7 We have no intention of fettering traders in their legitimate promotional activities, including activities intended to create a “queuing effect”, as long as information on the period and the quantities in which the advertised products are available (even if the period and quantities are grossly unreasonable, e.g. 2 handbags sold at 50% discount or handbags sold at 50% discount for the first hour of business) is provided to consumers such that they can make an informed decision as to whether they would like to come early and queue up. In this light, section 13G(3) of TDO states that if an advertisement states clearly the **period** or the **quantities** in which the products are offered for supply at the specific price and the trader offers those products for supply accordingly, the advertisement is not bait advertising.

6.8 We have to emphasize that a trader will not commit the offence bait advertising **only** because he does not state clearly the period and the quantities in which the advertised product is available. The effect of section 13G(3) is that a trader will not commit the offence, even when the advertised product is available for an unreasonably short period and in unreasonably small quantities, if he states clearly in the advertisement the period and quantities in which the product is available and does offer them for supply as advertised.

Section 26A - Additional Defence (bait advertising)

6.9 The TDO also provides an additional defence under section 26A for traders namely, offering rainchecks and offering equivalent products to customers if a trader fails to meet the legal requirement set out in paragraph 6.1. That means if traders genuinely run out of stock due to **unreasonable belief or forecast**, they should consider sourcing additional stock or to procure a third person to supply the specified product (or alternatively, equivalent product) to meet the demand of consumers at the originally advertised price within a reasonable time. If the offer was accepted by the consumer and the trader so supplied, the trader will be acquitted of the offence of bait advertising.

9. LIABILITY OF PARTIES INVOLVED

Personal liability for contravention by corporate body or unincorporated body

Liability of management

9.1 Section 20 of TDO sets out the circumstances under which certain classes of persons of a body corporate or an unincorporated body may also incur personal criminal liability in consequence of an offence committed by the body corporate or as a member of the unincorporated body. In the case of a body corporate, any person who at the time of the offence is a director, shadow director, company secretary, principal officer or manager of the body corporate may be liable. In the case of an unincorporated body, any person who is a partner or an office holder in or a member or manager of the unincorporated body may be liable. To establish their liability, it is necessary for the prosecution to prove that the offence has been committed with their consent or connivance or was attributable to their neglect.

9.2 A person will not be personally liable for the offence merely because of the position or role that he has in the company. In determining whether he should be held liable, we take into account the following factors:

- ❖ whether there is a sufficient nexus between the offence and the person;
- ❖ whether he is in a position or has an ability to make, or participate in the making of, decisions that influence the company in relation to the offence;
- ❖ whether he knows that or is negligent as to whether, the offence would occur but fails to take all reasonable steps to prevent the commission of the offence;

Liability of employees and agents

9.3 A trader includes any person acting in the name of or on behalf of a trader. If an employee, including a service provider, acting as an agent, has committed an act that offends the fair trading sections within the scope of his or her employment (or service agreement) and intended at least in some extent to benefit the principal, then the act and intent of the agent can be imputed to the corporation under the rule of principal and agent.

9.4 An agent's knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority. An agent may invoke the general defence to vindicate himself from criminal liability if he or she can prove that the offence was committed outside his or her control and he or she had made reasonable efforts to avoid the commission of such an offence by himself or any person under his control.

Section 26A - Additional Defence (bait advertising)

Section 26B - Additional Defence (wrongly accepting payment)

9.5 For additional defences in proceedings on offences of bait advertising and wrongly accepting payment, please refer to paragraphs 6.9 and 8.X respectively.

10. SANCTIONS AND POWERS AVAILABLE TO THE CUSTOMS AND EXCISE DEPARTMENT

10.1 Criminal prosecution may be instigated for contraventions of the fair trading sections. Any person who commits a fair trading offence will be liable on conviction on indictment, to a fine of \$500,000 and to imprisonment for 5 years; and on summary conviction to a fine of \$100,000 and 2 years imprisonment.

10.2 With the introduction of the compliance-based mechanism⁴, C&ED is empowered to draw on civil measures *viz.* undertakings and injunctions, to deal with suspected contraventions of TDO. An undertaking is a court-enforceable agreement proposed by a trader (and accepted by C&ED) to undertake specific actions, including stopping the offending acts and not repeating them in future. C&ED may also apply to the court for an injunction directing the trader to stop or refrain from continuing an offending act.

Investigatory powers

10.3 Authorized officers of C&ED carry out their duties in various ways, including inspection, sampling, test-purchasing, testing, detention of suspicious goods, investigation and prosecution, and also by informing, advising and educating traders and consumers.

10.4 Authorized officers have a wide variety of powers under TDO. They are empowered to enter non-domestic premises and inspect goods, and to inspect books and documents that are required to be kept under TDO or its subsidiary legislation for the purpose of ascertaining whether any offence under TDO has been or is being committed. If there are reasonable grounds to suspect that an offence has been committed, they may arrest suspects, to require the production of books, documents or records and, when necessary, to seize and detain offending goods, and books and documents that they believe may be required to be produced in a court of law as evidence.

10.5 If individuals or traders obstruct authorized officers in the performance of their lawful duties, they may be liable to prosecution under section 17.

⁴ Please refer to the Compliance and Enforcement Policy issued by the C&ED which is available in our departmental website: www.customs.gov.hk

10.6 For more details on compliance and enforcements, please refer to the “Compliance and Enforcement Policy” issued by C&ED which sets out the basic principles which guide C&ED in the selection of enforcement tools available under TDO in response to suspected contraventions of the fair trading sections, the objectives of enforcement and the factors that C&ED takes into account in prioritizing its enforcement resources in handling complaints.

11. CONSUMER REDRESS

11.1 Aggrieved consumers may seek restorative justice under section 36 whereby they are given the right to institute private actions for damages if they have suffered loss or damages due to conduct which constitutes a fair trading offence. Separately, under section 18A, where a person is convicted of any of the fair trading offences, a court of law may order the convicted person to compensate any person for financial loss resulting from the offence.

Customs and Excise Department
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