

For discussion on
11 December 2012

**LEGISLATIVE COUNCIL
PANEL ON ECONOMIC DEVELOPMENT**

**Trade Descriptions (Unfair Trade Practices)
(Amendment) Ordinance 2012 –
Draft Enforcement Guidelines and Other Enforcement-related Matters**

PURPOSE

This paper briefs Members on the progress of the preparatory work for the commencement of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (Ord. No. 25 of 2012) (“the Amendment Ordinance”).

THE AMENDMENT ORDINANCE

2. Following an extensive public consultation conducted in 2010 on legislative proposals to tackle unfair commercial practices that might be deployed by traders against consumers and the general support received, the Amendment Ordinance was enacted by the Legislative Council on 17 July 2012. It seeks to prohibit various types of unfair trade practices that may be deployed by traders against consumers and strengthen the enforcement mechanism.

3. Specifically, the Amendment Ordinance amends the existing Trade Descriptions Ordinance (Cap. 362) (“TDO”), through the introduction of new/revised provisions (collectively known as “fair trading sections”¹), to broaden the definition of trade descriptions of goods and extend its coverage to prohibit the following types of trade practices (further details at Annex) –

- (a) false trade descriptions of services;
- (b) misleading omissions;
- (c) aggressive commercial practices;
- (d) bait advertising;
- (e) bait-and-switch; and

¹ Sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H and 13I of the amended TDO.

(f) wrongly accepting payment.

4. The Amendment Ordinance also introduces a compliance-based mechanism under which civil enforcement options can be drawn on to deal with infringements: the enforcement agencies may, instead of lodging criminal prosecutions, seek an undertaking from a trader suspected of deploying an unfair trade practice to stop and not to repeat that practice and, where necessary, seek an injunction from the court for the purpose. The Amendment Ordinance also seeks to facilitate consumer redress by creating a provision on private right of action.

5. The Customs and Excise Department (“C&ED”) is at present responsible for enforcing the TDO. It will continue to be the principal agency to enforce the new provisions introduced by the Amendment Ordinance. The Amendment Ordinance further provides that the Communications Authority (“CA”) also has concurrent jurisdiction to enforce the fair trading sections in relation to commercial practices of licensees under the Broadcasting Ordinance (Cap. 562) (“BO”) and the Telecommunications Ordinance (Cap. 106) (“TO”) that are directly connected with the provision of a broadcasting service or telecommunications service under the respective Ordinances.

LATEST PROGRESS OF PREPARATORY WORK

Draft Enforcement Guidelines

6. To facilitate the compliance of the fair trading sections and enhance transparency, the Amendment Ordinance empowers the Commissioner of Customs and Excise (“the Commissioner”) and the CA to issue guidelines to state the manner in which they will exercise their powers under the fair trading sections of the TDO and provide guidance on the operation of the sections. Pursuant to new sections 16BA and 16H of the TDO, before issuing the guidelines, the Commissioner and the CA must consult any persons that they consider appropriate. The two enforcement agencies will soon publish a set of draft Enforcement Guidelines for consultation. We will invite Members to provide views on the draft as soon as they are available.

Delineation of Work

7. With a view to implementing the Amendment Ordinance and achieving the goal of enhancing consumer protection effectively, the two enforcement agencies are working out a common interface with a clear delineation of work to ensure that every actionable case is taken up by the appropriate party.

8. In particular, the Amendment Ordinance empowers the Commissioner and the CA to enter into a memorandum of understanding for the purpose of coordinating the performance of their functions. The C&ED and the Office of the Communications Authority (“OFCA”), the executive arm of the CA, will finalise and publicise the memorandum before the commencement of the Amendment Ordinance. On an operational level, after the Amendment Ordinance has come into operation, the two enforcement agencies will liaise closely with each other through regular meetings in order to facilitate coordination and cooperation, to exchange operational experience and to ensure consistency in enforcement efforts and standards.

9. The Consumer Council will also play an important role under the enhanced consumer protection regime. The two enforcement agencies will work with the Consumer Council on the arrangements for handling incoming complaints such that suspected violations of the TDO will be handled promptly by the enforcement agencies. In relation to cases not concerned with suspected violations, the Consumer Council will follow the current approach and provide advice to complainants and assist in conciliating between them and traders.

Powers Conferred upon the CA

10. The concurrent jurisdiction conferred upon the CA is confined to commercial practices of telecommunications and broadcasting licensees that are directly connected with the provision of licensed services under the BO and TO. Certain powers conferred on the C&ED under the Amendment Ordinance, such as those pertaining only to goods, are not necessary for the CA to discharge its statutory function under the Amendment Ordinance. New section 16E(2) of the TDO empowers the Chief Executive in Council to specify by notice published in the Gazette powers that are not exercisable by the CA in its enforcement of the fair trading sections under its jurisdiction. The notice to be made under this section is subsidiary legislation subject to negative vetting by the Legislative Council.

Deployment of Resources

11. Parties involved (including the C&ED, OFCA, the Department of Justice, the Government Laboratory and the Consumer Council) will allocate resources to cope with the additional workload that is expected to arise from the implementation of the Amendment Ordinance.

12. At present, the C&ED’s Trade Controls Branch (TCB) is responsible for the enforcement of the TDO. To capitalise on their enforcement experience and

expertise, the TCB is tasked to enforce the new offences under the fair trading sections on top of its existing functions. In fact, conducting inspection and enforcement actions against unfair trade practices of services and goods under the same roof would create synergies and ensure the effective use of resources. The C&ED will reorganize the TCB and redeploy resources for the enforcement of the new fair trading sections. It has also formed a dedicated TDO Special Planning Group to undertake the preparatory work for the Amendment Ordinance.

13. For OFCA, additional manpower resource will be provided to cope with the expanded enforcement duties of the CA under the Amendment Ordinance. In particular, OFCA proposes to create one permanent directorate post of Chief Regulatory Affairs Manager, through upgrading one permanent post of Principal Regulatory Affairs Manager (PRAM), to strengthen the directorate support in overseeing the implementation, administration and enforcement of the new fair trading sections. The Panel on Information Technology and Broadcasting was consulted on 12 November 2012 and gave general support to the proposal. Approval of the Finance Committee will be sought in February 2013. All the additional staff cost will be borne by the OFCA Trading Fund.

14. Additional resources will also be provided to the Department of Justice, the Government Laboratory and the Consumer Council to handle additional workload arising from the implementation of the compliance-based enforcement mechanism, anticipated increase in demand for testing services and surge in consumer complaints.

Enforcement Strategy

15. The objectives of our enforcement actions are to prevent and stop trade practices that contravene (or may contravene) any of the fair trading sections, to promote compliance and raise community awareness of the requirements of the Amendment Ordinance and to punish offenders who engage in conduct that amounts to a serious contravention of the Amendment Ordinance.

16. The enforcement agencies will actively respond to complaints from consumers. They will also keep close tab on market trends and may conduct targeted spot checks where appropriate. In order to facilitate compliance and optimise the use of enforcement resources, the enforcement agencies will first deploy their resources to investigate matters which have significant implications on consumers, the trade and the community at large. The enforcement agencies will prioritise cases having regard to considerations including public concern, identified risks and intelligence, and new and emerging market trends.

17. While the Amendment Ordinance does not have retrospective effect, the enforcement agencies will analyse the complaints received by them and the Consumer Council in the past with a view to drawing up targets which require their special attention. During the initial period, the agencies will focus on those malpractices which have been persistent and rampant in the market and caused significant detriment (be it social or financial) to consumers.

Publicity and Public Education

18. Dissemination of information about the Amendment Ordinance in an effective manner to members of the public and relevant stakeholders is crucial to the successful implementation of the Amendment Ordinance. We will launch a comprehensive publicity campaign to educate both traders and consumers and assist them in understanding the legal requirements and their rights and obligations. Our overall objectives for the publicity campaign are to:

- (a) empower consumers by education and raise public awareness of the prohibited unfair trade practices, the protection rendered to them under the Amendment Ordinance as well as the concept of “shopping smart”; and
- (b) assist traders in understanding the requirements of the legislation thereby facilitating their compliance, promote best practices in fair trade and deter rogue traders from deploying those practices to be prohibited under the Amendment Ordinance.

19. The focus of our publicity and the messages to be delivered would evolve over time. Publicity activities and the scale of the campaign will be stepped up in the run-up to the commencement of the Amendment Ordinance. In the meantime, we welcome views from Members on activities to be included in the publicity programmes.

NEXT STEPS

20. In the light of the wide coverage of the Amendment Ordinance, we consider it prudent to allow sufficient time for parties involved to complete the above preparatory work and to enable traders to more thoroughly understand their rights and obligations under the new legislation, so that the enhanced consumer protection regime can operate smoothly and effectively upon commencement. We will finalise the Guidelines taking into account the views collated during the consultation. In parallel, the enforcement agencies are arranging training to their staff members and building up the referral mechanism

and common protocol among parties. We will strive to bring the Amendment Ordinance into full operation in the second quarter of 2013.

ADVICE SOUGHT

21. Members are invited to note the latest developments and provide views on the draft Enforcement Guidelines when issued.

**Customs and Excise Department
and
Commerce, Industry and Tourism Branch,
Commerce and Economic Development Bureau
December 2012**

**Unfair Commercial Practices to be prohibited
under the Amended Trade Descriptions Ordinance (TDO)**

(i) False Trade Descriptions of Services (section 7A)

At present, the TDO prohibits anyone from applying a materially false or misleading indication to any goods in the course of trade or business. The TDO does not apply to consumer transactions of services. Under the amended TDO, the application of the TDO has been extended to trade descriptions of services made in consumer transactions.

2. Besides, the TDO currently provides that only false trade descriptions of **specified** aspects of goods are prohibited. Trade descriptions of other aspects, on which consumers may rely to make a decision (e.g. how prices are indicated), falls outside the regulatory reach of the TDO. To provide additional protection for consumers, the TDO has been amended to the effect that false indications given of **any** matters with respect to any goods (and for that matter, services) are prohibited.

(ii) Misleading Omissions (section 13E)

3. The interests of consumers may be hampered if they cannot get hold of critical pieces of information, either because of outright omissions by traders or unclear presentation. Traders should have the primary responsibility of presenting accurate, truthful and pertinent information in respect of their goods or services put up for sale to consumers. In light of this, “misleading omission” is an offence under the amended TDO. Specifically, if, in the factual context, a trader’s commercial practice omits or hides material information², or provides material information in an unclear or ambiguous manner, or fails to identify its commercial intent, and as a result, it causes the average consumer to make a transactional decision that the consumer would not have made otherwise, he commits the offence of misleading omissions.

(iii) Aggressive Commercial Practices (section 13F)

4. Consumers’ freedom of choice is likely to be undermined when they are under undue aggressive or high-pressure practices and as a result, their

² “Material information” is defined as the information that the average consumer needs, according to the context, to make an informed transactional decision (including any decision concerning whether and on what terms to purchase a product and whether and on what terms to exercise a contractual right).

consumption behaviour may be affected. To enhance protection for consumers, the amended TDO prohibits the use of aggressive commercial practices in consumer transactions. A commercial practice is considered as aggressive if, in its factual context, taking into account all relevant circumstances, it significantly impairs the average consumer's freedom of choice or conduct through the use of harassment, coercion or undue influence and it thereby causes the consumer to make a transactional decision that he would not have made otherwise.

(iv) *Bait*

5. "Bait" commonly refers to the practice of traders advertising or promoting products at bargain prices or on very favourable terms without having reasonable quantities or capacity to meet the demand that should have been foreseen. The following two offences are created under the amended TDO –

(a) "Bait advertising" (section 13G)

This offence prohibits a person from advertising for the supply of products at a specified price if there are no reasonable grounds for believing that he will be able to offer those products for sale at that price for a reasonable period and in reasonable quantities, having regard to the nature of the market and the nature of the advertisement.

(b) "Bait-and-switch" (section 13H)

This offence prohibits a person from making an offer to sell products at a specified price with the intention of promoting a different product through various tactics. The promoted item is in fact used as a bait to attract consumers into shop premises, so that the trader has the opportunity to switch them to more expensive products in various guises.

6. To ensure that businesses acting in good faith would not be inadvertently caught, additional defences are provided for bait advertising: a defendant will be entitled to be acquitted if he can adduce sufficient evidence to raise an issue that he had taken remedial action within a reasonable period of time (such as replenishing the stock, causing another supplier to supply the same goods or service at the same terms or offering equivalent goods or service on the same terms) if the demand was greater than he originally foresaw.

(v) *Wrongly Accepting Payment (section 13I)*

7. Pre-payment for goods or services is becoming an increasingly popular form of consumption. Consumers and businesses stand to benefit from this mode of consumption, as consumers normally enjoy discounts and the cash flow of businesses can be improved. Many problems may arise, however, when traders with no intention or ability to supply the contracted products trick consumers into pre-payment.

8. An offence is created under the amended TDO to tackle such a practice head-on. Specifically, a trader commits an offence if, at the time of accepting payment for a product, he intends not to supply the product or to supply a materially different product. A trader also commits an offence if at the time of accepting payment, there are no reasonable grounds for believing that he will be able to supply the product within the period specified or within a reasonable period (if no period is specified).

9. Additional defences are made available for defendants in proceedings for this proposed offence. If the defendant can adduce sufficient evidence to raise an issue that he had successfully procured a third party to supply the same or equivalent products, he will be entitled to be acquitted. In the case where the offence is only related to the “lack of ability to supply” (as opposed to “no intention to supply”), a refund in full made within a reasonable period was also an acceptable defence.