

立法會
Legislative Council

LC Paper No. LS37/11-12

**Paper for the House Committee Meeting
on 2 March 2012**

**Legal Service Division Report on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012**

I. SUMMARY

- 1. Objects of the Bill** To amend the Trade Descriptions Ordinance (Cap. 362) to extend its coverage to services, to prohibit certain unfair trade practices and to enhance enforcement mechanisms.
- 2. Comments**
 - (a) The Bill seeks to extend the prohibition of false trade descriptions under Cap. 362 to cover false indications of any matters with respect to goods or services.
 - (b) The Bill seeks to create new offences of misleading omission, aggressive commercial practice, bait advertising, bait and switch, and wrongly accepting payment, the maximum penalty being a fine of \$500,000 and imprisonment for five years.
 - (c) The Bill proposes to allow aggrieved consumers to sue for damages and to empower the courts to award compensation, but does not provide for any cooling-off arrangements.
- 3. Public Consultation** The public was consulted between 15 July and 31 October 2010 on the legislative proposals. According to the LegCo Brief, the public expressed general support.
- 4. Consultation with LegCo Panel** The Panel on Economic Development discussed the legislative proposals at its meetings held on 24 May 2010 and 24 January 2011. Members raised various concerns.
- 5. Conclusion** In view of the possible implications of the Bill on business practices and consumer protection, Members may wish to study the policy aspects of the Bill in detail.

II. REPORT

Objects of the Bill

The Bill seeks to amend the Trade Descriptions Ordinance (Cap. 362) (the Ordinance) to extend its coverage to services, to prohibit certain unfair trade practices and to enhance enforcement mechanisms.

LegCo Brief Reference

2. File Ref.: CITBCR 05/08/1 issued by the Commerce and Economic Development Bureau on 22 February 2012.

Date of First Reading

3. 29 February 2012.

Background

4. At present, certain undesirable trade practices are prohibited under the Ordinance with a view to protecting consumers. These practices include false trade descriptions, false marks and misstatements in respect of goods provided in the course of trade. Currently, there are no provisions under the Ordinance dealing with other types of unfair trade practices such as false descriptions of services, misleading omissions, aggressive commercial practices or bait advertising.

5. A public consultation paper on legislation to enhance protection for consumers against unfair trade practices was issued by the Administration in July 2010 to consult the public on a package of proposed amendments to the Ordinance seeking to expand the scope of prohibited unfair trade practices and to enhance the enforcement regime. According to paragraph 3 of the LegCo Brief, the proposals received wide public support and were reaffirmed in the public consultation report issued in January 2011.

Comments

6. Based on the outcome of the public consultation, the Administration has introduced the Bill with a view to strengthening consumer protection. The main proposals are set out in the following paragraphs.

Expanding the scope of application of the Ordinance to cover services

7. Under the new section 7A, a trader would commit an offence if he applies a false trade description to a service or supplies, or offers to supply, to a consumer a service to which such a description is applied. A "trade description", in relation to a service, is defined to mean an indication, direct or indirect, and by whatever means given, with respect to the service or any part of the service including an indication of nature, scope, fitness for purpose, risks and price etc. The proposed maximum penalty is the same as that for the offence of false trade description of goods, i.e. a fine of \$500,000 and imprisonment for five years.

Proposed new offences

8. Clause 13 seeks to add a new Part IIB to the Ordinance to introduce new offences to prohibit certain unfair trade practices engaged in by traders. The proposed maximum penalty for these new offences is the same as that for false trade description of goods or services. According to the LegCo Brief, the proposed offences provided in the new sections 13E to 13I are modelled on relevant provisions of consumer protection legislation in the United Kingdom and Australia. These new offences are summarized below.

Prohibition against misleading omissions (the new section 13E)

9. Under the new section 13E, a commercial practice is a misleading omission if it omits or hides material information, provides material information in a manner that is unclear, unintelligible, ambiguous or untimely, or fails to identify its commercial intent, and as a result causes or is likely to cause the average consumer to make a transactional decision that the consumer would not have made otherwise. A "commercial practice" is defined to mean any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or the sale or supply of a product to or from consumers, whether occurring before, during or after any commercial transaction in relation to a product.

Prohibition against aggressive commercial practices (the new section 13F)

10. Under the new section 13F, a commercial practice is aggressive if 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, thereby causing the consumer to make a transactional decision that the consumer would not have made otherwise.

Prohibition against bait advertising (the new section 13G)

11. Under the new section 13G, advertising by a trader of products for supply at a specified price would constitute bait advertising if there are no reasonable grounds for believing that the trader will be able to offer for supply those products at that price, or the trader fails to offer those products for supply at that price, for a period that is, and in quantities that are, reasonable.

Prohibition against bait and switch (the new section 13H)

12. Under the new section 13H, a trader engages in a bait and switch if, having made an invitation to purchase a product at a specified price, he refuses to show or demonstrate the product or to take orders for the product or deliver it within a reasonable time, or shows or demonstrates a defective sample of the product, with the intention of promoting a different product.

Prohibition against wrongly accepting payment (the new section 13I)

13. Under the new section 13I, a trader wrongly accepts payment for a product if, at the time of accepting payment or other consideration for the product, he intends not to supply the product, intends to supply a materially different product, or there are no reasonable grounds for believing that he will be able to supply the product within the period specified by him or within a reasonable period.

14. The new offences outlined above do not apply to an exempt person as set out in the proposed Schedule 3. These exempt persons include professionals who are regulated under other Ordinances, e.g. accountants, barristers, solicitors, medical practitioners, architects, engineers, surveyors and estate agents.

15. By virtue of the proposed Schedule 4, a trader cannot be charged with the proposed offences in relation to financial products or services sold or supplied by a person regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (cap. 485) or the Securities and Futures Ordinance (Cap. 571).

16. With the addition of the above new offences, the Bill proposes to repeal various existing provisions including section 7M of the Telecommunications Ordinance (Cap. 106) which at present prohibits misleading or deceptive conduct in the telecommunications sector, and the provisions under Part IIA of the Ordinance relating to false, misleading or incomplete information with respect to goods.

Enforcement-related matters

17. For enforcement purposes, the Bill proposes to give authorized officers of the Customs and Excise Department the following powers:

- (a) to require production of any books or documents required to be kept under the Ordinance for the purpose of ascertaining whether any offence under the Ordinance has been or is being committed;
- (b) to accept a written undertaking from a person not to continue or repeat or engage in conduct that constitutes an offence under the Ordinance; and
- (c) to apply to the courts for an injunction against any person who has engaged, is engaging or is likely to engage in any unfair trade practice or has breached any terms of an undertaking.

18. In relation to unfair trade practices engaged in by licensees under the Telecommunications Ordinance (Cap. 106) and the Broadcasting Ordinance (Cap. 562), the new sections 16E to 16I propose to confer concurrent enforcement powers upon the Telecommunications Authority and the Broadcasting Authority.

Consumer redress

19. Under clause 30 of the Bill, where a person is convicted of an offence relating to unfair trade practices under the Ordinance, the courts may, in addition to passing a sentence, order the person so convicted to pay reasonable compensation to another person who has suffered financial loss as a result of that offence.

20. Apart from criminal sanctions, the Bill proposes to enable consumers aggrieved by unfair trade practices to commence civil actions against other persons (not being exempt persons) to recover any loss or damage suffered. Under the new section 36 of the Ordinance, the limitation period for such actions is six years. However, the Bill does not provide for any cooling-off arrangements previously proposed by the Administration in the public consultation report.

Commencement

21. The Bill will come into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette, when it is enacted as an Ordinance.

Public Consultation

22. According to paragraph 22 of the LegCo Brief, the public was consulted between 15 July and 31 October 2010 on the legislative proposals. According to the Administration, the public expressed general support.

Consultation with LegCo Panel

23. The proposed amendments to the Ordinance were discussed at the meetings of the Panel on Economic Development held on 24 May 2010 and 24 January 2011. Members in general welcomed the proposals to improve consumer protection by expanding the coverage of the Ordinance. Some members considered that the implementation of cooling-off arrangements would have an adverse impact on the trade, and urged the Administration to balance the interests of consumers and traders. Members may refer to the minutes of those meetings (LC Paper Nos. CB(1)2302/09-10 and CB(1)1650/10-11) for further details.

Conclusion

24. Our scrutiny of the Bill is continuing. In view of the possible implications of the Bill on business practices and consumer protection, Members may wish to study the policy aspects of the Bill in detail.

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