



Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012
Submission by The Communications Association of Hong Kong

Executive Summary

The Communications Association of Hong Kong (“CAHK”) welcomes the objective of the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 but have a number of major concerns as set out in this submission.

1. Exemption of the telecom industry

- The telecom industry should be treated in the same manner as other exempted industries and be excluded from the scope of the Bill as it fulfills all the stated pre-requisites for an exemption.

2. OFCA should have sole jurisdiction over telecom matters

- The highly technical nature of the telecommunications products/services requires substantial industry specific knowledge for proper enforcement. The proposal of giving the Communications Authority and the Customs and Excise Department concurrent jurisdiction over telecommunications matters is undesirable.

3. The Bill is too vague and uncertain

- Crucial and fundamental concepts (e.g. “trader”, “consumer”, “average consumer”, and “material characteristics”) are not clearly defined making it difficult to ascertain where the responsibilities and liabilities lie.
- Doubtful if an “average consumer” does exist – an “average consumer” of general telecommunications products/services (such as a residential line) is different from an “average consumer” of high technology telecom products/services (such as bundled mobile and fixed broadband services which also involve the provision of content).

4. Unjustifiably broad, general and excessive offences

- “Bait advertising” would catch a telecom licensee who merely makes a wrong estimation of the market response to its products/services. The defence for “Bait Advertising” would require a telecom licensee to divulge commercially sensitive information as to stocks and offer period in its advertisement which lessens its competitive power.
- A telecom licensee should be acquitted of “Bait Advertising” and “Bait and Switch” as long as it makes adequate mitigation measures irrespective of whether the customer accepts the alternative offer.
- The offence of “Aggressive Commercial Practice” is subjective.

5. Unjustifiably excessive sanctions

- The offences do not require any impact/damage to have been done to a complainant. Penalizing a telecom licensee with criminal sanctions of fine (HK\$500,000) and imprisonment (5 years) for a conduct which has no impact or effect on anyone or the society is overly excessive.
- There is no basis for the proposal that the civil damages that a complainant would be able to get would be a discretionary amount dictated by the court as it thinks fit (without any sort of guidance) instead of reflecting the amount of loss that the claimant suffered. This will encourage vexatious litigants in the hope of achieving windfall damages.

6. There should be a statutory obligation to use the compliance-based mechanism in all cases

- The enforcement agency should not have the sole and unfettered discretion to go straight to prosecute without having to go through the compliance mechanism. The criminal sanctions should only apply in the most serious and persistent cases.
- An authorized officer should not have the power to request for an undertaking merely because he/she believes (even without a legitimate basis and not requiring a belief on reasonable ground) that an offence “is likely to be committed” and even before an action/inaction has been committed.



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The Communications Association of Hong Kong (“CAHK”) is pleased to submit the joint comments of mobile and fixed network operators on the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 (the “Bill”).

Subject to our comments below, CAHK and its members do not object to the proposal of enhancing consumer protection. However, in doing so, one must be mindful of the important need to strike a balance between protecting consumer interests on the one hand and cultivating a healthy environment to enable businesses to operate and compete effectively on the other hand. Further, piece of legislation needs to be carefully and appropriately scoped in order to achieve the aim of prohibiting the specific conduct concerned without being overly intrusive. It also needs to be clearly drafted to provide the businesses and the consumers with the necessary certainty as to what and when will be protected. This is especially true where criminal penalties are proposed.

The current draft of the Bill is too loosely drafted with the offences being unjustifiably broad, general and excessive. This lack of clarity (and convoluted drafting) must be addressed. If these issues are not resolved it will result in high compliance costs for both businesses and consumers. Please refer to our comments below.

Exemption of the telecom industry

As mentioned in our previous submission (a copy is attached), the telecom industry should be treated in the same manner as other exempted industries and be excluded from the scope of the Bill as it fulfills all the stated pre-requisites for an exemption.

All the telecom licensees object to the unfair and discriminatory treatment of the telecom industry. CEDB did not give any reason for its insistence on including the telecom industry in the Bill nor did it refer to any specific and substantial areas proposed to be covered by the Bill which are not already covered by the set of regulations that have been in place in the telecommunications sectors. We asked that if the CEDB justifiably considers that there are additional measures under the Bill that are not already in the Telecommunications Ordinance or different industry Code of Practice, telecom sector can include the additional provisions into its current regulatory regime rather than including telecom sector in the Bill but has not heard from the CEDB in that respect.

We also asked that CEDB provide us with a confirmation, substantiated by reference to the relevant regulations that the sector specific regulations of other industries which CEDB proposed to be excluded from the Bill are completely identical to those proposed under the Bill but we have not yet heard from the CEDB on that front.

The Communications Authority should have the sole jurisdiction over telecom matters

The highly technical nature of telecommunications services requires substantial industry-specific and specialized knowledge for proper enforcement of trade description related matters.



In recognition of this, the telecommunications industry has been regulated by the Communications Authority (formerly known as the “Telecommunications Authority”) (the “CA”) and its executive arm, the Office of the Communications Authority (formerly known as Office of the Telecommunications Authority) (“OFCA”), which is a sector-specific authority, charged with acquiring the specialist knowledge necessary to regulate such a highly technical and complex sectors.

In addition to the sector-specific regulator, the telecommunications sector is also subject to its own appeal tribunal, the Telecommunications (Competition Provisions) Appeals Board, which is set up with appropriate expertise to deal with appeals against the decisions of the CA in relation to competition and misleading and deceptive conduct provisions under the Telecommunications Ordinance (the “TO”).

The fact that not only a specialist regulator is required, but also a specialized appeal tribunal and process is set up specifically for the telecommunications sector are clear evidence that a significant degree of professional and specialized knowledge is required for proper and effective enforcement of the sector specific regulations.

As such, the proposal of giving the CA and the Customs and Excise jurisdiction (“C&E”) over telecom licensees (albeit concurrent with the CA) would create an undesirable impact on the industry especially when how and when a matter involving a telecom licensee would be handled by the C&E and the CA is not clear. The “first come first serve” proposal under Section 16F(2) where it is suggested that which of those two authorities lay their hands first on a matter on a telecom licensee will prohibit the other from involving create a possibility of the CA, the regulator which is the most familiarized with the telecom industry, from handling (in full or in part) of the matter.

The Bill is too vague and uncertain

The Bill has introduced too many new fundamental concepts which are not clearly defined. Without absolute clarity on those terms and concepts, it is difficult, if not impossible, to interpret the Bill to ascertain where do the responsibilities and liabilities lie. This will create lots of regulatory risks and uncertainties. Businesses might inadvertently be caught even though they take all reasonable steps to ensure compliance. It is fundamentally unfair for statutes with criminal liability to be so vague and unclear.

Who will be a “trader” and a “consumer” is not clear from the definitions. What will constitute an “average consumer” is confusing. By suggesting taking into account the “material characteristics” of “such an average consumer” in assessing the effect of a commercial practice on “the average consumer”, Section 13D of the Bill seems to suggest a subjective test as opposed to an objective one as regards a reasonable consumer. It is impossible for, and it is unfair to ask of, a telecom licensee (and each and every of its sales persons) to have an accurate assessment of the impact of its sales activities on each and every individual and specific consumer.

Besides, whether an “average consumer” exists is another question that needs careful consideration. An average consumer of a supermarket (general retail household items) is very different from an average consumer of telecommunications products/services. Even among the

telecommunications products/services, an average consumer of general and basic fixed line and mobile phone services is very different from an average consumer of complex and high technology telecom products or services. Besides, what are the “material characteristics” that need to be considered is not clear.

It also needs to be borne in mind that the “front line” of telecom licensees (and countless other businesses) will need to be able to interpret and apply these provisions (or at the very least they need to be clear enough that adequate training will give the basic elements of these provisions) as the oral representations that make during the sales process may give rise to offences. The convoluted drafting of the provisions at the moment (particularly the provisions in relation to offences in respect of trade descriptions of service and goods) make that practically impossible.

Unjustifiably broad, general and excessive offences

A telecom licensee (and all of its “responsible persons” as set out in Section 20 of the Bill) would have committed the offence of “Bait Advertising” if the person responsible for stocking merely has a wrong estimation of the market response to a new product/service.

An offence would have been committed even though no effect or impact whatsoever has been caused on any person i.e. no one needs to suffer from the shortage in stocking. While mistake is provided for as a defence, it is nonetheless unfair to presume that the person has committed a criminal offence and put the burden of proof on the person for it to show that it has committed a mistake.

The proposal that it will not constitute bait advertising if a telecom licensee states clearly in the advertisement the period for which, or the quantities in which, the products/services will be offered for supply at that stated price would, in effect, require a telecom licensee to make public commercially sensitive information as to its stock and offer period and it would harm its legitimate business interest and lessen its competitive power.

The fact that a telecom licensee which has, prime facie, engaged in bait advertising or bait and switch will be “acquitted” if it offers the same or equivalent products and that the customer accepts the offer does not provide any comfort. It should be sufficient if the licensee takes reasonable efforts to mitigate the situation by offering to supply the products/services at a price not higher than that advertised irrespective of whether the consumer accepts the offer. At the least, the customer would need to have legitimate and justifiable ground to turn down the offer. Otherwise, a second thought on the consumer which leads to a change of the mind of the consumer would render the telecom licensee (and all the “responsible persons” as pursuant to Section 20 of the Bill) committing a criminal offence.

The offence of Aggressive Commercial Practice is subjective – what is a conscientious sale pitch might be considered by one overly sensitive consumer as harassing and therefore be caught under this offence.

Unjustifiably excessive sanctions

The creation of seven new offences (mostly straight liability offences without the need to prove intention) attracts penalty in the form of a fine of HK\$500,000, imprisonment of 5 years, as well as compensation to the claimant in such an amount as the court thinks fit.

The offences do not require any impact/damage to have been done to the claimant and one will be penalized as long as the action “is likely to” cause the relevant effect to the (as opposed to an) “average customer”. Penalizing someone with criminal sanctions of fine and imprisonment for a conduct which has no impact or effect on anyone or the society is overly excessive.

The Bill seems to be suggesting that a wide range of people would potentially be imprisoned by including “managers” (which is very wide in scope) and “shadow directors”, on top of the directors and the direct reports to the directors. At the very least it is critical to be able to identify which people in the organization this covers, and the term “managers” needs to be carefully defined.

There is no basis for the proposal that the civil damages that a claimant would be able to get would be a discretionary amount dictated by the court as it thinks fit (without any sort of guidance) instead of reflecting the amount of loss that the claimant suffered and which he/she has the burden to prove. This will simply encourage vexatious litigation in the hope of achieving an award of damages which far outweighs the actual loss suffered.

There should be statutory obligation to use the compliance-based mechanism in all cases

While there is a compliance mechanism being introduced, the Bill does not state that the criminal sanctions and civil damages can only apply after the compliance mechanism in the form of providing an undertaking has been invoked and has been breached. The enforcement agency has the sole and unfettered discretion to go straight to prosecute without having to go through the compliance mechanism.

The fact that an authorized officer (who can be any public officer even without the need to have experience in the relevant industry is another concern) can request for an undertaking even before an action/inaction has been committed and merely because he/she believes (even without a legitimate basis and not requiring a belief on reasonable ground) that an offence “is likely to be committed” gives the authorized officer and the Government unreasonably wide power.

Submitted by
The Communications Association of Hong Kong
17 April 2012



香港通訊業聯會

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29 March 2011

Mr. Andrew Wong
Permanent Secretary for Commerce and Economic Development
(Commerce, Industry and Tourism)
Commerce and Economic Development (Commerce, Industry and Tourism)
Level 29, One Pacific Place
88 Queensway, Hong Kong

Dear Andrew,

Trade Descriptions Ordinance : Telecommunications sector

The Communications Association of Hong Kong (“CAHK”), on behalf of its members, hereby respectfully submits that the telecommunications industry should be exempted from the proposals put forward by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau (the “Bureau”) to extend the proposed amendments to the Trade Descriptions Ordinance (the “TDO”) to the telecommunications sector under which criminal sanctions will apply.

The telecommunications sector should be excluded from the proposed TDO provisions on the grounds that it meets the two pre-conditions for exclusion listed in the 15 July 2010 Consultation Paper (the “Consultation Paper”). This exclusion would justifiably enable the telecommunications industry to be treated in a same manner as other industries that have met the same pre-conditions. Including the telecommunications sector in the TDO is unjustifiable, discriminatory and unfair.

Criteria 1 – A significant degree of professional and specialized knowledge is required for enforcement of sector specific regulation

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The highly technical nature of telecommunications services requires substantial industry-specific and specialized knowledge for proper enforcement of trade description related matters.

In recognition of this, the telecommunications industry has been regulated by the Telecommunications Authority (the “TA”) and its executive arm, the Office of the Telecommunications Authority (“OFTA”), which is a sector-specific authority, charged with acquiring the specialist knowledge necessary to regulate such a highly technical and complex sectors.

In addition to the sector-specific regulator, the telecommunications sector is also subject to its own appeal tribunal, the Telecommunications (Competition Provisions) Appeals Board, which is set up with appropriate expertise to deal with appeals against the decisions of the TA in relation to competition and misleading and deceptive conduct provisions under the Telecommunications Ordinance (the “TO”).

The fact that not only a specialist regulator is required, but also a specialized appeal tribunal and process is set up specifically for the telecommunications sector are clear evidence that a significant degree of professional and specialized knowledge is required for proper and effective enforcement of the sector specific regulations.

We note that the proposed amendments to the TDO contemplate giving the TA concurrent jurisdiction with the future enforcement agency of the TDO. However, this proposal does not apply to other industries which are under sector specific regulation – they are being excluded from the ambit of the TDO altogether. Singling out the telecommunications sector by including it in the TDO (albeit giving the TA concurrent jurisdiction) while other sectors under specific regulations are being excluded altogether, is unjustifiable, discriminatory and unfair.

The telecommunications sector should be treated in the same manner as all of the sectors which are under specific regulation and be excluded from the TDO.

Criteria 2 – a similar level of protection has already been provided by such statutory frameworks parallel to, and compatible with, the new

enforced in practice, with increasingly severe financial penalties imposed for contravention.

The maximum penalties in the TO are HK\$200,000 for the first breach, HK\$500,000 for the second and HK\$1 million for the third and subsequent breaches. If the TA can show a court of first instance that these sanctions are insufficient in a particular case, the court can impose penalties of up to HK\$10 million or 10% of turnover in the market concerned, whichever is higher.

With the regulator and industry actively enhancing consumer protection in all areas of the sector and the robust legislative requirements, there is no reason to apply new legislation to a sector which largely overlaps with the existing requirements. To do so, it would be disproportionate and unfair, and would create confusion and uncertainty.

All of the telecommunications licensees have expressed their objection to the unfair and discriminatory inclusion of the telecommunications industry in the TDO in their submission to the Bureau in 2010. However, despite the concurrent and consensus of opinion of the industry, the Bureau maintains its proposal of applying the TDO to the sector only on a brief explanation that it considers Section 7M of the TO being only a general prohibition while the proposed provisions under the TDO are being more specific.

The current regulatory regime of the telecom sector already covered and overlapped with the proposed TDO to a large extent. In maintaining its proposal, CEDB did not refer to any specific and substantial areas proposed to be covered by the TDO which are not already covered by the set of regulations that have been in place in the telecommunications sectors. Even if the CEDB justifiably considers that there are additional measures under the TDO that are not already in the TO or different industry Code of Practice, telecom sector can include the additional provisions into its current regulatory regime, rather than including telecom sector in the TDO.

If CEDB continues to maintain its proposal that the telecommunications sector is to be included in the TDO for the above reason, we respectfully request for a confirmation, substantiated by reference to the relevant regulations, that the sector specific regulations of other industries which CEDB proposed to be

excluded from the TDO are completely identical to those proposed under the TDO.

Other sectors with sector-specific regulators and sector specific consumer protection requirements are proposed to be exempted from the TDO. The telecommunications industry should be treated in the same fashion.¹ In short, the present approach works well as telecommunications already provides existing consumer protection through the TO in a highly technical sector which is best served in this instance by the existing sector specific regulator. This approach is supported by the Consumer Council and it is noted the Bureau generally shares the thinking of the Consumer Council on this issue (see paragraphs 4.2 and 4.3 of the Consultation Paper).

Thank you for your attention.

Yours faithfully,
Communications Association of Hong Kong



Hubert Chan
Chairman

c.c.

Hon WONG Yuk-man, Chairman of Panel on Information Technology and Broadcasting

Dr Hon Samson TAM Wai-ho, JP, Legislative Councilor (Information Technology)

¹ This approach applies to banking, financial services, real estate, insurance and professional services. See Chapter 4 of the Consultation Paper, including paragraphs 4.2 and 4.3, and 4.4 to 4.10.