



15/03/2013 15:36

To <guidelinescon@customs.gov.hk>

cc

bcc

Subject Submission from HKRMA on consultation on TDO draft Enforcement Guidelines

Urgent  Return receipt  Sign  Encrypt

History:

 This message has been forwarded.

Dear Mr. Lam,

Please find attached a cover letter together with the submission and a marked-up version of the submission from the Hong Kong Retail Management Association in response to the consultation on draft Enforcement Guidelines of Trade Descriptions (Unfair Trade Practices)(Amendment) Ordinance 2012.

Thank you very much for your attention.

Best regards,



**Hong Kong Retail Management Association  
30<sup>th</sup> Anniversary**



HKRMA\_submission\_Mar2013.pdf



HKRMA\_TDO Enforcement Guidelines\_submission\_Mar2013.pdf



HKRMA\_TDO Enforcement Guidelines\_submission(marked-up)\_Mar2013.pdf



HONG KONG  
RETAIL MANAGEMENT  
ASSOCIATION  
香港零售管理協會

Driving Retail  
Excellence  
卓越零售  
30 Years

15 March, 2013

Mr. LAM Po Chuen  
Head  
Trade Description Ordinance Special Planning Group  
14/F, Trade and Industry Department Tower  
700 Nathan Road  
Mongkok  
Kowloon

Dear Mr. Lam,

**HKRMA's submission on public consultation on draft Enforcement Guidelines of Trade Descriptions (Unfair Trade Practices)(Amendment) Ordinance 2012**

In response to the public consultation on the draft Enforcement Guidelines of the captioned Ordinance, the Hong Kong Retail Management Association is pleased to present our comments and recommendations in the submission enclosed.

Please kindly note that a marked-up version of the submission is also enclosed for your ease of reference.

Thank you very much for your attention.

Yours sincerely,

# **DRAFT ENFORCEMENT GUIDELINES**

**FOR**

**THE TRADE DESCRIPTIONS**

**(UNFAIR TRADE PRACTICES)**

**(AMENDMENT) ORDINANCE 2012**

**PUBLIC CONSULTATION PAPER**

This consultation document can be found on the following websites of  
Customs and Excise Department at [www.customs.gov.hk](http://www.customs.gov.hk),  
Communications Authority at [www.coms-auth.hk](http://www.coms-auth.hk),  
GovHK at [www.gov.hk](http://www.gov.hk) and  
Consumer Council at [www.consumer.org.hk](http://www.consumer.org.hk)

7 December 2012

## Background

I. The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (“Amendment Ordinance”) was enacted by the Legislative Council on 17 July 2012. The Amendment Ordinance amends the existing Trade Descriptions Ordinance (Cap. 362) (“TDO”) to prohibit specified unfair trade practices that may be deployed against consumers and strengthen the enforcement mechanism.

### Enforcement Guidelines

II. The Customs and Excise Department (“C&ED”) is the principal agency responsible for enforcing the TDO. Concurrent jurisdiction is conferred on the Communications Authority (CA), with the Office of the Communications Authority (OFCA) as its executive arm, to enforce the fair trading sections<sup>1</sup> in the TDO in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) and the Broadcasting Ordinance (Cap. 562) that are directly connected with the provision of a telecommunications or broadcasting service under the relevant Ordinances.

III. The C&ED and the OFCA (collectively the “Enforcement Agencies”) have jointly drafted a set of Enforcement Guidelines. The Enforcement Guidelines comprises the “Compliance and Enforcement Policy Statement - Implementing the Fair Trading Sections of the Trade Descriptions Ordinance” (Policy Statement) [Part A] and the “General Guidelines on the Fair Trading Sections of the Trade Descriptions Ordinance” (General Guidelines) [Part B].

IV. The Policy Statement sets out the objectives of taking enforcement actions, the basic principles which guide the Enforcement Agencies in the application of enforcement tools available under the TDO and the factors that the Enforcement Agencies take into account in prioritizing the enforcement resources. The General Guidelines describes the manner in which the Enforcement Agencies may exercise their powers in respect of the fair trading sections and provide guidance as to the operation of the provisions of the TDO. They may also serve as guidance for traders in complying with the fair trading sections of the TDO and for consumers in understanding how they are protected.

---

<sup>1</sup> The fair trading sections include the prohibitions of false trade description in relation to goods and services; misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepting payment.

## Consultation

V. In accordance with the new sections 16BA(6) and 16H(2) of the TDO, the Enforcement Agencies are inviting views from the public on the draft Enforcement Guidelines. Individuals making comments should return the Submission Form [Appendix A] by means of mail, facsimile or email **on or before 17 January 2013:**

Mail Address: Customs and Excise Department  
Trade Description Ordinance Special Planning Group  
14/F., Trade and Industry Department Tower  
700 Nathan Road  
Mongkok  
Kowloon.

Fax number: 2398 0596

Email address: [guidelinescon@customs.gov.hk](mailto:guidelinescon@customs.gov.hk)

VI. It is voluntary for any member of the public and interested parties to supply his/her personal data upon providing views on this consultation document. Any personal data provided with a submission will only be used for the purpose of this public consultation exercise.

VII. The submissions and personal data collected may be passed to relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data are bound by such purposes in their subsequent use of such data.

VIII. The C&ED and/or OFCA may publish the submissions made in response to this consultation document for public viewing after the conclusion of the public consultation. If you do not wish your name or your affiliation (or both) to be disclosed when we publish the public views received, please state so when making your submission.

IX. Any sender providing personal data to the C&ED and OFCA in the submission will have the rights of access and correction with respect to such personal data. Any requests for data access or correction of personal data should be made in writing by using the aforementioned means of communication.

## Consultation Sessions

X. Members of the public and interested parties are also invited to participate in consultation sessions to be held on the dates specified below. Enrollment can be made by returning the Enrollment Form [Appendix B] by means of mail, facsimile or e-mail to the C&ED:

No.	Date	Time	Party to be consulted	Venue
1	21 December 2012	3:00 – 4:30 (PM)	Traders	Auditorium, 15/F., Customs Headquarters Building, 222 Java Road, North Point, Hong Kong
2	3 January 2013	10:00 – 11:30 (AM)		
3	3 January 2013	3:00 – 4:30 (PM)		
4	4 January 2013	3:00 – 4:30 (PM)	General public	4/F., Administration Building, Hong Kong Cultural Centre, 10 Salisbury Road, Tsim Sha Tsui, Kowloon
5	5 January 2013	10:00 – 11:30 (AM)	General public	Auditorium, 15/F., Customs Headquarters Building, 222 Java Road, North Point, Hong Kong

XI. We will contact relevant business sectors (e.g. trade associations) for arranging separate consultation sessions.

XII. For enquiries on this consultation, please contact the C&ED on 3403 6063 or OFCA on 2961 6325.

**Commissioner of Customs and Excise  
Communications Authority  
December 2012**

# **PART A**

**DRAFT**

**Compliance and Enforcement Policy Statement**

**Implementing the Fair Trading Sections of  
the Trade Descriptions Ordinance**

**Issued by**

**The Commissioner of Customs and Excise  
and  
The Communications Authority**

# Table of Contents

## Paragraph

**1-2 INTRODUCTION**

**3 ABOUT THIS COMPLIANCE AND ENFORCEMENT POLICY STATEMENT**

**4 ENFORCEMENT OBJECTIVES**

**5 GUIDING PRINCIPLES**

- ✧ **Targeting**
- ✧ **Proportionality**
- ✧ **Consistency**
- ✧ **Transparency**

**6-10 INVESTIGATION PRIORITIES**

**11-27 ENFORCEMENT TOOLS**

- ✧ **Civil Enforcement – Undertakings**
  - ❖ **Acceptance of an undertaking**
  - ❖ **Elements of an undertaking**
  - ❖ **Unacceptable terms in an undertaking**
  - ❖ **Compliance with an undertaking**
  - ❖ **Withdrawal of acceptance of an undertaking by C&ED**
- ✧ **Civil Enforcement - Injunctions**
- ✧ **Criminal proceedings**

**APPENDIX**

## INTRODUCTION

Concerns: The reference to “came into effect on [date]” seems to imply that the Guidelines will only be issued after the new legislation comes into effect. The Guidelines should be issued in their final form beforehand so as to give traders time to review and take necessary action. There should be a reasonable transition period between issuance of the guidelines and the legislation coming into effect. We would also suggest there should be a grace period of six-to-twelve months during which time the Enforcement Agencies should refrain from commencing criminal enforcement action. Instead the grace period should be used as a time to focus on working with traders to improve their conduct and where necessary warnings could be issued, but not criminal enforcement action.

To enhance protection for consumers, a set of legislative amendments to the Trade Descriptions Ordinance (Cap. 362) (TDO) **came into effect on [date]**. New prohibitions and enforcement mechanism have been introduced to deter specified unfair trade practices that traders may deploy against consumers. Collectively known as the “fair trading sections”, sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H and 13I<sup>1</sup> of the amended TDO (hereinafter, all sections mentioned in this document refer to the sections in the amended TDO unless otherwise stated) specify the relevant **criminal offences**. The Customs and Excise Department (C&ED) is the principal agency responsible for enforcing the TDO. Concurrent jurisdiction is conferred on the Communications Authority (CA), with the Office of the Communications Authority (OFCA) as its executive arm, to enforce the fair trading sections in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) (TO) and the Broadcasting Ordinance (Cap. 562) (BO) that are directly connected with the provision of a telecommunications or broadcasting service under the two Ordinances.

2. A civil **compliance-based mechanism** has been put in place to encourage compliance by traders and to stop identified unfair trade practices expeditiously. In gist, as an alternative to prosecution, C&ED and OFCA as enforcement agencies are empowered to accept undertakings pursuant to section 30L from a trader whom the enforcement agency in-charge (the “Enforcement Agency”) believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under fair trading sections, not to continue or repeat an offending conduct, or conduct of a substantially similar kind. Where necessary, it may also seek injunctions pursuant to section 30P from a court of law for the same purpose.

## ABOUT THIS COMPLIANCE AND ENFORCEMENT POLICY STATEMENT

3. This Compliance and Enforcement Policy Statement (Policy Statement) sets out the objectives of taking enforcement actions, basic principles which guide the

<sup>1</sup> 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

Enforcement Agency in the application of enforcement tools available under the amended TDO and the factors that the Enforcement Agency takes into account in prioritizing the enforcement resources. By publishing this policy statement, we hope to enhance transparency in enforcement and promote compliance of the fair trading sections. This Policy Statement is issued by the Commissioner of Customs and Excise (the Commissioner) in accordance with section 16BA, as well as by the Commissioner and the CA jointly in accordance with section 16H to the extent that the Policy Statement is applicable to the enforcement against the commercial practices of licensees under the TO and BO that are directly connected with the provision of a telecommunications or broadcasting service under the two Ordinances.

## **ENFORCEMENT OBJECTIVES**

4. The objectives of enforcement actions are to:
  - ❖ prevent and stop trade practices that contravene the fair trading sections;
  - ❖ promote compliance and raise community awareness of the requirements of the fair trading sections; and
  - ❖ punish offenders who engage in conduct that amounts to a serious contravention of the fair trading sections

## **GUIDING PRINCIPLES**

5. The major principles underpinning the enforcement actions are **targeting, proportionality, consistency and transparency.**

### **Targeting**

- ❖ The Enforcement Agency makes the best use of its resources and sets investigation priorities, having regard to considerations including public concern, identified risks and intelligence, and new and emerging trends.
- ❖ The Enforcement Agency pays particular attention to repeated offenders and contraventions which significantly impair consumer interests.

### **Proportionality**

- ❖ The Enforcement Agency strives to ensure that any enforcement action taken is proportionate to the extent of consumer detriment and the harm done to the community at large. A serious contravention which has a

greater social or economic impact warrants a stronger enforcement action.

### **Consistency**

- ❖ Consistency in enforcement is crucial in promoting the understanding of the operation of the fair trading sections and in upholding the interests of justice. In making the most appropriate regulatory responses to a situation, the Enforcement Agency strives to ensure consistency in enforcement (for example, the consistency between Enforcement Agencies and among officers in determining the most appropriate enforcement actions to be taken in different cases), having due regard to the circumstances of each case.

### **Transparency**

- ❖ To help traders to comply with the fair trading sections, the Enforcement Agency aims to enhance traders' understanding of the operation of the fair trading sections and the consequences of non-compliance.
- ❖ The Enforcement Agency publishes guidelines to explain the general circumstances where they will take enforcement action.
- ❖ The Enforcement Agency releases information on undertakings, injunctions and prosecutions in relation to the fair trading sections.

## **INVESTIGATION PRIORITIES**

6. To ensure that traders comply with the fair trading sections, and given the wide range of traders in both goods and services that fall within the jurisdiction of the fair trading sections, **C&ED will carry out regular inspections of traders' premises and conduct targeted spot checks.** [Concerns: Such inspections / spot checks should only be carried out where C&ED have reasonable grounds for suspicion of an offence, otherwise this could constitute an excessive intrusion of privacy] Taking into account actual circumstances and intelligence available, it may conduct undercover operations and targeted patrols against selected traders. As for OFCA, it will, as it has been the case all along, closely monitor developments in the telecommunications and broadcasting markets, and where the circumstances warrant, carry out the necessary operations in exercise of the powers conferred on the CA under the amended TDO. Both Enforcement Agencies will examine every consumer **complaint that they receive at their own end.** Suggestions: Add a statement to the effect that where it is clear that a claim is unfounded or unmeritorious then the Agencies should decline to take further investigatory action so as to avoid an unnecessary and unfair burden on traders in responding to enquiries relating to unmeritorious or unfounded claims.

7. In order to promote compliance and for optimal and effective use of enforcement resources, the Enforcement Agency will direct the necessary resources to investigate matters where the greatest overall benefit to consumers, the trade and the community at large can be achieved. The

Enforcement Agency therefore generally accords a higher priority to cases involving one or more of the following conduct :

- ❖ conduct that involves significant public interests or concerns;
- ❖ conduct that is a repeated, intentional, organized or constitutes a 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 indicates a significant, new or emerging market trend or is likely to become widespread in an industry or across industries;
- ❖ conduct against which enforcement actions taken may likely bring about worthwhile educative or deterrent effect.

8. While the Enforcement Agency examines all the complaints received, a reasonable amount of details is generally needed before the Enforcement Agency can investigate a complaint in an in-depth manner. The Enforcement Agency may not be able to take prompt actions or even pursue a complaint if information provided is insufficient. In this regard, complainants will be requested to provide adequate details, over an interview or through other means, such that the Enforcement Agency can make a fair and grounded assessment of whether it can take further action in the light of the investigation priorities stated above.

9. When the Enforcement Agency receives a complaint arising out of a dispute between a consumer and a trader, and the dispute may not have sufficient nexus to contravention of the fair trading sections, the complaint may not be able to be taken forward and the Enforcement Agency may, with the consent of the complainant, refer the complaint to the Consumer Council with a view to conciliation.

10. When the Enforcement Agency decides not to take further action in respect of a complaint, it will notify the complainant in writing.

## **ENFORCEMENT TOOLS**

11. When the Enforcement Agency proceeds to carry out enforcement action, it will clearly state to the trader against whom the action is to be taken:

- ❖ the conduct or commercial practice prompting the Enforcement Agency to take action; and
- ❖ the fair trading sections that the Enforcement Agency considers have been contravened, are being contravened or are likely to be contravened.

An opportunity will be given to a trader to give a reasonable account for the conduct or commercial practice in question in response to the Enforcement Agency's concern. Depending on the circumstances of the case, the Enforcement Agency may also explain to the trader the operation of the **civil compliance-based mechanism** under the TDO for addressing the conduct of concern, and his rights and obligations thereunder (please refer to paragraph 16 below).

Concerns: This civil compliance based mechanism does not clearly define the extent of the discretion of C&ED to decide whether or not to dispose of cases more informally, such as simple warning letter or accepting a written assurance from trader that the conduct has ceased.

Suggestion: There should be an express right for C&ED to settle the matter informally without recourse to undertakings, injunctions or criminal prosecution. For example, in cases where there may be a minor breach of the Ordinance, but the trader has already ceased the conduct and/or no harm has actually been done to the public, then it would not be an effective use of public resources to invoke formal enforcement, whether by undertaking, injunction or prosecution, as each of these require involvement of the Secretary for Justice. We propose that the C&ED should use their discretion to settle the matter informally with the trader before invoking these 'formal' mechanisms.

### **Civil Enforcement - Undertakings**

12. As an alternative to initiating prosecution, under section 30L, the Enforcement Agency may, with the consent of the Secretary for Justice, accept an undertaking from a trader whom the Enforcement Agency believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the fair trading sections.

13. An undertaking given by a trader is a commitment by him not to continue, repeat or engage in the conduct or commercial practice of concern. Section 30M provides that an investigation may not be commenced or continued and criminal proceedings in a court of law may not be brought or continued relating to the matter to which an undertaking relates<sup>2</sup>. Section 30L(5) empowers the Enforcement Agency to cause an undertaking to be published. Section 30N provides for matters regarding the withdrawal of acceptance of an undertaking. The following paragraphs set out the circumstances under which an undertaking may be accepted, published and withdrawn.

### **Acceptance of an undertaking**

14. Acceptance of undertaking is a means to encourage compliance by a trader and to resolve the matter more expeditiously. The Enforcement Agency will consider accepting an undertaking having regard to the circumstances of the case and a non-exhaustive list of factors, including:

- (a) the nature<sup>3</sup> of the conduct of concern and the regulatory impact of the undertaking

<sup>2</sup> Subject to the withdrawal mechanism in paragraphs 22 and 23.

<sup>3</sup> For example, the seriousness of the conduct of concern and the history of the trader.

compared to that of criminal prosecution;

- (b) the extent of cooperation that the trader has given in the investigation, including the provision of complete information about the conduct of concern and any timely and appropriate remedial efforts taken;
- (c) whether the undertaking contains an acknowledgement by the trader that the conduct of concern has occurred;
- (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 to put in place a compliance programme (with details) for his staff, where appropriate;
- (f) whether and what enforcement measures have been taken against other parties with similar degree of culpability in the same incident.

15. The Enforcement Agency and the trader concerned may, depending on the nature and actual circumstances of the case, discuss and explore the option of invoking the civil compliance-based mechanism. The Enforcement Agency will not mandate a trader to give an undertaking. Likewise, a trader cannot compel the Enforcement Agency to accept an undertaking. When a trader proposes to give an undertaking, the Enforcement Agency will assess the merits of the trader's proposal, with due regard to the factors set out at paragraph 14 above. However, this does not imply that an undertaking will necessarily be accepted as an alternative to criminal prosecution in addressing the conduct of concern. Ultimately, whether to accept an undertaking from a trader is subject to the written consent of the Secretary for Justice ("SJ"). Given the different background and nature of every case, the acceptance of an undertaking in the particular circumstances may not be regarded as a precedent for consideration of an undertaking in other circumstances, whether or not the same trader is involved.

16. To enable a trader to determine whether proposing an undertaking is the most appropriate path for him to take, the Enforcement Agency may, in appropriate circumstances, provide relevant information to the trader regarding the rights and obligations under the proposed undertaking, including the situation where the Enforcement Agency may withdraw an undertaking under the circumstances set out at paragraph 22, and the legal position of the undertaking as provided at paragraph 23 below.

### **Elements of an undertaking**

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

18. An undertaking usually includes the following elements (a sample is at the Appendix):

- ❖ an acknowledgment of or admission from a trader that the trader has engaged, is engaging or is likely to engage in a particular conduct which the Enforcement Agency believes that it constitutes an offence (or offences) under the fair trading sections;
- ❖ a positive commitment by the trader to cease the conduct and not to repeat it or to engage in conduct of a substantially similar kind;
- ❖ specific details of the corrective actions that will be taken by the trader to remedy the harm caused by the conduct (if any); and
- ❖ an acknowledgment by the trader that the Enforcement Agency may cause an undertaking to be published in any form, manner and to any extent, including placing it on its departmental website and making public reference to it from time to time, including in media statements.

19. Generally speaking, the validity of an undertaking would not be shorter than two years.

#### **Unacceptable terms in an undertaking**

20. The Enforcement Agency will not accept the following terms in any undertaking:

- ❖ a denial that the conduct contravenes or is likely to contravene the fair trading sections;
- ❖ any terms imposing obligations on the Enforcement Agency, other regulatory authorities and law enforcement agencies, or the government;
- ❖ a specific requirement that the Enforcement Agency will not in future institute proceedings against the contravention;
- ❖ any terms imposing obligations on a third party; and
- ❖ any terms purporting to establish defences that the conduct of concern was inadvertent, any self-serving statement by the trader or any statement for public relations or business promotional purposes.

## **Compliance with an undertaking**

21. 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 the compliance inspections conducted by the Enforcement Agency at his business premises.

## **Withdrawal of acceptance of an undertaking**

22. Section 30N sets out the circumstances under which the Enforcement Agency may withdraw the acceptance of an undertaking. Specifically, the Enforcement Agency may, with the written consent of SJ under section 30N, withdraw the acceptance of an undertaking if they have reasonable grounds for:

- (a) believing that there has been a material change of circumstances<sup>4</sup> since the undertaking was accepted;
- (b) suspecting that the person who gave the undertaking has breached any of its terms;
- (c) suspecting that the information on which the decision to accept the undertaking was based was incomplete, false or misleading in a material particular; or
- (d) suspecting that the acceptance of the undertaking was procured by improper or unlawful conduct.

23. Where the acceptance of an undertaking is withdrawn, the undertaking is no longer binding on the Enforcement Agency and the trader who gave it. The Enforcement Agency may commence or resume an investigation or instigate or continue proceeding in court relating to the matter to which the undertaking relates. 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<sup>5</sup>. 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. Where necessary, the Enforcement Agency may also apply to the court under section 30P(1) for an injunction against the matter to which the undertaking relates (please refer to paragraph 24 below).

<sup>4</sup> Circumstances may include the unfolding of significant information which causes the Enforcement Agency to reconsider the original decision, e.g.:

- (a) The number of consumers affected or the impact of the conduct on an affected individual is more than expected;
- (b) Quantum of financial loss or other detriment suffered by the victims is more than expected.

<sup>5</sup> Please see section 30N(3)(c).

### **Civil Enforcement – Injunctions**

24. Alternatively, the Enforcement Agency may, under section 30P(1)(a), apply to the court for an injunction to order a trader not to continue or repeat or engage in the contravening conduct. The court may grant an injunction if it is satisfied that a trader has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the fair trading sections. The court may also grant an interim injunction under section 30Q pending the determination of the application for an injunction if the court considers it desirable to do so. The grant of an injunction or interim injunction by the court will not prejudice the Enforcement Agency's continued investigation and enforcement actions that may be brought against the conduct of concern.

25. In considering whether to apply to the court for an injunction, the Enforcement Agency may take into account the following non-exhaustive list of factors:

- ❖ whether the conduct of concern is one which the Enforcement Agency considers as necessary to accord a high priority for investigation and enforcement such as the conduct mentioned in paragraph 7 above;
- ❖ whether the trader is continuing or repeating, or will likely continue or repeat, the conduct of concern, and there is a need to require the trader to take prompt action not to continue or repeat the conduct of concern.

26. Where the Enforcement Agency considers that the trader who gave an undertaking has breached any of its terms, it may also apply for an injunction under section 30P(1)(b).

### **Criminal proceedings**

27. The Enforcement Agency is more likely to institute criminal proceedings against a trader rather than to seek an undertaking in cases where there is a serious contravention of the fair trading sections, in the light of the following non-exhaustive list of 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 cause harassment, anxiety or distress to victims;
- ❖ any attempt by the trader to conceal his identity, whether directly or indirectly, such that the Enforcement Agency 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 the Enforcement Agency in taking lawful actions during investigation.

**Commissioner of Customs and Excise**

**Communications Authority**

**December 2012**

( Sample Undertaking )

Trade Descriptions Ordinance  
Undertaking to the Customs and Excise Department/Office of the Communications  
Authority given for the  
purposes of Section 30L

by

[Full name of Trader]  
Business Registration No./CR No./HKID No./Licence Type & No.

**Company/Person giving this undertaking**

- (1) This undertaking is given to the Customs and Excise Department (C&ED)/Office of the Communications Authority (OFCA) by [full name of trader (including BR No./CR No./HKID No./Licence Type & No.)] [company address] for the purposes of Section 30L of the Trade Descriptions Ordinance (the Ordinance).

**Background**

- (2) [Description of company's business in general terms].
- (3) [Description of the conduct that the C&ED/OFCA investigated].
- (4) [Brief details of C&ED/OFCA's inquiries].
- (5) [Trader's name] [acknowledges OR admits] that the trader has engaged, OR was engaging, OR was likely to engage in the conduct described at paragraphs 3 & 4 above.
- (6) [Explanation of why the C&ED/OFCA believes that the conduct contravenes or is likely to contravene the Ordinance].
- (7) [a statement by the company/proprietor/partner/principle officer, etc. that the conduct has stopped and any action already taken by the company to redress the effects of the conduct] [where appropriate].

**Commencement of Undertaking**

- (8) This undertaking comes into effect when:
  - (i) the undertaking is executed by [company name]; and
  - (ii) the [C&ED/OFCA] accepts the undertaking so executed.
- (9) Upon the commencement of this undertaking, [trader's name] undertakes to assume the obligations set out in paragraphs [insert numbers] below.

## Undertakings

- (10) [Trader's name] undertakes for the purposes of Section 30L of the Ordinance:
- (a) that for a period of [insert number] years [it / he or she] will ensure that [it / he or she] will not [in the course of trade or business OR in a commercial practice]
    - (i) .....
    - (ii) .....
  - (b) that [it / he or she] will:
    - (i) .....
    - (ii) .....
  - (c) will put in place a compliance programme (enclosed) for its staff. [\[Comment: This is too broad an obligation for such an undertaking and is effectively an admission that the trader has not complied with the Ordinance.\]](#)
  - (d) will give any other assistance, information or cooperation to the [C&ED/OFCA] for the purpose of performance of the compliance checks on [trader's name]. [\[Comment: Compliance checks should only be permitted if there is reasonable cause to suspect the trader is not complying with the undertaking.\]](#)

## Acknowledgment

- (11) [Trader's name] acknowledges that:
- (a) the [C&ED/OFCA] may cause this undertaking to be published in any form and manner, and to any extent, including by publishing it on the [C&ED/OFCA]'s public register of Section 30L Undertakings on its website;
  - (b) the [C&ED/OFCA] may, from time to time, make public reference to the undertaking including in news media statements and in [C&ED/OFCA] publications;
  - (c) this undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct of concern; and
  - (d) According to section 30N(3) of the Ordinance, when the acceptance of this undertaking is withdrawn, a statement of any fact contained in the undertaking may be admitted in evidence in any proceedings in a court relating to the matter to which the undertaking relates, and on its admission, is conclusive evidence in those proceedings of the fact stated in the undertaking.

**Executed by**

[Full names of trader and its authorized staff, and HKID No.] or [Full names of trader and its proprietor/partner, etc. and HKID No.]

.....

Director/Secretary/Authorized Staff/Proprietor/Partner

This.....day of.....201

OR

The Common Seal of [Full company name and BR No.] was affixed in the presence of:

.....

( office position of the witness )

.....

Director/Secretary/Proprietor/Partner, etc.

This.....day of.....201X

**ACCEPTED BY THE [CUSTOMS AND EXCISE DEPARTMENT / OFFICE OF THE COMMUNICATIONS AUTHORITY] PURSUANT TO SECTION 30L OF THE TRADE DESCRIPTIONS ORDINANCE WITH THE WRITTEN CONSENT OF THE SECRETARY FOR JUSTICE**

.....

[FORMATION HEAD]

This.....day of.....201

# **PART B**

**Draft**

**General Guidelines  
on the Fair Trading Sections of  
the Trade Descriptions Ordinance**

**Issued by  
The Commissioner of Customs and Excise  
and  
The Communications Authority**

## Acknowledgement

In preparing these guidelines, references have been made to the following materials:

### Australia

- 1 *The Australian Consumer Law - A guide to provisions*
- 2 *Avoiding unfair business practices – A guide for business and legal practitioners*
- 3 *Compliance and Enforcement Policy*
- 4 *Section 87B of the Trade Practices Act – Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission*
- 5 *Report on Personal Liability for Corporate Fault*

### European Commission

- 6 *The Unfair Commercial Practices Directive – New laws to stop unfair behaviour towards consumers*
- 7 *EC Guidance*
- 8 *Commission Staff Working Document – Guidance on the Implementation/Application of directive 2005/29/EC on Unfair Commercial Practices*

### United Kingdom

- 9 *The Guidance on the Consumer Protection from Unfair Trading Regulations 2008*
- 10 *The Pricing Practices Guide – Guidance for traders on good practice in giving information about prices*

# **Table of Contents**

## **INTRODUCTION**

- 1. FAIR TRADING SECTIONS OF THE TRADE DESCRIPTIONS ORDINANCE – SCOPE OF APPLICATION**
- 2. TRADE DESCRIPTIONS OF GOODS AND SERVICES**
- 3. MISLEADING OMISSIONS**
- 4. AGGRESSIVE COMMERCIAL PRACTICES**
- 5. BAIT ADVERTISING**
- 6. BAIT AND SWITCH**
- 7. WRONGLY ACCEPTING PAYMENT**
- 8. LIABILITY OF PARTIES INVOLVED**
- 9. SANCTIONS AND POWERS AVAILABLE TO THE COMMISSIONER AND THE COMMUNICATIONS AUTHORITY**
- 10. CONSUMER REDRESS**

## **INTRODUCTION**

I. To enhance protection for consumers, a set of legislative amendments to the Trade Descriptions Ordinance (Cap. 362) (TDO) came into effect on [date]. New criminal offences have been created and a new enforcement mechanism has been introduced to deter specified unfair trade practices which jeopardize consumer rights.

II. The Customs and Excise Department (C&ED) is the principal agency responsible for enforcing the TDO. Concurrent jurisdiction is conferred on the Communications Authority (CA), with the Office of the Communications Authority (OFCA) as its executive arm, to enforce the fair trading sections in the TDO in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) (TO) and the Broadcasting Ordinance (Cap. 562) (BO) that are directly connected with the provision of a telecommunications or broadcasting service under the relevant Ordinances.

## **AIM OF THE GUIDELINES**

III. This set of General Guidelines (the Guidelines) is issued by the Commissioner of Customs and Excise (the Commissioner) in accordance with section 16BA of the TDO (hereinafter, all sections mentioned in this set of Guidelines refer to the sections in the TDO unless otherwise stated), as well as by the Commissioner and the CA jointly in accordance with section 16H to the extent that the Guidelines are applicable to the commercial practices of licensees under TO and BO that are directly connected with the provision of a telecommunications or broadcasting service under TO or BO. The aim of the Guidelines is to set out the manner in which officers authorized by the Commissioner and the CA (the “Authorized Officers”) may, where applicable, exercise their powers in respect of sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H and 13I (collectively known as “fair trading sections”) and to provide guidance as to the operation of the provisions of the TDO. The Guidelines may also serve as guidance for traders in complying with the fair trading sections of the TDO and for consumers in understanding how they are protected.

IV. 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 each and every situation or practice which may (or may not) amount to a contravention. It is impossible for the Commissioner and the CA 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 the Commissioner or the CA as the case may be will not be concerned about that matter, issue or conduct. The Guidelines are not a substitute for, or a definitive interpretation of, the fair trading sections. Ultimately, only a court of law can decide whether or not a conduct is in contravention of the fair trading sections, taking into account the evidence of each case.

V. The Guidelines themselves are neither legally binding nor are they subsidiary legislation per se. A person does not 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 that is an issue or a conduct in any legal proceedings, the Guidelines are 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<sup>1</sup>.

VI. 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).

<sup>1</sup> Sections 16BA(8) and 16H(2).

## 1. FAIR TRADING SECTIONS OF THE TRADE DESCRIPTIONS

### ORDINANCE – SCOPE OF APPLICATION

1.1 Generally speaking, the fair trading sections apply to commercial practices directly connected with the sale or supply or promotion 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)<sup>2</sup>. In addition, commercial practices engaged by a person acting in the capacity of a professional person listed in Schedule 3 to the TDO are not regulated by the fair trading sections, except for the offence of false trade description of goods (section 7).

#### **What is a “commercial practice”?**

1.2 The term “commercial practice” is defined under section 2 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<sup>3</sup> 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”*.

*Comment: Please clarify whether ‘give-away’ promotion samples / redemption products would fall within this definition of sale or supply of a product?*

1.3 Commercial practice, as defined, may include traders’ activities like promotion sales, offers of discounts, price reduction and advertising. It is important to note that a commercial practice may occur not only before or during a transaction (if any) of a product (including goods and services), for example, at the marketing, sale, supply and payment stages; it may also occur after a consumer transaction has been completed (such as provision of warranties, maintenance and after-sale services, and contract cancellation mechanisms).

#### **Who is a consumer and who is a trader?**

1.4 Section 2 defines “consumer” as *“an individual who, in relation to a commercial practice, is acting, or purporting to act, primarily for purposes that are unrelated to the person’s trade or business”*. For the purpose of the fair trading sections, a consumer is a natural person and not a legal person (e.g. a company). In

---

<sup>2</sup> Schedule 4 to the TDO

<sup>3</sup> Product means any goods or services but does not include any goods or services covered by Schedule 4 to the TDO.

addition, whether or not an individual is a consumer will depend on whether or not the relevant activity is carried out primarily for a purpose that is unrelated to the person's trade or business.

1.5 Section 2 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 can be a natural person, a company or other forms of a body corporate. It should be noted that a *reference* to a trader includes any person acting in the name of, or on behalf of, a trader. The assessment of whether or not an entity is acting as a trader in relation to a commercial practice will depend on whether or not the relevant activity is carried out **for purposes relating to its 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 regarded as a trader for the purposes of the fair trading sections. In contrast, a person selling certain goods on the internet occasionally to dispose of unwanted personal items would unlikely be held to be acting for purposes relating to his trade or business.

Concern: It is still not clear in what circumstances the individual sales person may be prosecuted versus the "corporate trader". The HKRMA is very concerned about the risks to frontline staff who may inadvertently find themselves facing criminal sanctions. Likewise, there should be some protection for reputable companies who have given training and guidance to their staff, but then still find their staff act improperly or outside of their scope.

Suggestion: There should be a cross-reference to section 8 (Liability of Parties Involved). Please see our detailed suggestions in Section 8.

#### **Do the fair trading sections apply to conduct between consumers?**

1.6 The fair trading sections do not apply to "consumer-to-consumer" conduct. For example, a person who sells his 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 The fair trading sections of section 13E (on misleading omissions), section 13F (on aggressive commercial practices), section 13G (on bait advertising), section 13H (on bait and switch) and section 13I (on wrongly accepting payment) apply to "commercial practices". Since "commercial practices" include practices that are "*directly connected with the promotion of a product to consumers or sale or supply of a product **to** or **from** consumers*", it also covers arrangements that are commonly known as "buy-back" and those under which traders acquire products from consumers. To quote a few examples, a consumer may trade-in his existing car to the car dealer when he purchases a new one; gold and jewelry retailers may purchase gold articles from consumers for resale. Other traders including antique shops, retailers of second-hand goods, handbag and luxury goods shops may also purchase goods from consumers.

## **Who is an exempt person?**

- 1.8 The fair trading sections (except section 7 on false trade descriptions of goods) do not apply to the list of persons at Schedule 3 to the TDO when these persons act in the capacities in which they are registered under the respective Ordinances as set out in the Schedule. The commercial practices of these exempt persons are regulated by the professional bodies established under the respective Ordinances.

## 2. TRADE DESCRIPTIONS OF GOODS AND SERVICES

**Don't give any false or misleading product information to consumers. If traders are uncertain of the truthfulness of any product information, they should verify it and should not provide it to the consumers impetuously.**

2.1 Section 7 provides that it is an offence for any person, in the course of his trade or business, to apply a false trade description to any goods; or supply or offer to supply any goods to which a false trade description is applied. It is also an offence for any person to have in his possession any goods to which a false trade description is applied for any purpose of trade or manufacture. This section applies to both business-to-consumer and business-to-business conduct. Persons listed in Schedule 3 are not exempted.

2.2 Section 7A provides that it is an offence for a trader to apply a false trade description to a service supplied or offered to be supplied to a consumer; or supply or offer to supply to a consumer a service to which a false trade description is applied.

2.3 Section 2 defines "trade description" to mean an indication, direct or indirect, and by whatever means given, with respect to goods or services or any part of the goods or services.

2.4 A trade description includes anything that tell of the goods or services or any part of them, in whatever forms (e.g. statements, advertisements or display notices, etc.), and communicated through whatever means (e.g. through any form of the media, paper, visual, verbal, electronic means and even by conduct). In short, a trade description in relation to both goods and services could be by whatever means and in whatever forms.

2.5 Section 2 defines a "false trade description" as a trade description which is false to a material degree; or which, though not false, is misleading.

2.6 To amount to a false trade description, the falsity of the trade descriptions has to be to a material degree. Trivial errors or discrepancies in trade descriptions would not constitute an offence<sup>4</sup>. What constitutes a material degree will vary with the facts. For example, in an advertisement a trader claims that a smartphone has a 5.55 inch display whereas in fact the display measures only 5.54 inch. The difference of 0.01 inch would unlikely be taken as false to a material degree.

Concern: We note that this paragraph states that trivial errors/discrepancies in product description would not constitute an offence. This should also apply to minor errors in pricing.

Suggestion: The Guidelines to clarify inadvertent minor pricing mistakes or discrepancies will not be regarded as false description.

Examples:

(i) There was a typographical or other inadvertent error in the pricing of a product in a newspaper

advertisement by the trader. The labelling of the product in the store however showed the correct pricing. As soon as the trader became aware of the error in the advertisement it recalled the advertisement (where possible for on-going or repeat advertisement).

- (ii) There was typographical or other inadvertent error in the pricing of a product in the price tag of certain quantities of that product in a store(s) and the error in pricing was rectified forthwith by the trader with the correct selling price of that product shown in the relevant store(s) or otherwise before it is purchased by any customer.

<sup>4</sup> A trade description which indicates the fineness of gold is an exception. Under section 3, it is a false trade description if the fineness is false to any extent or degree, except by understating the fineness.

2.7 A trade description is also a false trade description if it, though not false, is misleading. A member of the public entering a shop and seeing a bottle marked “mineral water” would reasonably expect it to contain something more than mere tap water, and that a prospective consumer would understand that the product so labeled is, in terms of composition, richer than tap water in mineral content. Therefore, the trade description “mineral water” when applied to a bottled water which is no richer than tap water in mineral content is misleading in that it is likely to be taken as an indication, false to a material degree, of the composition of the contents of the bottle<sup>5</sup>.

2.8 The aspects of goods or services to which a trade description indicates can vary from case to case. The following are some examples of trade descriptions applied to goods and services, where the offence of false trade descriptions may or may not have been committed.

### **Availability of a product**

2.9 Whether certain products are available is an aspect the indication of which is a trade description. Inaccurate information relating to the availability of a product for supply may be an offence.

#### Example

*A statement that a product is in short supply and that the trader is the only one having it in stock where in fact there are still plenty available in the market may constitute an offence of false trade description.*

#### Example

*A pay TV service provider promotes a 24-month sports channel package by claiming that it owns the exclusive right to broadcast live matches of the popular ABC football league for the 24-month duration. However, the pay TV service provider actually only holds the broadcasting right for one year and the ABC football league has not yet invited any interested parties to bid for the broadcasting right for the coming year. The pay TV service provider may commit an offence of applying a false trade description to a service.*

### **Compliance with a standard specified or recognized by any person**

<sup>5</sup> *The Queen v. Wong Yan-chuen, CACC 523/1987*

2.10 Accreditation is common for businesses as an accreditation generally connotes good quality and services. A false claim of accreditation may constitute the offence of false trade description.

Example

*A shop displays at a noticeable location the logo of the Quality Tourism Service (QTS) Scheme administered by the Hong Kong Tourism Board whereas in fact it has never been QTS-accredited. The display of the QTS logo by the shop may constitute misrepresentations that the shop has complied with the accreditation requirements under QTS.*

Example

*A tour operator advertises its one-day Mainland tour targeted at consumers in Hong Kong. The tour sets off across the border in the Mainland instead of in Hong Kong. The operator advertises the tour as one protected by the Travel Industry Compensation Fund. In order to be eligible for the protection, the tour must be an outbound travel service satisfying two or more of the following:*

*(i) carriage (by land, sea or air transport) from Hong Kong to places outside Hong Kong;*

*(ii) accommodation outside Hong Kong; and*

*(iii) arrangement for an activity outside Hong Kong.*

*As the tour sets off in the Mainland and involves no accommodation, the participating tourists are not protected by the Fund. The tour operator may be liable for applying a false trade description.*

**A certain person has acquired the product, or has agreed to acquire it**

2.11 In order to attract the attention of consumers and to promote the brand of product offered for supply, it is common for traders to make reference that a celebrity has used the product. The reference should be valid and genuine.

Example

*In the promotion of a slimming product, a beauty consultant tells a consumer that the same product has been acquired by a celebrity for her personal use with good results. If the celebrity has never acquired or agreed to acquire the product, the beauty consultant may be held to have committed the offence of applying a false trade description.*

*Suggestion : please give further explanation and examples to show what kind of celebrity endorsement would be considered a mere advertising puff or brand building exercise which would not contravene Section 7 of the Ordinance; and the kind which may constitute a false description offence.*

### **Who supplies the service?**

2.12 In some situations, a key factor that consumers will take into account in deciding whether to patronize or not is who the person providing the service is.

#### Example

*An education centre advertises its mathematics tutorial classes with the pseudonym “King of Maths Mr Smart Ng” as the tutor. To the disappointment of the students, Mr Smart Ng never showed up in these classes and only the teaching materials used were prepared by him. The education centre may be liable for giving false or misleading information as to the provider of the service.*

### **After-sale service**

2.13 Traders may sell goods with after-sale service, for example, maintenance or warranty services. Traders should ensure that they can provide the after-sale service as claimed.

#### Example

*A local computer trader advertised that it provided life-time global maintenance services for computer parts they sold. It even specified maintenance agents outside Hong Kong, including Shanghai. A Mainland customer approached the specified maintenance agent in Shanghai for repairing a computer motherboard which he bought in Hong Kong 3 years ago, and found out that the agent had never been appointed as the maintenance agent by the local trader. The local trader may be liable for making a false statement in relation to the availability of maintenance services.*

### **Price, how price is calculated, the existence of any price advantage or discount**

2.14 Price is one of the most important pieces of information that can influence the purchasing decision of the consumer. The ability to make an informed choice will be hampered if any false or misleading information related to price is communicated to the consumer.

2.15 If traders choose to make price comparisons, they should be able to justify them, and to show that any claims so made are accurate and valid, in particular, that any price advantage claimed is real.

### Example

*In a newspaper advertisement, a telecommunications operator claims that its newly promoted service plan has the lowest price tag in Hong Kong by comparing the price of its plan with those offered by its competitors. However, the comparison is not made on a like-for-like basis in that the telecommunications operator has compared the service plans of the competitors which have material difference in service features (such as different contract durations), and such differences are not made known in the advertisement. The price comparison is likely considered to be a false trade description of service.*

2.16 Terms in relation to prices (like “sale” or “reduced price”) should be used with caution so as to avoid misleading consumers. Traders who use such terms should make sure that the special offer / price reduction is genuine. If the “original price” is quoted together with the “reduced price”, the “original price” ~~must be a price which has been applied to the same product concerned before. A price should not be regarded as the “original price” if it has only been applied to the product for a short period.~~ may (i) refer to the recommended retail price suggested by the supplier and/or manufacturer and/or producer from time to time (as per paragraph 2.17) which need not have been actually applied to the product concerned before, or (ii) for products which do not have a recommended retail price, or which are ‘private label’ products (i.e. developed by the trader), original price shall be a price which has been applied to the product concerned before. A reasonableness test (with full regard to the nature of the product in question (e.g. is it a perishable or is it a product the value of which dissipates over time quickly)) should be applied to determining whether the period is long enough rendering the indication of a price reduction a genuine one. ~~As a best practice, it is advised that the previous higher price should be quoted only if it has been applied to the same goods or services for at least seven consecutive days in the same shop location immediately preceding the day on which the lower price is introduced.~~

Concern: The HKRMA has serious concerns regarding this ‘seven-consecutive days’ best practice. Different types of products have differing promotion practices and we believe the ‘seven-day-rule’ is too rigid. For example, perishable products are often discounted several times within the same day. In addition, many retailers ‘price match’ against their competitors (i.e. they reduce price in response to competition in the market) which makes the seven-day-rule impractical.

Suggestion: Amend paragraph 2.16 as marked above and provide some practical examples as per below.

### Example:

- (i) The original price (as suggested by the supplier and/or manufacturer at the relevant time) of a certain branded skincare product is HK\$150 each. The trader can quote a price comparison for example showing HK\$150 or ~~HK\$150~~ (struck through), alongside the reduced price of say HK\$130 each.

Additionally if there is a multi-buy promotion, the trader could quote for example (a) buy 2 get 1 free ( 2 1) at HK\$100 each; or (b) buy 2 get 1 free ( 2 1) ; or (c) buy any 2 selected items with a red label for additional 33% off (任何 2 件特選貨品照價六六折送)

- (ii) A trader sells its own private label brand of household detergent. The trader has previously applied a price of \$24 to the detergent. Now it is offering it at the reduced price of \$22. The trader can quote a price comparison for example showing HK\$24 or ~~HK\$24~~ (struck through), alongside the reduced price of HK\$22.

~~2.17 There may be recommended retail prices (RRPs) for certain products. In these cases, if traders quote the RRP and the actual selling prices at the same time and give an impression that there are “discounts” or “savings” on the products, the same reasonableness test should be applied as to whether the RRP is a defensible basis for the price comparison.~~

Concern: It is not clear what is meant by “the same reasonableness test should be applied” and a ‘defensible basis’ for comparison.

Suggestion: Section 2.17 be replaced as follows:

2.17 There may be recommended retail prices (RRPs) for certain products. In these cases, traders may quote the RRP, as suggested by the supplier and/or manufacturer and/or producer from time to time, and the actual selling prices at the same time as a basis for comparison. The trader should not use a RRP, but a price which has been applied to the product concerned before, as a comparison in respect of private label products (i.e. developed by the trader).

2.18 Traders should avoid making “lowest price” claims (a claim that they are offering a price lower than their competitors) if the claims are not backed up by evidence. A “price-promise campaign” under which a consumer will be rewarded with twice the price difference with a competitor’s lower price if reported could still amount to a misleading trade description as to the existence of a price advantage if the campaign gives a misleading indication that the prices at which products are being offered are the lowest. If the offer is limited to a price matching promise, traders should make it clear.

2.19 General notices of “half-price sale for all items” should be avoided if in fact the sale is not applicable to certain products in the shop. As a best practice, “up to 50% off” should also be avoided if the maximum reduction quoted applies to a very small range of products for sale for the whole period during which the notices are valid. If the maximum reduction applies to less than 10% of the range of products for sale, it is better to state clearly that only some selected products are up to 50% off.

2.20 The price advertised should tally with the actual selling price at the point of sale or checkout. Any additional charge that is directly connected with the supply of the products should be clearly disclosed to the consumer<sup>6</sup>. Hidden additional charge might constitute an offence of misleading omission.

### **Performance Claims**

2.21 Claims should not be false or misleading to a material degree. False or misleading claims on the effectiveness of a product without sufficient supporting (mainly scientific) evidence may constitute an offence of false trade descriptions.

#### Example

*Shampoos that contain synthetic materials, such as preservatives, should not be described as “100% natural”. A claim that a shampoo can “repair” hair damage should not be used if laboratory test merely proves that the product can only slow down hair damages caused by pollutants.*

Concerns: The Guidelines imply the trader is responsible for checking all claims and ensuring sufficient supporting evidence including laboratory tests. This would be too onerous a burden on retailers and it should be the manufacturer and/or producer and/or supplier, not the retailer, who is responsible for performance claims in respect of branded products. This is effectively imposing the role of “police” on the retailers to review and investigate all claims on products / packaging, which is totally unrealistic.

Suggestion: Clarification is required in the Guidelines that retailers would not be liable if they “had no reason to suspect and could not with reasonable diligence have ascertained” that the product did not conform to the description (as per the due diligence defence under section 26.3 of the TDO). Or C&ED may consider similar “supplier’s warranty” defence under section 71 of the Public Health and Municipal Services Ordinance, Cap. 132 should be made available. A further example to support this could be given – e.g. that if it is a reputable supplier and/or producer and/or manufacturer in the market or if supporting document(s) (including but without limitation to certificate(s) or warranty is given by the supplier or manufacturer or producer, then it would be reasonable for the trader to rely on the QA verification process of the suppliers or manufacturer or producer or warranty by supplier or manufacturer or producer, without requiring any further due diligence by the trader.

2.22 Traders, especially those in the health and beauty sectors, often use “before” and “after” photographs of subjects to provide a visual representation of the effectiveness of their products. Visual promotional gimmick is commonly used to demonstrate the efficacy of slimming products, diet regimes, cosmetic creams and products and hair treatments. Photographs so used, even with a statement that they have been re-touched, should not give a misleading indication as to the efficacy of the products and traders need to ensure that they have relevant evidence to substantiate the impression created by the images. Advertisers acting for traders are also encouraged to retain appropriate materials which are able to demonstrate what re-touching has been carried out in the event of being questioned.

---

<sup>6</sup> Please refer to paragraphs 3.32 and 3.33 on the Chapter of Misleading Omissions.

2.23 The TDO prohibits false or misleading claims in advertisements. For example, an advertisement for facial injection states that “XYZ was formally registered in Hong Kong in 2010”. From the context of the advertisement, the statement may mislead consumers into believing that it is a medicine registered with the Department of Health. However, the advertised product does not fall within the definition of medicine under the Pharmacy and Poisons Ordinance and cannot be registered as a medicine in Hong Kong. The statement would be misleading to a material degree.

### **Place of manufacture / Country of origin claim**

2.24 Under section 2(2)(a)(i), goods shall be deemed to be manufactured in a place in which they last underwent a treatment or process which changed permanently and substantially the shape, nature, form or utility of the basic materials used in their manufacture.

2.25 When traders state the place of manufacture or country of origin for their goods, they should ensure that the claim complies with section 2(2)(a)(i).

#### Example

*A pair of trousers which were cut and sewn in the United States of America (USA) with fabric manufactured in China will likely be taken as manufactured in the USA. A TV set assembled in China with parts manufactured in Japan and Korea will likely be taken as manufactured in China.*

2.26 Under section 2(2)(a)(ii), goods shall be deemed to have been produced in the place in which they were wholly grown or mined

#### Example

*There is a reasonable expectation that the geographic denomination of “陽澄湖大閘蟹” would refer to Chinese mitten crabs bred and harvested in Yangcheng Lake (陽澄湖). US strawberries should refer to those wholly grown in the USA.*

*On the other hand, “Yangzhou” (揚州) in Yangzhou fried rice, a popular Chinese-style dish served in many restaurants merely refers to a particular cooking style originated in Yangzhou and would unlikely be taken as the place of manufacture.*

Concern: We find these examples confusing and may not assist trader to be able to draw distinction between the ‘cooking style’ of Yangzhou fried rice and the commonly use geographic denomination of “陽澄湖大閘蟹” (Yangcheng Lake crab).

Suggestion: delete the above two examples of Yancheng Lake crab and Yanzhou fried rice. We suggest the following examples as alternatives.

#### Examples:

- (i) “陽澄湖大閘蟹” would refer to Chinese mitten crabs bred and harvested in Yangcheng Lake (陽澄湖) instead of Chinese mitten crabs bred and harvested in other provinces/regions like Tai Lake (太湖) as there is a reasonable expectation to the geographic denomination of the bred

which is a material factor determining the product price.

- (ii) On the other hand, “Fuji apple”, a popular kind of apple merely refers to a particular apple variety, instead of place in which they were wholly grown. Therefore, the traders can apply the description of “Fuji apple” from Japan to the variety grown in Japan as well as “Fuji apple” from Shandong to the variety grown in Shandong 山東, China to indicate its country of origin.
- (iii) “ ”, a common local bun, is not made in Mexico, nor does it refer to a particular cooking style. Similar names should not be caught under the amended Ordinance.

2.27 If traders have doubts on the origin claims of the goods they supply, they are advised to seek clarifications from their suppliers, including obtaining copies of certificates of origin to support the claims. If traders are not certain of the place of manufacture of the goods they supply, it will be legitimate to tell consumers that they do not know.

Concern: Similar to the concern regarding performance claims, it is too onerous an obligation for retailers to check and verify all origin claims made by the suppliers or manufacturers of the product.

Suggestion: Similar to para. 2.21 above we suggest that clarification is required in the Guidelines that retailers would not be liable if they “had no reason to suspect and could not with reasonable diligence have ascertained” that the product did not conform to the description. It is too onerous an obligation for retailers to check and verify all origin claims and to determine which place the product last underwent treatment / processing.

### **Puffery**

2.28 Some advertisements may include such puffery claims as “the best” and “the most popular”. Common advertising practice of making exaggerated statements are legitimate as these statements are not meant to be taken literally and the average consumer would unlikely take literally the meaning of these obvious exaggerations or puffery, for example, “the best car in the world”, or “it energizes you instantly”.

2.29 Nevertheless, these claims should be used with caution when they are used with quantifiable standards or reference, for example, “the best-selling book in 2011”. Traders should be prepared to give sufficient evidence to show that the book was sold in a quantity in 2011 which has out-numbered the sales of the others.

### 3. MISLEADING OMISSIONS

**Traders run the risk of misleading omissions if they fail to give consumers sufficient information about the product that is necessary for them to make an informed transactional decision.**

3.1 Traders have the primary responsibility of providing accurate, truthful and pertinent information in respect of their products to consumers in a clear, intelligible and timely manner to enable consumers to make informed transactional decisions.

3.2 Section 13E(1) provides that a trader who engages in relation to a consumer in a commercial practice that is a misleading omission commits an offence. Section 13E(2) and (3) further provide that a commercial practice is a misleading omission if, in its factual context, taking into account the factors stated in paragraph 3.3 below:

- (a) it omits or hides material information;
- (b) it provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
- (c) it fails to identify its commercial intent unless this is already apparent from the context,

and as a result, it causes or is likely to cause, the average consumer to make a transactional decision that he would not have made otherwise.

3.3 The factors to be considered as referred in paragraph 3.2 above are:

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice including limitations of space or time; and
- (c) if the medium used to communicate the commercial practices imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

3.4 Thus, if it is impracticable for traders to provide all the necessary information to consumers due to limitations of the communication medium available, other means of communication medium should be used by the traders to make the information available to consumers to enable them to make informed transactional decisions. For example, traders promoting their products by short message service (SMS) may find it difficult to include in the message all the necessary information due to the constraints on the

message length<sup>7</sup>. Traders are less likely to commit a misleading omission if they make it clear where omitted information can be found. For instance, traders may provide their website address or a hotline telephone number in the SMS and invite consumers to browse it for more detailed information on the products they are promoting.

3.5 For a commercial practice described in paragraph 3.2 (a) to (c) to amount to a misleading omission, it has to “cause or likely to cause the average consumer to make a transactional decision that he would not have made otherwise”. Similar requirement is also applicable to the offence of aggressive commercial practice. Hence, to understand the operation of the offence of misleading omission (and also the offence of aggressive commercial practices which is dealt with in Chapter 4), it is necessary to understand the concepts of “average consumer” and “transactional decision”.

### **Average consumer**

3.6 The concept of average consumer does not refer to any actual consumer and there is no requirement to show evidence of any actual consumer being affected by an unfair commercial practice. It is an objective reference which determines whether a commercial practice breaches the offences of misleading omissions and aggressive commercial practices. It is the notional average consumer whom the commercial practice reaches or to whom it is directed that is relevant. Section 13D provides that *“In determining the effect on the average consumer of a commercial practice that reaches or is directed to a consumer or consumers, account must be taken of the material characteristics of such an average consumer, including that the consumer is reasonably well informed and reasonably observant and circumspect”*. The term “average” does not mean a statistically average consumer; and the average consumer is not ill-informed, ignorant or reckless.

Concerns: The concept of “average consumer” is confusing and puts heavy burden on the traders as it is difficult for a trader to know how different consumers will react to advertising claims or what information is material to one may not be to another. Strict liability offences should only be committed if some harm has been done to consumers, as opposed to situations where there is no loss or damage suffered in the case of a hypothetical consumer.

Suggestion: The Guidelines should make clear that the general contract law principle of ‘caveat emptor’ still applies (i.e. the buyer beware). The Government itself acknowledged in the original consultation on the Bill that consumers have a responsibility to seek information as necessary before they purchase, and so the Guidelines should not attribute all the responsibility on the trader to anticipate what information the consumer wants or needs.

3.7 On the other hand, since a commercial practice may have different impact on consumers depending on the type or group of consumers the practice reaches or directed to, section 13D(3)(a) and (b) sets out the circumstances in which the “average consumer” refers to one that is in a particular smaller group instead of the population as a whole. It is the characteristics of the average

member of these particular groups that are relevant. The above-mentioned circumstances are (a) *where the commercial practice is directed to a particular group of consumers (paragraph 3.8 refers); or (b) where a clearly identifiable group of consumers is particularly vulnerable to the*

---

<sup>7</sup> It is a form of space restriction - the length of a SMS message is restricted to 160 English characters, or 70 Chinese characters, including punctuation and space.

*commercial practice or the underlying product because of mental or physical infirmity, age or credulity in a way which the trader could reasonable be expected to foresee (paragraphs 3.9-3.12 refer). This is intended to help a court of law decide if a practice is prohibited due to the impact or potential impact it has on a particular group of consumers, while the practices might not change the decision of consumers at large.*

### **Average member of a targeted group of consumers**

3.8 In determining the effect on the average consumer of a commercial practice that is directed to a particular group of consumers, it is the material characteristics of the average consumer of that particular group that is relevant. Indications of what group of consumers a commercial practice is directed to may be found, for example, in the way advertising is placed, the language of a commercial communication, the nature of the product and the context.

#### Example

*For a Japanese language life-style magazine, the main characteristics of an average consumer of the target group may likely be someone who can read Japanese. On the other hand, the target group of a Japanese magazine for children, and hence the characteristics of an average consumer of that group, can be very different.*

#### Example

*Certain retail shops registered with the Tourist Industries Council (TIC) predominantly serve Mainland tourists. The characteristics of Mainland tourists, such as their knowledge in marketing practices commonly adopted in Hong Kong, may be different from those of the Hong Kong residents. If a commercial practice is held to be directed to Mainland tourists as a particular group, in the determination of whether the practice amounts to a misleading omission or an aggressive commercial practice, it is the characteristics of the average member of this group which should be taken as the benchmark for assessing the practice's impact.*

#### Example

*Different television programmes aim at reaching different target audiences and the programmes are broadcast in different timeslots to maximize their impacts on the target audiences. For example, television advertisements on toys broadcast during children's programmes may likely be considered as being directed to children (and/or their parents).*

## Example

*Consumers who need to use corrective lens might be considered as a target group in relation to advertising claims about corrective lens with built-in sun-glasses function.*

### **Average member of a vulnerable group of consumers**

3.9 Where a clearly identifiable group of consumers is particularly vulnerable to the practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, then it is the average member of that group that is the relevant average consumer. It is not necessary that the trader actually foresees the effect (or likely effect) on the vulnerable group; it is sufficient if he could reasonably be expected to do so.

3.10 Infirmity (mental or physical) covers a range of infirmities including sensory impairment, limited mobility and other disabilities. For example, consumers who need to use wheelchairs might be a vulnerable group in relation to a commercial practice promoting a mobility aid, or those with a hearing impairment may be a particularly vulnerable group in relation to commercial practices involving the supply of hearing aids.

3.11 Age may be appropriate to consider a practice from the perspective of an older or younger consumer. For example, the elderly might be particularly vulnerable to certain commercial practices connected with burglar alarm sales, or children might be particularly vulnerable to advertisements relating to toys shown on daytime television.

3.12 Credulity covers groups of consumers who may more readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims. An instance might be members of a group who, because of a particular misfortune (e.g. certain severe illness), might believe certain claims more readily than others. The concept of credulity may also apply to the education level of the consumers, if the group of consumers is clearly identifiable.

*Concerns: This concept of credulity is very hard for traders to predict. It also seems to conflict with section 2.28 of the Guidelines which refers to 'puffery' claims. How can the trader be expected to know in advance whether his claim may be taken too literally by consumers of particular credulity?*

*Suggestion: Please provide specific examples of what types of scenario this section may cover.*

### **Transactional decision test**

3.13 For a commercial practice described in paragraphs 3.2(a) to (c) to amount to misleading omissions in contravention of section 13E (and also that on aggressive commercial practices in Chapter 4), the practice must cause, or is likely to cause, the average consumer to make a

transactional decision that the consumer would not have made otherwise. In other words, the effect or the likely effect on the average consumer's transactional decision is critical.

3.14 Section 2(1) defines transactional decision as "any decision made by a consumer, whether it is to act or to refrain from acting, concerning (a) whether, how or on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or (b) whether, how or on what terms to exercise a contractual right in relation to a product." For instance, a decision to purchase a product, as well as a decision not to purchase the product, are both transactional decisions. A decision to terminate a service in accordance with the relevant provisions in the service contract is also a transactional decision.

Concerns: A criminal offence should only be committed if the unfair trade practice has actually caused the consumer to purchase the goods or services (as opposed to not purchase), since otherwise no material harm is actually done.

Suggestion: The Guidelines should make it clear that if for example there is a misleading omission by a trader which leads the customer to decide not to proceed with the purchase, and hence the customer suffered no loss, then the trader should not be liable.

3.15 In essence, the transactional decision test would mean the following question: "Would the average consumer make the same transactional decision if not because of the commercial practice of the trader?" It is not necessary to prove that an individual consumer has actually made a different transactional decision as a result of a commercial practice and therefore suffers. It is sufficient if the commercial practice causes, or is likely to cause, the average consumer to make a transactional decision that he would not have made but for the commercial practice.

Concern: (1) This does not take account of the well informed / expert purchaser. For example, if a customer, who is an expert on cameras, goes into a camera store and asks to buy the latest Canon 6D. If the sales person starts to give him the usual product information which would be given to all customers but he says he doesn't need the information, would the trader commit an offence as he may not be providing all the material information which the average consumer requires, even though this Consumer had 'above-average' knowledge?!

(2) There are widely accepted and legitimate business practices that might now be said to have contravened the section.

Suggestion: The Guidelines should include examples to clarify the above point (1); and to expressly specify that common and widely commercial practices anticipated by an average consumer would not fail this transactional decision test.

## **Material information**

3.16 What information is material depends on the circumstances and the nature of the products involved, including for instance the products' characteristics, where and how they are offered for sale and who the target consumers are. Generally speaking, material information is information that the average consumer needs, according to the factual context, to make an informed transactional decision. Information may be material in one commercial practice but may not be so in others and should be judged on a case-by-case basis. As a general rule, for simple products, information on the basic characteristics of the product, if it is not already apparent from the context, should be sufficient. More information will be needed for sophisticated products for the average consumer to make an informed transactional decision.

Concerns: Traders are required to decide on a list of "material information" for disclosure to customers which they honestly believe would affect the customers "transactional decision". Such a list is not finite and will vary from industry-to-industry, and from product-to-product. It is impractical and unfair for a retailer to be required to provide information which is additional to the specifications that come from the supplier or manufacturer of the product.

Suggestion: The Guidelines should clarify for the avoidance of doubt that a retailer will not be liable for misleading omission, in respect of failing to provide information which goes beyond the specifications provided by the supplier or manufacturer concerned. The Guidelines should also make it clear that it is sufficient for traders to discharge their duty by (i) providing the consumer with the opportunity to raise further queries, and/or (ii) the relevant product information is publicly available on website(s) or other media.

Example:

Individual sales staff is serving customer in the store. Customer buys a smart phone based on the information provided by the sales staff but subsequently finds out that it does not support "Flash" and alleges that material information has been omitted. As the sales staff was simply following the product descriptions of the manufacturer the sales staff should not be liable for an offence as it was reasonable for him to rely on such information.

#### Example - simple product

A boutique offers for sale different styles of apparel items. The basic information an average consumer needs to know is the price, size, major materials used in manufacture and washing instructions for the apparel items.

### Example - sophisticated product

*A trader offers for sale computers and smartphones on its website. Its homepage shows the pictures of each of the products with a link to a detailed page which gives all the necessary information on the computers and smartphones that a consumer needs to decide whether to make a purchase, including:*

- ❖ the main characteristics of the electronic gadget (for example the computer and the smartphone model, the processor, memory, graphics, software and operating system) including its function (for example communication, camera, home multimedia, word processing and games etc. );*
- ❖ the full price (include any freight or delivery charge and insurance cost) if this was not given on the previous page;*
- ❖ the trader's name and geographic address;*
- ❖ the delivery of goods and payment arrangements;*
- ❖ a right of cancellation (if the trader provides such cancellation policy); and*
- ❖ after sale service (maintenance policy and terms).*

Concern: The Guidelines are not clear as to whether it is sufficient at the point of sale to refer customers to the trader's or manufacturer's website for the detailed product specification rather than providing all such information at the point of sale in store, which is not practical.

Suggestion: An example similar to the above should be given, but referring to sale of 'sophisticated' products like electronics in a physical store. As long as the product information is available on-line or in a printed brochure or other media, and the trader has referred the customer to it, the trader should have discharged its duty.

Example:

Brand A is popular in professional cameras. However, no camera of Brand A contains the latest function of "multiple exposure", while some other brands of professional camera do have such function. The product information of Brand A cameras do not mention about "multiple exposure" at all. Traders should not be liable for the offence of material omission for not telling the customer about the lacking of the function, as the trader should not be obliged to give more information than what is supplied by the manufacturer.

### **Omission or hiding of material information**

3.17 Omitting or hiding material information is misleading omission in contravention of section 13E if as a result, it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise.

Concern: Similar concerns as those set out under para. 3.16 above. The potential contravention in the event of omission of material information is particularly onerous for a retailer. The retailer relies on the manufacturer's product information and should not be liable for failure to provide information which was not generally available from the manufacturer.

An example is that a mobile phone manufacturer's product information does not state that its smartphone battery cannot be changed or that it does not support "Flash". Another example is smart TV sets, the product information of which usually claims that it has internet capabilities, namely access to all websites. The reality is that many websites block access by smart TVs.

Suggestion: The Guidelines to clarify that the offence of misleading omissions of material information should not extend beyond product information generally available in the manufacturer's product manual, specifications or official website.

Concern: The Guidelines should make it clear that this offence only applies to omitting information about the specific product in question. Therefore if a similar product is on promotion and the trader does not tell the customer about the promotion for the other product, this would not be a misleading omission.

Suggestion: It would be helpful if the Guidelines provide specific examples to illustrate this scenario.

Example:

If a wine bar is having a Chilean wine promotion and a customer specifically orders red wine from Bordeaux, the bar should not be liable for material omission if the bar staff do not inform the customer that red wine from Chile is on a buy-one-get-one-free promotion.

#### Example

*A mobile operator advertises an "unlimited mobile data plan" to the consumers. Nevertheless, the mobile operator does not mention that the unlimited mobile data plan is subject to a usage restriction, under which the download data rate of the service will be substantially limited if a certain usage threshold unilaterally set by the mobile operator is exceeded. The usage restriction is considered to be "material information" in the context of the mobile operator's service promotion as this restriction is likely to be a piece of information that the average consumer needs in making his transactional decision. The omission of such material information is therefore likely considered to be a misleading omission.*

#### Example

*In a telemarketing call made to a potential customer, an International Direct Dial*

*(“IDD”) service provider promotes its IDD value plan by only informing the potential customer of the per minute usage charge for making IDD calls. The IDD service provider does not mention that it will also charge a fixed monthly fee upon customer’s subscription to the service. As fee charged is commonly recognized as a material information that the average consumer needs to make an informed transactional decision, the IDD service provider is likely to be considered as committing the offence of misleading omission.*

#### Example

*A trader offers smartphones for sale. The smartphones are second-hand or have been reconditioned but they look like brand new. The trader offers them for sale at prices at which new smartphones of identical models are normally sold and does not disclose that they are not new. In this case, the fact that the smartphones are second-hand or reconditioned is likely to be material information that the average consumer needs, the omission of which would likely be held as committing the offence of misleading omission.*

3.18 In most circumstances, the **price and unit of sale** of the product are material information. The sale of goods usually requires reference to a unit of quantity, including length, width, height, area, volume, capacity, weight and number, for example the retail price of a tael/catty of fish, a litre of milk and a tael of Korean ginseng. The sale of service may require reference to, for example, the charge of body massage on an hourly basis, and the charge of an IDD service on a per minute basis. To the average consumer, the price per unit of quantity/sale is material information and will have a direct bearing on their decisions whether to buy the product. Mere provision of the selling price of products without the unit of quantity/sale is likely a misleading omission unless the unit of quantity/sale is apparent from the type of products involved, for example a price tag attached to a handbag would likely connote that the price is for one handbag.

3.19 It is advisable for traders to review their commercial practices and determine what information is required for the average consumer to make an informed transactional decision, taking into account the context<sup>8</sup>. As practitioners in the sectors in which they operate their businesses, traders are expected to exercise their common sense and professional diligence and make use of their experience and expertise to develop a set of material information that consumers should generally require to make

---

<sup>8</sup> In the event of an invitation to purchase, certain information is deemed to be material. Please refer to paragraphs 3.27.

an informed transactional decision. They should put themselves in the position of their customers and consider whether omitting a certain piece of information would likely impair the average consumer's ability to make an informed transactional decision or would likely cause the average consumer to make a decision to purchase or acquire products that he would not have made if the information were disclosed to him.

### **Provision of material information in a manner that is unclear, unintelligible, or ambiguous**

3.20 Provision of material information in a manner that is unclear, unintelligible, ambiguous is a misleading omission in breach of section 13E, if it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise.

3.21 Material information should be provided in a clear, intelligible and unambiguous manner, unless apparent from the context. Information that is obscured or partially obscured may be held to be unclear, unintelligible or ambiguous.

#### Example

*A trader uses small fine print to state the unit of quantity for its goods. Although the price is given in a clear manner, the unit of quantity is so small that an average consumer could not read it in a readily comprehensible manner. The trader is likely considered to have committed an offence of misleading omission.*

3.22 Apart from printed or written media, ambiguity and unintelligibility of information may arise out of the language and/or graphics used in the presentation of the information. For example, Mainland tourists may have difficulties in understanding the price per unit of quantity in Cantonese if the price is communicated verbally and the price indication is not readily available. The trader can avoid committing misleading omission by stating the price in Chinese say “\$500/斤” on a price tag and show it to the consumers. Another example would be using Quick Response Code (QR code) in product advertisement and product information could only be obtained by consumers using their smartphones equipped with QR code reader. Traders are advised to provide the same material information by other media so that consumers without smartphones can still have access to the same information to enable them to make informed decisions.

*Concern: To take the above example one step further, even when the basic and essential information of a product, has been clearly indicated on the price tag relating to the product, tourists from the Mainland who speak dialects other than Cantonese and Putonghua may still have difficulty in understanding the product information, which is in traditional Chinese characters and communicated to them in Cantonese and Putonghua. In any event, there are so many different nationalities of tourists in Hong Kong who may not speak Chinese or English and we are concerned this example places an unreasonable burden on traders to account for the language abilities of their customers.*

### **Untimely provision of material information**

3.23 Provision of material information in an untimely manner is also a misleading omission in breach of section 13E, if it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise. Traders should clearly inform consumers of the price of products and how the price and any discount available are calculated before the consumers decide whether or not to buy or acquire them.

#### Example

*A beauty group promotes a stem cell transfusion service performed by a medical practitioner to its consumer without disclosing the risk of the medical treatment and suitability of applying such treatment to a particular consumer (which requires advice from a medical practitioner) until after the consumer pays for the service. If the commercial practice is structured in such a way that this material information is not disclosed to its consumer in a timely manner, the beauty group risks contravening the misleading omission offence.*

#### Example

*A trader operates a car park. The parking fee is material information. The trader should clearly display the parking fee, for example, in terms of hourly parking rate at a conspicuous location at the entrance of the car park to enable consumers to decide whether or not they wish to park their cars there before they enter the car park.*

#### Example

*A promotion agent acting for a trader promotes the sale of discounted buffet coupons at \$128 each. The agent tells a consumer that \$128 is the only payment required for a coupon. The consumer gives his personal details and his permission to pay for the transaction by credit card to the agent, who only then informs the consumer that to be eligible for the discounted offer, an amount of \$1,536 (i.e. \$128 x 12 coupons) has to be paid in advance. The agent may have committed the offence of misleading omission.*

3.24 **Duration of contract** can also be material information. Some services are provided over a period of time and as a legitimate marketing technique, the longer the duration of the service contract is, the lower the unit price will be charged. For example, for a beauty treatment contract, the duration of the contract and frequency/extent of the treatment to be provided is material information and should be disclosed to consumers before the contract is concluded.

#### Example

*A fitness centre encourages its customers to renew their service contracts by offering them a very*

*favourable monthly plan. However, the manager of the centre omits to inform the customers that the new contract will last for 15 years and early termination is subject to a penalty. The average consumer is likely to take a different decision if he knows he would be bound for such a long period of time. Omitting the period of a contract and termination penalty is likely considered to be a misleading omission offence.*

3.25 Where service fees can only be ascertained after some testing or inspection work has been undertaken, for example **repair service**, traders should inform their customers in advance of the calculation of the fees, including whether fees are required for the testing and inspection work before the repair service is commenced. Some traders sell second-hand, reconditioned goods or parallel imports and are not able to provide after-sale services such as maintenance as comprehensively as those offered by the authorized dealer or the original manufacturer. Failing to disclose such information prior to the sale of goods would likely contravene the offence of misleading omission.

#### **Information required by other laws**

3.26 Material information also includes information that should be mandatorily provided in accordance with the requirements of other provisions of Hong Kong Laws. For example, the Accreditation of Academic and Vocational Qualifications Ordinance, Cap. 592 requires that advertisements promoting learning programmes recognized under the qualifications framework have to contain, among other things, information on the relevant level of the qualifications framework under which the qualification obtainable is recognized and the relevant registration number. Such information is material for the purpose of section 13E.

#### **Invitation to purchase**

3.27 Under section 2(1), an invitation to purchase is defined as a **commercial communication** that indicates the **characteristics of the product and its price** in a way appropriate to the medium used for that communication and **therefore enables** the consumer to make a purchase.

3.28 The term “therefore enables” primarily refers to enabling of a purchase through the provision of information. The amount of information that enables the consumer to make a purchase varies depending on the circumstances. Sophisticated products may require the provision of more information than simple ones before a

purchase is enabled.

3.29 Examples of invitations to purchase include a price label on a product displayed in a shop; an automobile advertisement in a newspaper that advertises the products' image and price; a menu in a restaurant in which the price and choice of dishes are listed; and an interactive TV advertisement showing images of the products and their prices.

3.30 Section 13E(4) provides that if a commercial practice is an invitation to purchase, the following information is regarded as material and must be made available unless such information is apparent from the context -

- ❖ *the main characteristics of the product, to the extent appropriate to the product and to the medium by which the invitation to purchase is communicated (such as what the product is and what are its main functions);*
- ❖ *the identity (such as trading name) of the trader and of any other trader on whose behalf the trader is acting;*
- ❖ *the address (not including a postal box address) of the trader's usual place of business and of any other trader on whose behalf the trader is acting;*
- ❖ *either (i) the price, including any taxes; or (ii) if the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;*
- ❖ *where appropriate, either (i) all additional freight, delivery or postal charges; or (ii) if those charges cannot reasonably be calculated in advance, the fact that they may be payable;*
- ❖ *any arrangements for payment, delivery of goods, supply of service (such as the way in which any work is to be carried out, or service provided) that depart from the requirements of professional diligence (see paragraph 3.35 below); and*
- ❖ *for products in relation to which there is a right of withdrawal or cancellation, the existence of that right.*

3.31 An invitation to purchase does not necessarily need to contain all the above information if the information is already apparent from the context.

Concern: This reference to "information already apparent from the context" is rather vague. Therefore it is useful to have the examples specified by C&ED below, but we would propose additional example as follows:

### Example

A fashion retailer with over 200 stores in Hong Kong, advertises in the newspaper for its new season collection. Of course, it is not practical to list, the address of all the stores and stock availability of individual store and it should be sufficient to include in the advertisement the retailers' website address or an enquiry hotline, to enable customers to check the website or hotline for the store locations and stock availability of a particular store.

### Example

*A boutique displays many different fashion items for sale with labels stating price,*

*materials used and washing instructions attached. While this is an invitation to purchase, the boutique may not be required to indicate its address, trading name and delivery arrangements because it is apparent that consumers visiting the boutique know where they are and they have to take delivery of the items by themselves upon payment.*

#### Example

*The drink list of a bar placed on each table states the price in unit of quantity and any special offer or discount, for example “buy one get one free from five to eight o’clock on weekdays”. It provides consumers with the information they need to enable them to make decision as to what drinks to order. The name of the bar is already on the list, and the address is apparent because consumers are already in the bar.*

3.32 If traders are making an invitation to purchase, but are unable to actually tell consumers the full price including tax or postal charges because the tax or the postal charges cannot reasonably be calculated in advance, traders must give information on the manner in which that full price is to be calculated.

3.33 Any additional charges that come with the supply of the goods or services should be clearly communicated to consumers before they make the purchase.

Concern: It should be sufficient for trader charging customer additional charges to put up signage and/or notice for such charges in store(s) and/or its website as a clear communication to customers before their purchase of the product.

#### Example:

A trader selling electronics or home furnishing products charges customers a fee for delivery of the product, as well as a fee for installation. Provided that the trader displays a notice at the checkout specifying the delivery and installation charges, this should be sufficient to make customers aware of the charges before they make the purchase.

#### Example

*A restaurant promotes its steam whole chicken at the price of \$1 each. A consumer orders a chicken and after the meal when he pays the bill, he is informed that the spring onion and ginger paste which comes with the chicken is charged at \$50. The restaurant may be liable for providing misleading price information on the chicken.*

Concern: This example may be too extreme. Of course if the paste is 50 times more expensive than the chicken this would be unreasonable, but what if the chicken was \$50 and the paste only \$1? Would the restaurant still be liable for misleading price information as the amount is so immaterial?

3.34 In making an invitation to purchase, a trader should cause consumers to be informed of any **right of cancelling** a transaction.

#### Example

*Shops registered with the Travel Industry Council undertake to provide an unconditional full refund to Mainland tour members who return their purchases within six months. Notices setting out the refund arrangements are displayed in conspicuous locations inside and outside the shops to enable consumers to make informed transactional decisions.*

#### **Professional diligence**

3.35 Under section 13E(5), professional diligence is defined as “the standard of skill and care that a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice in the trader’s field of activity or the general principle of good faith in that field”.

3.36 Professional diligence is an objective standard which may vary according to the context. However, poor current practice that is widespread in an industry or sector cannot be taken as an acceptable objective standard because this is not what a reasonable person would expect from a trader who is acting in accordance with honest market practice or good faith. Professional diligence requires traders to approach transactions professionally and fairly as judged by a reasonable person. A simple way of undertaking professional diligence would be to ask: “is the trader acting to a standard that a reasonable person would expect?”

3.37 A furniture store offers free delivery service and a reasonable person would expect that it covers most of the urban residential areas in Hong Kong. However, if the free delivery service is provided only where an address has lifts or the delivery schedule is fixed by the store, these arrangements depart from the requirements of professional diligence and should be disclosed to consumers in a clear and timely manner to enable them to make informed transactional decisions.

Concern: This section on ‘professional diligence’ seems to imply that there is a general duty of ‘professional diligence’ and it is not clear if it is an offence not to use such diligence.

Suggestion: Clarify that the concept of ‘professional diligence’ is specific to assessing what information is material in an invitation to purchase and in particular relates to arrangements for (i) payment, (ii) delivery, (iii) performance pursuant to Section 13E(4)(f) of the Ordinance.

#### **Failure to identify the commercial intent of a commercial practice**

3.38 As mentioned in paragraph 3.2 above, a trader may commit a misleading omission offence if he fails to identify the commercial intent of a commercial practice. While such an intent is apparent in the majority of cases (for example the presence of a price often notifies the commercial intent of the advertisement, or an TV advertisement is clearly perceived to be promoting a product, an “advertorial” may be considered as a misleading omission offence if its way of presentation makes it hardly distinguishable from the rest of the publication in which it appears.

3.39 The genuine engagement of celebrities in product promotions is a legitimate practice, but a trader may commit a misleading omission offence if he engages a celebrity to disguise himself or herself as a consumer and arranges for him or her to be photographed by the unsuspecting media at a product exhibition without disclosing any contractual relationship between the celebrity and the trader.

3.40 A trader may also commit a misleading omission offence if he or his agent disguises himself as a consumer and posts comments using pseudonyms in discussion forums or in social media in a bid to promote sales or “bad mouth” competitors.

Example

*A beauty company instructs its employees or a blogging agent to post on various online forums and social networking websites very favourable comments to promote its services. The comments are posted under a disguise as consumers who have patronized the services before. This practice may be in breach of a misleading omission offence by failing to identify the genuine commercial intent.*

Example

*A company launches a series of health seminars targeting senior citizens by offering free gifts to them. The elderly may be enticed by the practice to join the seminar to learn more about health maintenance. But the attendees were not told that the only activity throughout the whole seminar is to introduce and promote the trader’s health products.*

Concerns: We have some concern about this example as it may imply that traders cannot promote their products at all in conjunction with any seminar or discussion forum. However, it is surely a matter of degree and hence in the above example it states “the **only** activity throughout the **whole seminar** is to introduce and promote the trader’s health products”.

Suggestion: Add a clarificatory statement that limited product promotion in conjunction with a topical seminar or discussion forum is not intended to be caught by this offence.

## 4. AGGRESSIVE COMMERCIAL PRACTICES

**Traders must not use harassment, coercion, and undue influence to restrict or impair the freedom of choice or conduct of consumers, which will cause or likely cause consumers to make a transactional decision that would not have been made otherwise.**

4.1 Under section 13F(2), *“a commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances, 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 or likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise”*.

### **Harassment**

4.2 Generally speaking, harassment includes an infliction of physical and / or non-physical (including psychological) pressure. In the context of the section, it describes a range of conduct in connection with the supply of goods or services, which includes, but is not limited to, applying repeated pressure to a consumer who is under no obligation to acquire the goods or services, repeated unwelcome approaches to a potential customer of goods or services etc.

### **Coercion**

4.3 A commercial practice may involve coercion if the consumer is subjected to pressure and threat. Coercion is not limited to deliberate intimidation. It may or may not involve the use of physical force. An example is the use of personally abusive or obscene language that has the effect of humiliating a consumer or subjecting a consumer to fears over his own safety or the safety of his next of kin and prejudicing his freedom of choice.

### **Undue Influence**

4.4 It means an exploitation of a position of power in relation to a consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly impairs the consumer's ability to make an informed decision.

### Example

*A mechanic has a consumer's car at his garage and has done more work on the car than agreed. He refused to return the car to the consumer until he was paid in full for the work. The mechanic did not check with the consumer before he went ahead with the extra work. As the mechanic has the car, he has power over the consumer's decision to pay for the unauthorized work. He has exploited his position of power, by demanding payment for doing more than was agreed and refusing to return the car until the consumer has paid for all the work. The mechanic could be liable for exercising undue influence and / or coercion on the consumer.*

4.5 Offering some incentive to consumers, such as a free shuttle transfer to and from shopping centres, or the provision of some light refreshments free in shopping centres might influence consumers but it might **not** likely constitute undue influence as the consumers' ability to make an informed transactional decision would not be impaired. However, if a trader takes consumers to a resort for a health plan presentation which is situated at a distant location with no public transport available and after the presentation, the trader says he would arrange return transport only if consumers sign a contract to subscribe to a health plan, this could amount to coercion and/or undue influence.

### **Freedom of choice or conduct**

4.6 The concept of freedom of choice or conduct is not limited solely to decisions about whether to purchase a product or not. It covers a wide range of transactional decisions. For example, coercion might cause consumers to purchase the product at a much higher price or on disadvantageous terms, or from one trader instead of another.

### **Factors indicating an aggressive commercial practice**

4.7 Section 13F(3) stipulates that the following factors must be taken into account when determining whether a commercial practice is aggressive:

- ❖ timing, location, nature or persistence;
- ❖ the use of threatening or abusive language or behaviour;
- ❖ the exploitation by the trader of any specific misfortune or circumstance, of which the trader is aware and which is of such gravity as to impair the consumer's judgment, to influence the consumer's decision with regard to the product;
- ❖ any onerous or disproportionate non-contractual barrier imposed by the

- ❖ trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or switch to another product or another trader; and any threat to take any action that cannot legally be taken.

4.8 It is not necessary for all of these above factors to be present for a commercial practice to be aggressive. Furthermore, a court of law may consider any other relevant factors as it sees fit. Traders are advised to stop promoting their goods or services when consumers have explicitly rejected the offer.

#### Example

*A beautician persuaded a consumer B to pay slimming treatment fees by several credit cards, claiming that payment by different credit cards would entitle her more “fabulous offers”. B gave the beautician three credit cards which were then held in custody by the cashier. Twenty minutes later, when the slimming treatment was still in progress, the manageress of the beauty salon came into the treatment room and asked B if she was delighted with the treatment. B was embarrassed by the manageress’ abrupt move as her upper body was barely covered with body cream and ointment. The manageress and the beautician then kept promoting other slimming and beauty packages to B for more than 30 times during the two-hour treatment until B finally agreed to join one. B later changed her mind and asked for the cancellation of the transactions and return of her credit cards, but was denied unless she signed the agreements. Both the manageress and the beautician may be liable for using harassment and undue influence.*

#### Example

*Staff working in a private columbarium put pressure on a recently bereaved relative, who is looking for a funeral package and columbarium, to buy a more expensive package to avoid bringing bad fortune to him and other members of the family. This could amount to coercion or undue influence because the staff has exploited the misfortune of the bereaved relative to influence his decision at a time when he is in deep sorrow.*

#### Example

*Two salespersons from a pay TV service provider conduct unsolicited doorstep marketing of pay TV services. They knock on the door of a flat late at night. An elderly man, who is alone in the flat and is woken up by the door knocking, opens the door. The two salespersons quickly enter into the flat and start promoting the pay TV*

*services to the elderly man. Although the elderly man indicates that he is not interested in the services, the salespersons refuse to leave and keep on pressing him to sign the contract. The conduct of the salespersons is likely considered to be an aggressive commercial practice.*

#### Example

*A trader specialized in timeshare rights and long-term holiday products may offer its customers a three-day cooling-off period. However, many onerous or disproportionate non-contractual barriers arise when the customers try to exercise their contractual right to terminate the contract. For example, the termination form can only be obtained by fax or mail (not email) and the applicant together with the duly completed form are required to submit the form in person to a sub-office in Lantau Island during normal office hours. Traders are reminded that imposing these kind of non-contractual barriers, even occurring after the commercial transaction, may amount to an aggressive commercial practice.*

## 5. 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.**

5.1 Section 13G 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 the advertisement and the nature of the market in which the trader carries on business. The TDO also makes it an offence for the trader who **fails to offer those products for supply at that price, for a period that is, and in quantities that are reasonable** having regard to the **nature of the market** in which the trader carries on business and the **nature of the advertisement**.

5.2 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 attract consumers to come forward, but when arriving at the traders' premises or visiting the traders' websites intending to buy the advertised product (the bait), consumers only find out that the advertised product is no longer available (or perhaps has never been available). They may end up buying something that they might not have purchased if not for having been attracted by the bait in the first place.

5.3 A trader may commit an offence if he does not supply the advertised goods or services in reasonable quantities for a reasonable period. 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.

Concern: it is very subjective to determine what is "reasonable" in the context of the "nature of the market". How are traders expected to determine in advance what will be reasonable as such decisions generally rely on subjective factors only known after the event?

Suggestion: The factors listed below relating to the nature of the market should be expressly linked to the Section 26 Defence, and also backed-up by examples. Please refer to our detailed suggestions below.

### **Nature of the market**

5.4 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 are generally taken into account include, but are 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/or traders in the same market, demand elasticity at different

prices and the extent of reach of the advertisement. Factors which are not reasonably foreseeable by traders and may have a substantial impact on the size of demand, for example a sudden drop in temperature prompting a great number of consumers rushing for down jackets, are taken into account. In relation to the supply side, it is recognized that certain products are inherently limited in the quantities that could be made available to meet a sudden upsurge in market demand, for example perishables and other fast moving consumer goods the production of which is subject to capacity constraints. Further, constraints in replenishing supply that are beyond the traders' control are considered.

5.5 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 and to notify consumers as soon as possible such that no more unmet demand will be generated.

Concern: We acknowledge that ideally, traders should be certain when advertising products that they will be in a position to meet likely demand at the advertised price. However, it is sometimes not commercially viable for a trader to arrive at an accurate projection of stock to meet the unpredictable market demand. This is particularly as a result of the manufacturers controlling stock or supply, and other replenishment constraints or because the product is new and untested in the market making it especially hard to predict demand.

Suggestion: Given the general statutory defence under section 26, the Guidelines should expressly confirm that such defence applies to situations where the retailer has been unable to meet demand as a result of factors beyond its control, such as supplier restricting stocks or other replenishment constraints or unexpected high demand.

Suggested Example: Mobile phone retailer advertises a new generation smartphone which will go on sale on 1<sup>st</sup> June. This is designed to promote the "queuing effect" mentioned in section 5.8 below. However, the smartphone supplier controls the release of the stock and only released two-thirds of the expected stock to the retailer. There are lots of disappointed customers. The retailer should be able to avail itself of the defence that this resulted from causes beyond its control.

5.6 Traders are advised that the use of the disclaimer "while stocks last" will unlikely be sufficient to protect traders from committing the offence of bait advertising. If they are not able to supply the products at the specified price for a period that is, and in quantities that are, reasonable, they would still be liable to the offence.

## **Nature of the advertisement**

5.7 As stated in paragraph 5.4 above, the size of the consumer demand for the advertised goods or services is generally subject to the extent of the 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 expected to be 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 have committed the offence of 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 participating in the annual computer festival creates 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 started 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 advertised 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 have committed the offence of 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**

5.8 There is 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, for example, 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) 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.

[Suggestion: Add additional phrase at the end of Section 5.9 to make it that there is no obligation on trader to include such details in its advertisement if it is not practical to do so.](#)

[We would also propose that in respect of "hot items" if the trader cannot predict the stock availability from supplier then it should not be bait advertising if the trader states clearly on the advertisement "subject to product availability from supplier".](#)

#### Example:

[A new model of electronic product has launched in the US. Local retailer placed purchase order with the supplier. However, as a marketing strategy, the supplier deliberately withholds information on the quantity that will be supplied to the retailer, and further limits the supply of the new product to develop](#)

a queuing effect. The retailer will not be liable for bait advertising if the retailer put the following wordings on the advertisement “subject to product availability from supplier” because the amount of stock is beyond the control of the retailer.

5.9 It must be emphasized that a mere absence of an indication in an advertisement of the period and the quantities in which the advertised product is available does not in itself amount to an offence of bait advertising.

## **Additional defence**

5.10 Besides the general defence under section 26 for all fair trading sections (please refer to paragraph 8.6 below), the TDO also provides additional defences under section 26A for traders, such as seeking the help of another supplier to provide the same product or offering an equivalent product to consumers if a trader fails to meet the legal requirement set out in paragraph 5.1. The effect of the additional defence is that when traders genuinely run out of stock, they may be absolved from liability if they can show that they have offered to supply additional stock or procure a third person to supply the additional stock of the specified product (or alternatively, an equivalent product) to meet the demand of consumers at the originally advertised price within a reasonable time. For avoidance of doubt, traders may still be absolved from liability although consumers do not accept the alternative offer so far as traders can demonstrate that they are able to meet the terms of the offer if accepted.

## **Equivalent products**

5.11 What are “equivalent products” will be determined on a case-by-case basis, and ultimately, is a matter of fact to be decided by a court of law. Generally speaking, equivalent products refer to products which possess characteristics, functions and performance similar to the products that traders have offered for sale to consumers, and with a similar selling price and similar after-sale services, if any.

## 6. BAIT AND SWITCH

**Traders must not make an invitation to purchase a product at a specified price and then refuse to show or demonstrate the product, refuse to take orders for the product, or demonstrate a defective sample of the product, with the intention of promoting a different product.**

6.1 Section 13H prohibits traders from engaging in a bait and switch. Traders engage themselves in a bait and switch if having made an invitation to purchase<sup>9</sup> a product at a specified price, they then with the **intention** of promoting a different product:

- (a) refuse to show or demonstrate the product;
- (b) refuse to take orders for the product or deliver it within a reasonable time; or
- (c) show or demonstrate a defective sample of the product.

6.2 The section does not seek to prohibit a trader from promoting products other than the product which is the subject of the invitation to purchase. The section prohibits a trader from taking any one of the three courses of conduct referred to in paragraph 6.1 above when he has the intention of promoting a different product after making an invitation to purchase a product at a specified price. In order to establish an offence under this section, it is necessary to prove the intention of the trader.

### Example

*A trader advertises to sell a television at his shop window for \$4,000, which is 30% less than the market price. He actually has no intention to sell the television he advertises. He only wants to use the advertisement as a bait to lure customers so that he can sell another television model. A consumer is attracted by the offer and orders one from the trader. However, the trader refuses to take the order and then refers the consumer to a different television model. If the trader is held to have intended to promote a product which is different from the one he offers to supply to consumers, he may commit an offence of bait and switch.*

<sup>9</sup> Please refer to paragraph 3.27 for the definition of invitation to purchase.

## 7. WRONGLY ACCEPTING PAYMENT

**A trader must not accept payments for a product if at the time of accepting the payments, he does not intend to supply it or intends to supply another product, or if there are no reasonable grounds for believing that he will be able to supply it at the agreed time or within a reasonable time.**

7.1 It is common for consumers to make pre-payments in the purchase of goods or services to be delivered at a later date. To boost business, some traders offer discounts for pre-payments, especially in bulk purchases. Traders are advised not to accept pre-payments from consumers if they are uncertain whether the pertinent goods or services can be delivered to consumers at the agreed time or, if no time is agreed, within a reasonable time.

7.2 Sections 13I(2)(a) and (b) prohibit a trader from accepting payment in whole or in part and by whatever means for a product if at the time of accepting payment, the trader intends not to supply or intends to supply a materially different product. It is also an offence under section 13I(2)(c) if at the time of accepting payment, there are no reasonable grounds for believing that the trader will be able to supply the products in the time specified or, if no time is specified, within a reasonable time.

7.3 In order to establish an offence under the section, it is necessary to prove that **at the time of accepting payment or other consideration for a product**, the trader intends not to supply the product or intends to supply a materially different product, or the circumstances are such that a common sense, right thinking member of the community would consider that there are no reasons to lead a person in the same position as the trader to believe that he would be able to supply the goods or services in the time specified or, if no time is specified, within a reasonable time.

### Example

*An Internet service provider offers 100 Mbps and 10 Mbps broadband Internet access services to consumers in Hong Kong, but it does not have coverage of both types of services in every residential building. A consumer is attracted to the 100 Mbps service plan and calls the Internet service provider to make subscription to the 100 Mbps service. The telesales staff of the service provider receiving the call is aware that the consumer is residing in a building where only 10 Mbps broadband Internet access service can be provided to the residents. However, the telesales staff still secures a service contract with the customer for the provision of 100 Mbps service and accepts*

*payment of the monthly fee from the consumer. In the end, the service provider provides 10 Mbps service to the consumer. The service provider is likely to have committed the offence of wrongly accepting payment as it does not have any intention to supply the 100 Mbps service, or only intends to supply a service that is materially different from the 100 Mbps service, at the time of accepting payment.*

#### Example

*A restaurant advertises the sale of dining vouchers at a discounted price of \$100. The condition of the voucher sets out that it should be redeemed within three months from the date of purchase. A total of 8,000 vouchers are eventually sold within a week. However, the restaurant has a capacity of 20 seats only. It is impossible for all vouchers to be deemed (even after discounting normal wastages) within the validity period of three months. The restaurant may have committed the offence of wrongly accepting payment because at the time of accepting payments for the vouchers, there are no reasonable grounds for believing that it can deliver the specified dining services within the specified time.*

#### Example

*A consumer intends to purchase a Country J-made 46'LCD 3D TV set from an AV shop. The requested model has been sold out and its availability of replenishment is not known. It was also widely reported that there was a natural disaster near the production facilities in Country J that had caused serious damages to the road facilities and power supply system of the area, and stock replenishment process might take much longer time. The AV shop accepts deposit from the consumer and undertook to deliver the TV in three days. The AV shop may be liable for the offence of wrongly accepting payment, if it is held that the circumstances are such that there are no reasonable grounds for believing that it can deliver the TV within the specified time at the time of accepting payment.*

*It may be a plausible defence under section 26 (please refer to paragraph 8.6 below) for the shop if it had checked with its wholesaler the availability of the model and the expected delivery time prior to accepting the deposit from consumers.*

#### **Reasonable time**

7.4 Traders are at liberty to agree with consumers the time of delivery of the goods or services even if the delivery time is long. Otherwise, the product has to be delivered within a reasonable time. What is reasonable time depends on the nature of

the goods or services involved and the facts of individual cases. A Christmas gift delivered to a consumer after Christmas would likely be outside a reasonable time, if the delivery time has not been specified.

7.5 Traders should always ensure that they have sufficient staff, equipment and facilities to meet the demand of consumers prior to accepting pre-payment for any goods or services to be delivered at a later stage. They should evaluate, on an on-going basis, their capacity and ability in supplying goods or providing services to new and existing customers, having regard to the potential growth of customers, demand pattern, change in market environment and difference in demand between seasons, peak and non-peak hours. Traders are advised to avoid overselling their goods or services to an extent that is beyond their capacity or ability to meet the demand.

#### Example

*A beauty salon promotes its service plan for facial treatment at a very competitive price to new customers. Despite that there are insufficient dedicated equipment and trained beauticians for providing the treatments, the salon oversells its service plan to its customers. When the customers request the facial treatment, the salon can only provide the service after 6 months (an unreasonable time). The salon may be held liable for the offence of wrongly accepting payment, as at the time of accepting payment, there are no reasonable grounds for believing that the beauty salon will be able to provide the facial treatment within a reasonable period of time.*

#### **Additional defence**

7.6 Besides the general defence available under section 26 for all fair trading sections (please refer to paragraph 8.6 below), the TDO also provides an additional defence under section 26B for the offence of wrongly accepting payment (section 131) namely, (i) the traders offered to supply an equivalent product or (ii) the traders procures a third person to supply the specified product or an equivalent product if the traders fail to meet the legal requirement set out in paragraph 7.2 above. Traders may be absolved from liability if they can show that they have offered to supply additional stock or procure a third person to supply the additional stock of the specified product (or alternatively, an equivalent product) to meet their obligations. For avoidance of doubt, traders may still be absolved from liability although consumers do not accept the alternative offer so far as traders can demonstrate that<sup>39</sup> they are able to meet the terms of the offer if accepted.

7.7 Section 26B(2) provides a further additional defence for an offence under section 13I(2)(c). A trader might be acquitted if a **refund in full** of the payment or consideration for the product was made within a reasonable period after the expiry of the period for supply that is specified before or at the time of payment, or if no period is specified, within a reasonable period.

## 8. LIABILITY OF PARTIES INVOLVED

### Liability of management

8.1 Section 20 sets out the circumstances under which certain classes of persons of a body corporate or an unincorporated body may also incur personal 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 a member 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 to prove that the offence has been committed with their consent or connivance or was attributable to their neglect.

8.2 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, the following factors would be taken into account:

- ❖ 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.

### Employees and agents of a trader

8.3 A trader includes any person acting in the name of or on behalf of a trader. If an employee, 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 to 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.

8.4 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 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.

8.5 The existence of an agent means that consumers do not always deal with the actual product supplier directly. Taking the online-group purchasing websites as an example, the companies operating the websites can either act as transaction platforms which earn service fee on a transactional basis or cooperate with the suppliers on a proceeds-sharing basis. The online-group purchasing companies accept payments from consumers (say hair-cut services) are separate entities from the one who actually supplies the services. Despite the presence of this intermediary in a commercial practice, it does not prevent the enforcement agencies from taking on both the intermediary and the supplier in the event of any breach of the fair trading sections.

## **Defences**

8.6 The TDO puts in place general defences for the person charged. Under section 26, a person might be acquitted if sufficient evidence is adduced to raise an issue that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control and adequate notice in writing is given and served on the prosecutor; and he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

### Example

*A tutorial company may involve in the inaccurate promotion of certain tutor relating to their tutorial service and the advertisement claims that the tutor possesses certain academic qualification which is in fact untrue. The tutorial school might be acquitted if sufficient evidence is adduced and adequate notice in writing is given and served on the prosecutor to show that the false academic qualification claim was made upon reliance on the information supplied by the tutor and the company took all reasonable steps to ascertain the accuracy of the tutor's qualification including reference check to the relevant university or institution and exercised all due diligence to avoid the false information.*

Concerns: Please refer to section 1.5 regarding definition of 'Trader'.

It is essential to state clearly in the Guidelines that corporate traders, their directors and respective employees who have taken reasonable precautions to ensure compliance with the maintaining and participating in an internal compliance procedure shall be entitled to rely on a defence against prosecution under the Ordinance. The Guidelines should also provide practicable examples to explain the circumstances under which these persons may be liable.

Suggestion: Additional examples should be provided.

Example:

A trader engages a third party operator such as promoter, concessionaire or franchisee in its stores to promote that third party's branded products or the trader's products (as the case may be). Despite giving the third party operator a checklist of the trader's policies and procedures (which includes guidance on unfair trade practices), the third party operator in trader does not and/or neglects and/or omits to observe or comply with the trader's policies and procedure,

- (i) the third party operator offers unreasonably high commission to its staff or agent to promote sales of the particular products , the staff of the third party operator repeatedly approaches customers and puts pressure on them to buy the promoted products. The customer then complains of 'aggressive commercial practice'; or
- (ii) the third party operator in trader's store gives false description of the products to the customers.

It should be the third party operator in the trader's store, not the trader, who would have any liability in this instance.

### **Additional defence**

8.7 For additional defences in proceedings on offences of bait advertising and wrongly accepting payment, please refer to paragraphs 5.10 and 7.6 to 7.7 respectively.

## **9. SANCTIONS AND POWERS AVAILABLE TO THE COMMISSIONER AND THE CA**

9.1 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.

9.2 With the introduction of the compliance-based mechanism<sup>10</sup>, C&ED and OFCA are empowered to draw on civil measures viz. undertakings and injunctions, to deal with suspected contraventions. An undertaking is a court-enforceable agreement proposed by a trader (and accepted by C&ED or OFCA as the case may be) to undertake specific actions, including to stop the offending acts and not to repeat them in future. C&ED or OFCA, as the case may be, may also apply to a court of law for an injunction directing the trader to stop or refrain from continuing an offending act.

### **Investigatory powers**

9.3 Authorized Officers may 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.

9.4 C&ED, as the principal agency to enforce the TDO, has a full spectrum of enforcement powers. For example, they are empowered to enter non-domestic premises and inspect goods, and to inspect books and documents that are required to be kept under the TDO or its subsidiary legislation for the purpose of ascertaining whether any offence under the TDO has been or is being committed. If there are reasonable grounds to suspect that an offence has been committed, they may arrest suspects, require the production of books, documents or records and, when necessary, 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. As for the CA, it is conferred enforcement powers that commensurate with its jurisdiction under the TDO with respect to telecommunications and broadcasting services licensed under the TO or BO<sup>11</sup>.

<sup>10</sup> Please refer to the Compliance and Enforcement Policy Statement issued by the Commissioner and the CA which is available in their departmental websites: [www.customs.gov.hk](http://www.customs.gov.hk) or [www.coms-auth.hk](http://www.coms-auth.hk).

<sup>11</sup> Pursuant to section 16E(2), the Chief Executive in Council may, by notice published in the Gazette, specify that certain powers conferred on an Authorized Officer under the TDO are not exercisable by the CA.

9.5 Traders should cooperate with the enforcement agents during investigation. If individuals or traders obstruct Authorized Officers in the performance of their lawful duties, they may be liable to prosecution under section 17.

9.6 For more details on compliance and enforcements, please refer to the “Compliance and Enforcement Policy Statement” issued by the Commissioner and the CA setting out the objectives of enforcement actions, the basic principles which guide C&ED and OFCA in the application of enforcement tools available under the TDO and the factors that C&ED and OFCA take into account in prioritizing its enforcement resources in handling complaints.

*Suggestion: The Guidelines could clarify that the enforcement officers would only carry out inspection of the traders’ premises and conduct targeted spot checks when they have reasonable grounds for suspicion of an offence. This balancing exercise would give comfort to the traders that the enforcement authorities respect the trader’s fundamental rights to privacy while exercising their functions of investigating and taking enforcement actions only with valid reasons.*

## **10. CONSUMER REDRESS**

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

**Commissioner of Customs and Excise**

**Communications Authority**

**December 2012**

**DRAFT ENFORCEMENT GUIDELINES**

**FOR**

**THE TRADE DESCRIPTIONS**

**(UNFAIR TRADE PRACTICES)**

**(AMENDMENT) ORDINANCE 2012**

**PUBLIC CONSULTATION PAPER**

This consultation document can be found on the following websites of  
Customs and Excise Department at [www.customs.gov.hk](http://www.customs.gov.hk),  
Communications Authority at [www.coms-auth.hk](http://www.coms-auth.hk),  
GovHK at [www.gov.hk](http://www.gov.hk) and  
Consumer Council at [www.consumer.org.hk](http://www.consumer.org.hk)

7 December 2012

## Background

I. The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (“Amendment Ordinance”) was enacted by the Legislative Council on 17 July 2012. The Amendment Ordinance amends the existing Trade Descriptions Ordinance (Cap. 362) (“TDO”) to prohibit specified unfair trade practices that may be deployed against consumers and strengthen the enforcement mechanism.

### Enforcement Guidelines

II. The Customs and Excise Department (“C&ED”) is the principal agency responsible for enforcing the TDO. Concurrent jurisdiction is conferred on the Communications Authority (CA), with the Office of the Communications Authority (OFCA) as its executive arm, to enforce the fair trading sections<sup>1</sup> in the TDO in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) and the Broadcasting Ordinance (Cap. 562) that are directly connected with the provision of a telecommunications or broadcasting service under the relevant Ordinances.

III. The C&ED and the OFCA (collectively the “Enforcement Agencies”) have jointly drafted a set of Enforcement Guidelines. The Enforcement Guidelines comprises the “Compliance and Enforcement Policy Statement - Implementing the Fair Trading Sections of the Trade Descriptions Ordinance” (Policy Statement) [Part A] and the “General Guidelines on the Fair Trading Sections of the Trade Descriptions Ordinance” (General Guidelines) [Part B].

IV. The Policy Statement sets out the objectives of taking enforcement actions, the basic principles which guide the Enforcement Agencies in the application of enforcement tools available under the TDO and the factors that the Enforcement Agencies take into account in prioritizing the enforcement resources. The General Guidelines describes the manner in which the Enforcement Agencies may exercise their powers in respect of the fair trading sections and provide guidance as to the operation of the provisions of the TDO. They may also serve as guidance for traders in complying with the fair trading sections of the TDO and for consumers in understanding how they are protected.

<sup>1</sup> The fair trading sections include the prohibitions of false trade description in relation to goods and services; misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepting payment.

## Consultation

V. In accordance with the new sections 16BA(6) and 16H(2) of the TDO, the Enforcement Agencies are inviting views from the public on the draft Enforcement Guidelines. Individuals making comments should return the Submission Form [Appendix A] by means of mail, facsimile or email **on or before 17 January 2013**:

Mail Address: Customs and Excise Department  
Trade Description Ordinance Special Planning Group  
14/F., Trade and Industry Department Tower  
700 Nathan Road  
Mongkok  
Kowloon.

Fax number: 2398 0596

Email address: [guidelinescon@customs.gov.hk](mailto:guidelinescon@customs.gov.hk)

VI. It is voluntary for any member of the public and interested parties to supply his/her personal data upon providing views on this consultation document. Any personal data provided with a submission will only be used for the purpose of this public consultation exercise.

VII. The submissions and personal data collected may be passed to relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data are bound by such purposes in their subsequent use of such data.

VIII. The C&ED and/or OFCA may publish the submissions made in response to this consultation document for public viewing after the conclusion of the public consultation. If you do not wish your name or your affiliation (or both) to be disclosed when we publish the public views received, please state so when making your submission.

IX. Any sender providing personal data to the C&ED and OFCA in the submission will have the rights of access and correction with respect to such personal data. Any requests for data access or correction of personal data should be made in writing by using the aforementioned means of communication.

## Consultation Sessions

X. Members of the public and interested parties are also invited to participate in consultation sessions to be held on the dates specified below. Enrollment can be made by returning the Enrollment Form [Appendix B] by means of mail, facsimile or e-mail to the C&ED:

No.	Date	Time	Party to be consulted	Venue
1	21 December 2012	3:00 – 4:30 (PM)	Traders	Auditorium, 15/F., Customs Headquarters Building, 222 Java Road, North Point, Hong Kong
2	3 January 2013	10:00 – 11:30 (AM)		
3	3 January 2013	3:00 – 4:30 (PM)		
4	4 January 2013	3:00 – 4:30 (PM)	General public	4/F., Administration Building, Hong Kong Cultural Centre, 10 Salisbury Road, Tsim Sha Tsui, Kowloon
5	5 January 2013	10:00 – 11:30 (AM)	General public	Auditorium, 15/F., Customs Headquarters Building, 222 Java Road, North Point, Hong Kong

XI. We will contact relevant business sectors (e.g. trade associations) for arranging separate consultation sessions.

XII. For enquiries on this consultation, please contact the C&ED on 3403 6063 or OFCA on 2961 6325.

**Commissioner of Customs and Excise  
Communications Authority  
December 2012**

# **PART A**

**DRAFT**

**Compliance and Enforcement Policy Statement**

**Implementing the Fair Trading Sections of  
the Trade Descriptions Ordinance**

**Issued by**

**The Commissioner of Customs and Excise  
and  
The Communications Authority**

## **Table of Contents**

### **Paragraph**

#### **1-2 INTRODUCTION**

#### **3 ABOUT THIS COMPLIANCE AND ENFORCEMENT POLICY STATEMENT**

#### **4 ENFORCEMENT OBJECTIVES**

#### **5 GUIDING PRINCIPLES**

- ❖ **Targeting**
- ❖ **Proportionality**
- ❖ **Consistency**
- ❖ **Transparency**

#### **6-10 INVESTIGATION PRIORITIES**

#### **11-27 ENFORCEMENT TOOLS**

- ❖ **Civil Enforcement – Undertakings**
  - ❖ **Acceptance of an undertaking**
  - ❖ **Elements of an undertaking**
  - ❖ **Unacceptable terms in an undertaking**
  - ❖ **Compliance with an undertaking**
  - ❖ **Withdrawal of acceptance of an undertaking by C&ED**
- ❖ **Civil Enforcement - Injunctions**
- ❖ **Criminal proceedings**

#### **APPENDIX**

## INTRODUCTION

Concerns: The reference to “came into effect on [date]” seems to imply that the Guidelines will only be issued after the new legislation comes into effect. The Guidelines should be issued in their final form beforehand so as to give traders time to review and take necessary action. There should be a reasonable transition period between issuance of the guidelines and the legislation coming into effect. We would also suggest there should be a grace period of six-to-twelve months during which time the Enforcement Agencies should refrain from commencing criminal enforcement action. Instead the grace period should be used as a time to focus on working with traders to improve their conduct and where necessary warnings could be issued, but not criminal enforcement action.

: This

To enhance protection for consumers, a set of legislative amendments to the Trade Descriptions Ordinance (Cap. 362) (TDO) **came into effect on [date]**. New prohibitions and enforcement mechanism have been introduced to deter specified unfair trade practices that traders may deploy against consumers. Collectively known as the “fair trading sections”, sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H and 13I<sup>1</sup> of the amended TDO (hereinafter, all sections mentioned in this document refer to the sections in the amended TDO unless otherwise stated) specify the relevant **criminal offences**. The Customs and Excise Department (C&ED) is the principal agency responsible for enforcing the TDO. Concurrent jurisdiction is conferred on the Communications Authority (CA), with the Office of the Communications Authority (OFCA) as its executive arm, to enforce the fair trading sections in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) (TO) and the Broadcasting Ordinance (Cap. 562) (BO) that are directly connected with the provision of a telecommunications or broadcasting service under the two Ordinances.

2. A civil **compliance-based mechanism** has been put in place to encourage compliance by traders and to stop identified unfair trade practices expeditiously. In gist, as an alternative to prosecution, C&ED and OFCA as enforcement agencies are empowered to accept undertakings pursuant to section 30L from a trader whom the enforcement agency in-charge (the “Enforcement Agency”) believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under fair trading sections, not to continue or repeat an offending conduct, or conduct of a substantially similar kind. Where necessary, it may also seek injunctions pursuant to section 30P from a court of law for the same purpose.

### ABOUT THIS COMPLIANCE AND ENFORCEMENT POLICY STATEMENT

3. This Compliance and Enforcement Policy Statement (Policy Statement) sets out the objectives of taking enforcement actions, basic principles which guide the

<sup>1</sup> 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

Enforcement Agency in the application of enforcement tools available under the amended TDO and the factors that the Enforcement Agency takes into account in prioritizing the enforcement resources. By publishing this policy statement, we hope to enhance transparency in enforcement and promote compliance of the fair trading sections. This Policy Statement is issued by the Commissioner of Customs and Excise (the Commissioner) in accordance with section 16BA, as well as by the Commissioner and the CA jointly in accordance with section 16H to the extent that the Policy Statement is applicable to the enforcement against the commercial practices of licensees under the TO and BO that are directly connected with the provision of a telecommunications or broadcasting service under the two Ordinances.

#### **ENFORCEMENT OBJECTIVES**

4. The objectives of enforcement actions are to:
- ❖ prevent and stop trade practices that contravene the fair trading sections;
  - ❖ promote compliance and raise community awareness of the requirements of the fair trading sections; and
  - ❖ punish offenders who engage in conduct that amounts to a serious contravention of the fair trading sections

#### **GUIDING PRINCIPLES**

5. The major principles underpinning the enforcement actions are **targeting, proportionality, consistency and transparency.**

##### **Targeting**

- ❖ The Enforcement Agency makes the best use of its resources and sets investigation priorities, having regard to considerations including public concern, identified risks and intelligence, and new and emerging trends.
- ❖ The Enforcement Agency pays particular attention to repeated offenders and contraventions which significantly impair consumer interests.

##### **Proportionality**

- ❖ The Enforcement Agency strives to ensure that any enforcement action taken is proportionate to the extent of consumer detriment and the harm done to the community at large. A serious contravention which has a

greater social or economic impact warrants a stronger enforcement action.

### **Consistency**

- ❖ Consistency in enforcement is crucial in promoting the understanding of the operation of the fair trading sections and in upholding the interests of justice. In making the most appropriate regulatory responses to a situation, the Enforcement Agency strives to ensure consistency in enforcement (for example, the consistency between Enforcement Agencies and among officers in determining the most appropriate enforcement actions to be taken in different cases), having due regard to the circumstances of each case.

### **Transparency**

- ❖ To help traders to comply with the fair trading sections, the Enforcement Agency aims to enhance traders' understanding of the operation of the fair trading sections and the consequences of non-compliance.
- ❖ The Enforcement Agency publishes guidelines to explain the general circumstances where they will take enforcement action.
- ❖ The Enforcement Agency releases information on undertakings, injunctions and prosecutions in relation to the fair trading sections.

## **INVESTIGATION PRIORITIES**

6. To ensure that traders comply with the fair trading sections, and given the wide range of traders in both goods and services that fall within the jurisdiction of the fair trading sections, **C&ED will carry out regular inspections of traders' premises and conduct targeted spot checks.** [Concerns: Such inspections / spot checks should only be carried out where C&ED have reasonable grounds for suspicion of an offence, otherwise this could constitute an excessive intrusion of privacy] Taking into account actual circumstances and intelligence available, it may conduct undercover operations and targeted patrols against selected traders. As for OFCA, it will, as it has been the case all along, closely monitor developments in the telecommunications and broadcasting markets, and where the circumstances warrant, carry out the necessary operations in exercise of the powers conferred on the CA under the amended TDO. Both Enforcement Agencies will examine every consumer **complaint that they receive at their own end.** Suggestions: Add a statement to the effect that where it is clear that a claim is unfounded or unmeritorious then the Agencies should decline to take further investigatory action so as to avoid an unnecessary and unfair burden on traders in responding to enquiries relating to unmeritorious or unfounded claims.

7. In order to promote compliance and for optimal and effective use of enforcement resources, the Enforcement Agency will direct the necessary resources to investigate matters where the greatest overall benefit to consumers, the trade and the community at large can be achieved. The

Enforcement Agency therefore generally accords a higher priority to cases involving one or more of the following conduct :

- ❖ conduct that involves significant public interests or concerns;
- ❖ conduct that is a repeated, intentional, organized or constitutes a 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 indicates a significant, new or emerging market trend or is likely to become widespread in an industry or across industries;
- ❖ conduct against which enforcement actions taken may likely bring about worthwhile educative or deterrent effect.

8. While the Enforcement Agency examines all the complaints received, a reasonable amount of details is generally needed before the Enforcement Agency can investigate a complaint in an in-depth manner. The Enforcement Agency may not be able to take prompt actions or even pursue a complaint if information provided is insufficient. In this regard, complainants will be requested to provide adequate details, over an interview or through other means, such that the Enforcement Agency can make a fair and grounded assessment of whether it can take further action in the light of the investigation priorities stated above.

9. When the Enforcement Agency receives a complaint arising out of a dispute between a consumer and a trader, and the dispute may not have sufficient nexus to contravention of the fair trading sections, the complaint may not be able to be taken forward and the Enforcement Agency may, with the consent of the complainant, refer the complaint to the Consumer Council with a view to conciliation.

10. When the Enforcement Agency decides not to take further action in respect of a complaint, it will notify the complainant in writing.

#### **ENFORCEMENT TOOLS**

11. When the Enforcement Agency proceeds to carry out enforcement action, it will clearly state to the trader against whom the action is to be taken:

- ❖ the conduct or commercial practice prompting the Enforcement Agency to take action; and
- ❖ the fair trading sections that the Enforcement Agency considers have been contravened, are being contravened or are likely to be contravened.

An opportunity will be given to a trader to give a reasonable account for the conduct or commercial practice in question in response to the Enforcement Agency's concern. Depending on the circumstances of the case, the Enforcement Agency may also explain to the trader the operation of the **civil compliance-based mechanism** under the TDO for addressing the conduct of concern, and his rights and obligations thereunder (please refer to paragraph 16 below).

Concerns: This civil compliance based mechanism does not clearly define the extent of the discretion of C&ED to decide whether or not to dispose of cases more informally, such as simple warning letter or accepting a written assurance from trader that the conduct has ceased.

Suggestion: There should be an express right for C&ED to settle the matter informally without recourse to undertakings, injunctions or criminal prosecution. For example, in cases where there may be a minor breach of the Ordinance, but the trader has already ceased the conduct and/or no harm has actually been done to the public, then it would not be an effective use of public resources to invoke formal enforcement, whether by undertaking, injunction or prosecution, as each of these require involvement of the Secretary for Justice. We propose that the C&ED should use their discretion to settle the matter informally with the trader before invoking these 'formal' mechanisms.

#### **Civil Enforcement - Undertakings**

12. As an alternative to initiating prosecution, under section 30L, the Enforcement Agency may, with the consent of the Secretary for Justice, accept an undertaking from a trader whom the Enforcement Agency believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the fair trading sections.

13. An undertaking given by a trader is a commitment by him not to continue, repeat or engage in the conduct or commercial practice of concern. Section 30M provides that an investigation may not be commenced or continued and criminal proceedings in a court of law may not be brought or continued relating to the matter to which an undertaking relates<sup>2</sup>. Section 30L(5) empowers the Enforcement Agency to cause an undertaking to be published. Section 30N provides for matters regarding the withdrawal of acceptance of an undertaking. The following paragraphs set out the circumstances under which an undertaking may be accepted, published and withdrawn.

#### **Acceptance of an undertaking**

14. Acceptance of undertaking is a means to encourage compliance by a trader and to resolve the matter more expeditiously. The Enforcement Agency will consider accepting an undertaking having regard to the circumstances of the case and a non-exhaustive list of factors, including:

- (a) the nature<sup>3</sup> of the conduct of concern and the regulatory impact of the undertaking

<sup>2</sup> Subject to the withdrawal mechanism in paragraphs 22 and 23.

<sup>3</sup> For example, the seriousness of the conduct of concern and the history of the trader.

compared to that of criminal prosecution;

- (b) the extent of cooperation that the trader has given in the investigation, including the provision of complete information about the conduct of concern and any timely and appropriate remedial efforts taken;
- (c) whether the undertaking contains an acknowledgement by the trader that the conduct of concern has occurred;
- (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 to put in place a compliance programme (with details) for his staff, where appropriate;
- (f) whether and what enforcement measures have been taken against other parties with similar degree of culpability in the same incident.

15. The Enforcement Agency and the trader concerned may, depending on the nature and actual circumstances of the case, discuss and explore the option of invoking the civil compliance-based mechanism. The Enforcement Agency will not mandate a trader to give an undertaking. Likewise, a trader cannot compel the Enforcement Agency to accept an undertaking. When a trader proposes to give an undertaking, the Enforcement Agency will assess the merits of the trader's proposal, with due regard to the factors set out at paragraph 14 above. However, this does not imply that an undertaking will necessarily be accepted as an alternative to criminal prosecution in addressing the conduct of concern. Ultimately, whether to accept an undertaking from a trader is subject to the written consent of the Secretary for Justice ("SJ"). Given the different background and nature of every case, the acceptance of an undertaking in the particular circumstances may not be regarded as a precedent for consideration of an undertaking in other circumstances, whether or not the same trader is involved.

16. To enable a trader to determine whether proposing an undertaking is the most appropriate path for him to take, the Enforcement Agency may, in appropriate circumstances, provide relevant information to the trader regarding the rights and obligations under the proposed undertaking, including the situation where the Enforcement Agency may withdraw an undertaking under the circumstances set out at paragraph 22, and the legal position of the undertaking as provided at paragraph 23 below.

### **Elements of an undertaking**

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

18. An undertaking usually includes the following elements (a sample is at the Appendix):

- ❖ an acknowledgment of or admission from a trader that the trader has engaged, is engaging or is likely to engage in a particular conduct which the Enforcement Agency believes that it constitutes an offence (or offences) under the fair trading sections;
- ❖ a positive commitment by the trader to cease the conduct and not to repeat it or to engage in conduct of a substantially similar kind;
- ❖ specific details of the corrective actions that will be taken by the trader to remedy the harm caused by the conduct (if any); and
- ❖ an acknowledgment by the trader that the Enforcement Agency may cause an undertaking to be published in any form, manner and to any extent, including placing it on its departmental website and making public reference to it from time to time, including in media statements.

19. Generally speaking, the validity of an undertaking would not be shorter than two years.

#### **Unacceptable terms in an undertaking**

20. The Enforcement Agency will not accept the following terms in any undertaking:

- ❖ a denial that the conduct contravenes or is likely to contravene the fair trading sections;
- ❖ any terms imposing obligations on the Enforcement Agency, other regulatory authorities and law enforcement agencies, or the government;
- ❖ a specific requirement that the Enforcement Agency will not in future institute proceedings against the contravention;
- ❖ any terms imposing obligations on a third party; and
- ❖ any terms purporting to establish defences that the conduct of concern was inadvertent, any self-serving statement by the trader or any statement for public relations or business promotional purposes.

### **Compliance with an undertaking**

21. 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 the compliance inspections conducted by the Enforcement Agency at his business premises.

### **Withdrawal of acceptance of an undertaking**

22. Section 30N sets out the circumstances under which the Enforcement Agency may withdraw the acceptance of an undertaking. Specifically, the Enforcement Agency may, with the written consent of SJ under section 30N, withdraw the acceptance of an undertaking if they have reasonable grounds for:

- (a) believing that there has been a material change of circumstances<sup>4</sup> since the undertaking was accepted;
- (b) suspecting that the person who gave the undertaking has breached any of its terms;
- (c) suspecting that the information on which the decision to accept the undertaking was based was incomplete, false or misleading in a material particular; or
- (d) suspecting that the acceptance of the undertaking was procured by improper or unlawful conduct.

23. Where the acceptance of an undertaking is withdrawn, the undertaking is no longer binding on the Enforcement Agency and the trader who gave it. The Enforcement Agency may commence or resume an investigation or instigate or continue proceeding in court relating to the matter to which the undertaking relates. 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<sup>5</sup>. 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. Where necessary, the Enforcement Agency may also apply to the court under section 30P(1) for an injunction against the matter to which the undertaking relates (please refer to paragraph 24 below).

<sup>4</sup> Circumstances may include the unfolding of significant information which causes the Enforcement Agency to reconsider the original decision, e.g.:

- (a) The number of consumers affected or the impact of the conduct on an affected individual is more than expected;
- (b) Quantum of financial loss or other detriment suffered by the victims is more than expected.

<sup>5</sup> Please see section 30N(3)(c).

### **Civil Enforcement – Injunctions**

24. Alternatively, the Enforcement Agency may, under section 30P(1)(a), apply to the court for an injunction to order a trader not to continue or repeat or engage in the contravening conduct. The court may grant an injunction if it is satisfied that a trader has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the fair trading sections. The court may also grant an interim injunction under section 30Q pending the determination of the application for an injunction if the court considers it desirable to do so. The grant of an injunction or interim injunction by the court will not prejudice the Enforcement Agency's continued investigation and enforcement actions that may be brought against the conduct of concern.

25. In considering whether to apply to the court for an injunction, the Enforcement Agency may take into account the following non-exhaustive list of factors:

- ❖ whether the conduct of concern is one which the Enforcement Agency considers as necessary to accord a high priority for investigation and enforcement such as the conduct mentioned in paragraph 7 above;
- ❖ whether the trader is continuing or repeating, or will likely continue or repeat, the conduct of concern, and there is a need to require the trader to take prompt action not to continue or repeat the conduct of concern.

26. Where the Enforcement Agency considers that the trader who gave an undertaking has breached any of its terms, it may also apply for an injunction under section 30P(1)(b).

### **Criminal proceedings**

27. The Enforcement Agency is more likely to institute criminal proceedings against a trader rather than to seek an undertaking in cases where there is a serious contravention of the fair trading sections, in the light of the following non-exhaustive list of 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 cause harassment, anxiety or distress to victims;
- ❖ any attempt by the trader to conceal his identity, whether directly or indirectly, such that the Enforcement Agency 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 the Enforcement Agency in taking lawful actions during investigation.

**Commissioner of Customs and Excise**

**Communications Authority**

**December 2012**

## APPENDIX

( Sample Undertaking )

Trade Descriptions Ordinance  
Undertaking to the Customs and Excise Department/Office of the Communications  
Authority given for the  
purposes of Section 30L

by

[Full name of Trader]  
Business Registration No./CR No./HKID No./Licence Type & No.

### Company/Person giving this undertaking

- (1) This undertaking is given to the Customs and Excise Department (C&ED)/Office of the Communications Authority (OFCA) by [full name of trader (including BR No./CR No./HKID No./Licence Type & No.)] [company address] for the purposes of Section 30L of the Trade Descriptions Ordinance (the Ordinance).

### Background

- (2) [Description of company's business in general terms].
- (3) [Description of the conduct that the C&ED/OFCA investigated].
- (4) [Brief details of C&ED/OFCA's inquiries].
- (5) [Trader's name] [acknowledges OR admits] that the trader has engaged, OR was engaging, OR was likely to engage in the conduct described at paragraphs 3 & 4 above.
- (6) [Explanation of why the C&ED/OFCA believes that the conduct contravenes or is likely to contravene the Ordinance].
- (7) [a statement by the company/proprietor/partner/principle officer, etc. that the conduct has stopped and any action already taken by the company to redress the effects of the conduct] [where appropriate].

### Commencement of Undertaking

- (8) This undertaking comes into effect when:
  - (i) the undertaking is executed by [company name]; and
  - (ii) the [C&ED/OFCA] accepts the undertaking so executed.
- (9) Upon the commencement of this undertaking, [trader's name] undertakes to assume the obligations set out in paragraphs [insert numbers] below.

**Undertakings**

- (10) [Trader’s name] undertakes for the purposes of Section 30L of the Ordinance:
- (a) that for a period of [insert number] years [it / he or she] will ensure that [it / he or she] will not [in the course of trade or business OR in a commercial practice]
    - (i) .....
    - (ii) .....
  - (b) that [it / he or she] will:
    - (i) .....
    - (ii) .....
  - (c) will put in place a compliance programme (enclosed) for its staff. *[Comment: This is too broad an obligation for such an undertaking and is effectively an admission that the trader has not complied with the Ordinance.]*
  - (d) will give any other assistance, information or cooperation to the [C&ED/OFCA] for the purpose of performance of the compliance checks on [trader’s name]. *[Comment: Compliance checks should only be permitted if there is reasonable cause to suspect the trader is not complying with the undertaking.]*

**Acknowledgment**

- (11) [Trader’s name] acknowledges that:
- (a) the [C&ED/OFCA] may cause this undertaking to be published in any form and manner, and to any extent, including by publishing it on the [C&ED/OFCA]’s public register of Section 30L Undertakings on its website;
  - (b) the [C&ED/OFCA] may, from time to time, make public reference to the undertaking including in news media statements and in [C&ED/OFCA] publications;
  - (c) this undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct of concern; and
  - (d) According to section 30N(3) of the Ordinance, when the acceptance of this undertaking is withdrawn, a statement of any fact contained in the undertaking may be admitted in evidence in any proceedings in a court relating to the matter to which the undertaking relates, and on its admission, is conclusive evidence in those proceedings of the fact stated in the undertaking.

**Executed by**

[Full names of trader and its authorized staff, and HKID No.] or [Full names of trader and its proprietor/partner, etc. and HKID No.]

....

Director/Secretary/Authorized Staff/Proprietor/Partner

This.....day of.....201

OR

The Common Seal of [Full company name and BR No.] was affixed in the presence of:

( office position of the witness )

.....

Director/Secretary/Proprietor/Partner, etc.

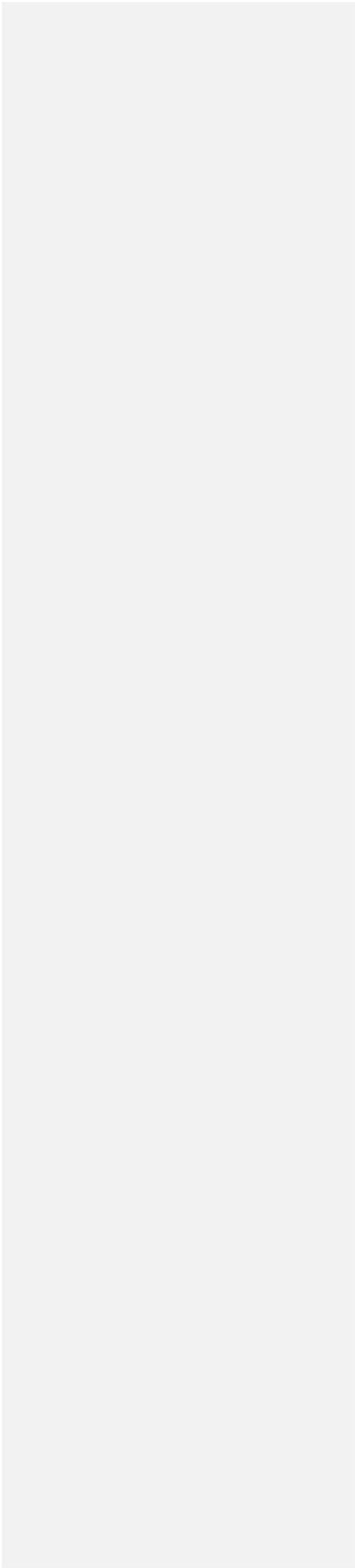
This.....day of.....201X

**ACCEPTED BY THE [CUSTOMS AND EXCISE DEPARTMENT / OFFICE OF THE COMMUNICATIONS AUTHORITY] PURSUANT TO SECTION 30L OF THE TRADE DESCRIPTIONS ORDINANCE WITH THE WRITTEN CONSENT OF THE SECRETARY FOR JUSTICE**

.....

[FORMATION HEAD]

This.....day of.....201



# **PART B**

**Draft**

**General Guidelines  
on the Fair Trading Sections of  
the Trade Descriptions Ordinance**

**Issued by  
The Commissioner of Customs and Excise  
and  
The Communications Authority**

## **Acknowledgement**

In preparing these guidelines, references have been made to the following materials:

### **Australia**

- 1 *The Australian Consumer Law - A guide to provisions*
- 2 *Avoiding unfair business practices – A guide for business and legal practitioners*
- 3 *Compliance and Enforcement Policy*
- 4 *Section 87B of the Trade Practices Act – Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission*
- 5 *Report on Personal Liability for Corporate Fault*

### **European Commission**

- 6 *The Unfair Commercial Practices Directive – New laws to stop unfair behaviour towards consumers*
- 7 *EC Guidance*
- 8 *Commission Staff Working Document – Guidance on the Implementation/Application of directive 2005/29/EC on Unfair Commercial Practices*

### **United Kingdom**

- 9 *The Guidance on the Consumer Protection from Unfair Trading Regulations 2008*
- 10 *The Pricing Practices Guide – Guidance for traders on good practice in giving information about prices*

## **Table of Contents**

### **INTRODUCTION**

- 1. FAIR TRADING SECTIONS OF THE TRADE DESCRIPTIONS ORDINANCE – SCOPE OF APPLICATION**
- 2. TRADE DESCRIPTIONS OF GOODS AND SERVICES**
- 3. MISLEADING OMISSIONS**
- 4. AGGRESSIVE COMMERCIAL PRACTICES**
- 5. BAIT ADVERTISING**
- 6. BAIT AND SWITCH**
- 7. WRONGLY ACCEPTING PAYMENT**
- 8. LIABILITY OF PARTIES INVOLVED**
- 9. SANCTIONS AND POWERS AVAILABLE TO THE COMMISSIONER AND THE COMMUNICATIONS AUTHORITY**
- 10. CONSUMER REDRESS**

## **INTRODUCTION**

I. To enhance protection for consumers, a set of legislative amendments to the Trade Descriptions Ordinance (Cap. 362) (TDO) came into effect on [date]. New criminal offences have been created and a new enforcement mechanism has been introduced to deter specified unfair trade practices which jeopardize consumer rights.

II. The Customs and Excise Department (C&ED) is the principal agency responsible for enforcing the TDO. Concurrent jurisdiction is conferred on the Communications Authority (CA), with the Office of the Communications Authority (OFCA) as its executive arm, to enforce the fair trading sections in the TDO in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) (TO) and the Broadcasting Ordinance (Cap. 562) (BO) that are directly connected with the provision of a telecommunications or broadcasting service under the relevant Ordinances.

## **AIM OF THE GUIDELINES**

III. This set of General Guidelines (the Guidelines) is issued by the Commissioner of Customs and Excise (the Commissioner) in accordance with section 16BA of the TDO (hereinafter, all sections mentioned in this set of Guidelines refer to the sections in the TDO unless otherwise stated), as well as by the Commissioner and the CA jointly in accordance with section 16H to the extent that the Guidelines are applicable to the commercial practices of licensees under TO and BO that are directly connected with the provision of a telecommunications or broadcasting service under TO or BO. The aim of the Guidelines is to set out the manner in which officers authorized by the Commissioner and the CA (the "Authorized Officers") may, where applicable, exercise their powers in respect of sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H and 13I (collectively known as "fair trading sections") and to provide guidance as to the operation of the provisions of the TDO. The Guidelines may also serve as guidance for traders in complying with the fair trading sections of the TDO and for consumers in understanding how they are protected.

IV. 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 each and every situation or practice which may (or may not) amount to a contravention. It is impossible for the Commissioner and the CA 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 the Commissioner or the CA as the case may be will not be concerned about that matter, issue or conduct. The Guidelines are not a substitute for, or a definitive interpretation of, the fair trading sections. Ultimately, only a court of law can decide whether or not a conduct is in contravention of the fair trading sections, taking into account the evidence of each case.

V. The Guidelines themselves are neither legally binding nor are they subsidiary legislation per se. A person does not 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 that is an issue or a conduct in any legal proceedings, the Guidelines are 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<sup>1</sup>.

VI. 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).

<sup>1</sup> Sections 16BA(8) and 16H(2).

## 1. FAIR TRADING SECTIONS OF THE TRADE DESCRIPTIONS

### ORDINANCE – SCOPE OF APPLICATION

1.1 Generally speaking, the fair trading sections apply to commercial practices directly connected with the sale or supply or promotion 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)<sup>2</sup>. In addition, commercial practices engaged by a person acting in the capacity of a professional person listed in Schedule 3 to the TDO are not regulated by the fair trading sections, except for the offence of false trade description of goods (section 7).

#### What is a “commercial practice”?

1.2 The term “commercial practice” is defined under section 2 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<sup>3</sup> 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”*.

*Comment: Please clarify whether ‘give-away’ promotion samples / redemption products would fall within this definition of sale or supply of a product?*

1.3 Commercial practice, as defined, may include traders’ activities like promotion sales, offers of discounts, price reduction and advertising. It is important to note that a commercial practice may occur not only before or during a transaction (if any) of a product (including goods and services), for example, at the marketing, sale, supply and payment stages; it may also occur after a consumer transaction has been completed (such as provision of warranties, maintenance and after-sale services, and contract cancellation mechanisms).

#### Who is a consumer and who is a trader?

1.4 Section 2 defines “consumer” as *“an individual who, in relation to a commercial practice, is acting, or purporting to act, primarily for purposes that are unrelated to the person’s trade or business”*. For the purpose of the fair trading sections, a consumer is a natural person and not a legal person (e.g. a company). In

---

<sup>2</sup> Schedule 4 to the TDO

<sup>3</sup> Product means any goods or services but does not include any goods or services covered by Schedule 4 to the TDO.

addition, whether or not an individual is a consumer will depend on whether or not the relevant activity is carried out primarily for a purpose that is unrelated to the person's trade or business.

1.5 Section 2 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 can be a natural person, a company or other forms of a body corporate. It should be noted that a *reference* to a trader includes any person acting in the name of, or on behalf of, a trader. The assessment of whether or not an entity is acting as a trader in relation to a commercial practice will depend on whether or not the relevant activity is carried out **for purposes relating to its 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 regarded as a trader for the purposes of the fair trading sections. In contrast, a person selling certain goods on the internet occasionally to dispose of unwanted personal items would unlikely be held to be acting for purposes relating to his trade or business.

Concern: It is still not clear in what circumstances the individual sales person may be prosecuted versus the "corporate trader". The HKRMA is very concerned about the risks to frontline staff who may inadvertently find themselves facing criminal sanctions. Likewise, there should be some protection for reputable companies who have given training and guidance to their staff, but then still find their staff act improperly or outside of their scope.

Suggestion: There should be a cross-reference to section 8 (Liability of Parties Involved). Please see our detailed suggestions in Section 8.

#### **Do the fair trading sections apply to conduct between consumers?**

1.6 The fair trading sections do not apply to "consumer-to-consumer" conduct. For example, a person who sells his 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 The fair trading sections of section 13E (on misleading omissions), section 13F (on aggressive commercial practices), section 13G (on bait advertising), section 13H (on bait and switch) and section 13I (on wrongly accepting payment) apply to "commercial practices". Since "commercial practices" include practices that are "*directly connected with the promotion of a product to consumers or sale or supply of a product to or from consumers*", it also covers arrangements that are commonly known as "buy-back" and those under which traders acquire products from consumers. To quote a few examples, a consumer may trade-in his existing car to the car dealer when he purchases a new one; gold and jewelry retailers may purchase gold articles from consumers for resale. Other traders including antique shops, retailers of second-hand goods, handbag and luxury goods shops may also purchase goods from consumers.

### **Who is an exempt person?**

- 1.8 The fair trading sections (except section 7 on false trade descriptions of goods) do not apply to the list of persons at Schedule 3 to the TDO when these persons act in the capacities in which they are registered under the respective Ordinances as set out in the Schedule. The commercial practices of these exempt persons are regulated by the professional bodies established under the respective Ordinances.

## 2. TRADE DESCRIPTIONS OF GOODS AND SERVICES

**Don't give any false or misleading product information to consumers. If traders are uncertain of the truthfulness of any product information, they should verify it and should not provide it to the consumers impetuously.**

2.1 Section 7 provides that it is an offence for any person, in the course of his trade or business, to apply a false trade description to any goods; or supply or offer to supply any goods to which a false trade description is applied. It is also an offence for any person to have in his possession any goods to which a false trade description is applied for any purpose of trade or manufacture. This section applies to both business-to-consumer and business-to-business conduct. Persons listed in Schedule 3 are not exempted.

2.2 Section 7A provides that it is an offence for a trader to apply a false trade description to a service supplied or offered to be supplied to a consumer; or supply or offer to supply to a consumer a service to which a false trade description is applied.

2.3 Section 2 defines "trade description" to mean an indication, direct or indirect, and by whatever means given, with respect to goods or services or any part of the goods or services.

2.4 A trade description includes anything that tell of the goods or services or any part of them, in whatever forms (e.g. statements, advertisements or display notices, etc.), and communicated through whatever means (e.g. through any form of the media, paper, visual, verbal, electronic means and even by conduct). In short, a trade description in relation to both goods and services could be by whatever means and in whatever forms.

2.5 Section 2 defines a "false trade description" as a trade description which is false to a material degree; or which, though not false, is misleading.

2.6 To amount to a false trade description, the falsity of the trade descriptions has to be to a material degree. Trivial errors or discrepancies in trade descriptions would not constitute an offence<sup>4</sup>. What constitutes a material degree will vary with the facts. For example, in an advertisement a trader claims that a smartphone has a 5.55 inch display whereas in fact the display measures only 5.54 inch. The difference of 0.01 inch would unlikely be taken as false to a material degree.

**Concern:** We note that this paragraph states that trivial errors/discrepancies in product description would not constitute an offence. This should also apply to minor errors in pricing.

**Suggestion:** The Guidelines to clarify inadvertent minor pricing mistakes or discrepancies will not be regarded as false description.

### Examples:

(i) There was a typographical or other inadvertent error in the pricing of a product in a newspaper

advertisement by the trader. The labelling of the product in the store however showed the correct pricing. As soon as the trader became aware of the error in the advertisement it recalled the advertisement (where possible for on-going or repeat advertisement).

(ii) There was typographical or other inadvertent error in the pricing of a product in the price tag of certain quantities of that product in a store(s) and the error in pricing was rectified forthwith by the trader with the correct selling price of that product shown in the relevant store(s) or otherwise before it is purchased by any customer.

<sup>4</sup> A trade description which indicates the fineness of gold is an exception. Under section 3, it is a false trade description if the fineness is false to any extent or degree, except by understating the fineness.

2.7 A trade description is also a false trade description if it, though not false, is misleading. A member of the public entering a shop and seeing a bottle marked “mineral water” would reasonably expect it to contain something more than mere tap water, and that a prospective consumer would understand that the product so labeled is, in terms of composition, richer than tap water in mineral content. Therefore, the trade description “mineral water” when applied to a bottled water which is no richer than tap water in mineral content is misleading in that it is likely to be taken as an indication, false to a material degree, of the composition of the contents of the bottle<sup>5</sup>.

2.8 The aspects of goods or services to which a trade description indicates can vary from case to case. The following are some examples of trade descriptions applied to goods and services, where the offence of false trade descriptions may or may not have been committed.

#### **Availability of a product**

2.9 Whether certain products are available is an aspect the indication of which is a trade description. Inaccurate information relating to the availability of a product for supply may be an offence.

##### Example

*A statement that a product is in short supply and that the trader is the only one having it in stock where in fact there are still plenty available in the market may constitute an offence of false trade description.*

##### Example

*A pay TV service provider promotes a 24-month sports channel package by claiming that it owns the exclusive right to broadcast live matches of the popular ABC football league for the 24-month duration. However, the pay TV service provider actually only holds the broadcasting right for one year and the ABC football league has not yet invited any interested parties to bid for the broadcasting right for the coming year. The pay TV service provider may commit an offence of applying a false trade description to a service.*

#### **Compliance with a standard specified or recognized by any person**

<sup>5</sup> *The Queen v. Wong Yan-chuen, CACC 523/1987*

2.10 Accreditation is common for businesses as an accreditation generally connotes good quality and services. A false claim of accreditation may constitute the offence of false trade description.

Example

*A shop displays at a noticeable location the logo of the Quality Tourism Service (QTS) Scheme administered by the Hong Kong Tourism Board whereas in fact it has never been QTS-accredited. The display of the QTS logo by the shop may constitute misrepresentations that the shop has complied with the accreditation requirements under QTS.*

Example

*A tour operator advertises its one-day Mainland tour targeted at consumers in Hong Kong. The tour sets off across the border in the Mainland instead of in Hong Kong. The operator advertises the tour as one protected by the Travel Industry Compensation Fund. In order to be eligible for the protection, the tour must be an outbound travel service satisfying two or more of the following:*

- (i) carriage (by land, sea or air transport) from Hong Kong to places outside Hong Kong;*
- (ii) accommodation outside Hong Kong; and*
- (iii) arrangement for an activity outside Hong Kong.*

*As the tour sets off in the Mainland and involves no accommodation, the participating tourists are not protected by the Fund. The tour operator may be liable for applying a false trade description.*

**A certain person has acquired the product, or has agreed to acquire it**

2.11 In order to attract the attention of consumers and to promote the brand of product offered for supply, it is common for traders to make reference that a celebrity has used the product. The reference should be valid and genuine.

Example

*In the promotion of a slimming product, a beauty consultant tells a consumer that the same product has been acquired by a celebrity for her personal use with good results. If the celebrity has never acquired or agreed to acquire the product, the beauty consultant may be held to have committed the offence of applying a false trade description.*

[Suggestion : please give further explanation and examples to show what kind of celebrity endorsement would be considered a mere advertising puff or brand building exercise which would not contravene Section 7 of the Ordinance; and the kind which may constitute a false description offence.](#)

### **Who supplies the service?**

2.12 In some situations, a key factor that consumers will take into account in deciding whether to patronize or not is who the person providing the service is.

#### Example

*An education centre advertises its mathematics tutorial classes with the pseudonym “King of Maths Mr Smart Ng” as the tutor. To the disappointment of the students, Mr Smart Ng never showed up in these classes and only the teaching materials used were prepared by him. The education centre may be liable for giving false or misleading information as to the provider of the service.*

### **After-sale service**

2.13 Traders may sell goods with after-sale service, for example, maintenance or warranty services. Traders should ensure that they can provide the after-sale service as claimed.

#### Example

*A local computer trader advertised that it provided life-time global maintenance services for computer parts they sold. It even specified maintenance agents outside Hong Kong, including Shanghai. A Mainland customer approached the specified maintenance agent in Shanghai for repairing a computer motherboard which he bought in Hong Kong 3 years ago, and found out that the agent had never been appointed as the maintenance agent by the local trader. The local trader may be liable for making a false statement in relation to the availability of maintenance services.*

### **Price, how price is calculated, the existence of any price advantage or discount**

2.14 Price is one of the most important pieces of information that can influence the purchasing decision of the consumer. The ability to make an informed choice will be hampered if any false or misleading information related to price is communicated to the consumer.

2.15 If traders choose to make price comparisons, they should be able to justify them, and to show that any claims so made are accurate and valid, in particular, that any price advantage claimed is real.

### Example

In a newspaper advertisement, a telecommunications operator claims that its newly promoted service plan has the lowest price tag in Hong Kong by comparing the price of its plan with those offered by its competitors. However, the comparison is not made on a like-for-like basis in that the telecommunications operator has compared the service plans of the competitors which have material difference in service features (such as different contract durations), and such differences are not made known in the advertisement. The price comparison is likely considered to be a false trade description of service.

2.16 Terms in relation to prices (like “sale” or “reduced price”) should be used with caution so as to avoid misleading consumers. Traders who use such terms should make sure that the special offer / price reduction is genuine. If the “original price” is quoted together with the “reduced price”, the “original price” may (i) refer to the recommended retail price suggested by the supplier and/or manufacturer and/or producer from time to time (as per paragraph 2.17) which need not have been actually applied to the product concerned before, or (ii) for products which do not have a recommended retail price, or which are ‘private label’ products (i.e. developed by the trader), original price shall be a price which has been applied to the product concerned before. A reasonableness test (with full regard to the nature of the product in question (e.g. is it a perishable or is it a product the value of which dissipates over time quickly)) should be applied to determining whether the period is long enough rendering the indication of a price reduction a genuine one.

Concern: The HKRMA has serious concerns regarding this ‘seven-consecutive days’ best practice. Different types of products have differing promotion practices and we believe the ‘seven-day-rule’ is too rigid. For example, perishable products are often discounted several times within the same day. In addition, many retailers ‘price match’ against their competitors (i.e. they reduce price in response to competition in the market) which makes the seven-day-rule impractical.

Suggestion: Amend paragraph 2.16 as marked above and provide some practical examples as per below.

### Example:

(i) The original price (as suggested by the supplier and/or manufacturer at the relevant time) of a certain branded skincare product is HK\$150 each. The trader can quote a price comparison for example showing HK\$150 or ~~HK\$150~~ (struck through), alongside the reduced price of say HK\$130 each.

Additionally if there is a multi-buy promotion, the trader could quote for example (a) buy 2 get 1 free (買2送1) at HK\$100 each; or (b) buy 2 get 1 free (買2送1); or (c) buy any 2 selected items with a red label for additional 33% off (任何2件特貨品照價六六折選

(ii) A trader sells its own private label brand of household detergent. The trader has previously applied a price of \$24 to the detergent. Now it is offering it at the reduced price of \$22. The trader can quote a price comparison for example showing HK\$24 or ~~HK\$24~~ (struck through),

: must be a price which has been applied to the same product concerned before. A price should not be regarded as the “original price” if it has only been applied to the product for a short period.

: As a best practice, it is advised that the previous higher price should be quoted only if it has been applied to the same goods or services for at least seven consecutive days in the same shop location immediately preceding the day on which the lower price is introduced.

: the

alongside the reduced price of HK\$22.

2.17

Concern: It is not clear what is meant by “the same reasonableness test should be applied” and a ‘defensible basis’ for comparison.

Suggestion: Section 2.17 be replaced as follows:

2.17 There may be recommended retail prices (RRPs) for certain products. In these cases, traders may quote the RRP, as suggested by the supplier and/or manufacturer and/or producer from time to time, and the actual selling prices at the same time as a basis for comparison. The trader should not use a RRP, but a price which has been applied to the product concerned before, as a comparison in respect of private label products (i.e. developed by the trader).

刪除: -

刪除: There may be recommended retail prices (RRPs) for certain products. In these cases, if traders quote the RRP and the actual selling prices at the same time and give an impression that there are “discounts” or “savings” on the products, the same reasonableness test should be applied as to whether the RRP is a defensible basis for the price comparison.

刪除: Could C&ED please give an example?

2.18 Traders should avoid making “lowest price” claims (a claim that they are offering a price lower than their competitors) if the claims are not backed up by evidence. A “price-promise campaign” under which a consumer will be rewarded with twice the price difference with a competitor’s lower price if reported could still amount to a misleading trade description as to the existence of a price advantage if the campaign gives a misleading indication that the prices at which products are being offered are the lowest. If the offer is limited to a price matching promise, traders should make it clear.

2.19 General notices of “half-price sale for all items” should be avoided if in fact the sale is not applicable to certain products in the shop. As a best practice, “up to 50% off” should also be avoided if the maximum reduction quoted applies to a very small range of products for sale for the whole period during which the notices are valid. If the maximum reduction applies to less than 10% of the range of products for sale, it is better to state clearly that only some selected products are up to 50% off.

2.20 The price advertised should tally with the actual selling price at the point of sale or checkout. Any additional charge that is directly connected with the supply of the products should be clearly disclosed to the consumer<sup>6</sup>. Hidden additional charge might constitute an offence of misleading omission.

### **Performance Claims**

2.21 Claims should not be false or misleading to a material degree. False or misleading claims on the effectiveness of a product without sufficient supporting (mainly scientific) evidence may constitute an offence of false trade descriptions.

#### Example

*Shampoos that contain synthetic materials, such as preservatives, should not be described as “100% natural”. A claim that a shampoo can “repair” hair damage should not be used if laboratory test merely proves that the product can only slow down hair damages caused by pollutants.*

Concerns: The Guidelines imply the trader is responsible for checking all claims and ensuring sufficient supporting evidence including laboratory tests. This would be too onerous a burden on retailers and it should be the manufacturer and/or producer and/or supplier, not the retailer, who is responsible for performance claims in respect of branded products. This is effectively imposing the role of “police” on the retailers to review and investigate all claims on products / packaging, which is totally unrealistic.

Suggestion: Clarification is required in the Guidelines that retailers would not be liable if they “had no reason to suspect and could not with reasonable diligence have ascertained” that the product did not conform to the description (as per the due diligence defence under section 26.3 of the TDO). Or C&ED may consider similar “supplier’s warranty” defence under section 71 of the Public Health and Municipal Services Ordinance, Cap. 132 should be made available. A further example to support this could be given – e.g. that if it is a reputable supplier and/or producer and/or manufacturer in the market or if supporting document(s) (including but without limitation to certificate(s) or warranty is given by the supplier or manufacturer or producer, then it would be reasonable for the trader to rely on the QA verification process of the suppliers or manufacturer or producer or warranty by supplier or manufacturer or producer, without requiring any further due diligence by the trader.

2.22 Traders, especially those in the health and beauty sectors, often use “before” and “after” photographs of subjects to provide a visual representation of the effectiveness of their products. Visual promotional gimmick is commonly used to demonstrate the efficacy of slimming products, diet regimes, cosmetic creams and products and hair treatments. Photographs so used, even with a statement that they have been re-touched, should not give a misleading indication as to the efficacy of the products and traders need to ensure that they have relevant evidence to substantiate the impression created by the images. Advertisers acting for traders are also encouraged to retain appropriate materials which are able to demonstrate what re-touching has been carried out in the event of being questioned.

---

<sup>6</sup> Please refer to paragraphs 3.32 and 3.33 on the Chapter of Misleading Omissions.

2.23 The TDO prohibits false or misleading claims in advertisements. For example, an advertisement for facial injection states that “XYZ was formally registered in Hong Kong in 2010”. From the context of the advertisement, the statement may mislead consumers into believing that it is a medicine registered with the Department of Health. However, the advertised product does not fall within the definition of medicine under the Pharmacy and Poisons Ordinance and cannot be registered as a medicine in Hong Kong. The statement would be misleading to a material degree.

#### **Place of manufacture / Country of origin claim**

2.24 Under section 2(2)(a)(i), goods shall be deemed to be manufactured in a place in which they last underwent a treatment or process which changed permanently and substantially the shape, nature, form or utility of the basic materials used in their manufacture.

2.25 When traders state the place of manufacture or country of origin for their goods, they should ensure that the claim complies with section 2(2)(a)(i).

#### Example

*A pair of trousers which were cut and sewn in the United States of America (USA) with fabric manufactured in China will likely be taken as manufactured in the USA. A TV set assembled in China with parts manufactured in Japan and Korea will likely be taken as manufactured in China.*

2.26 Under section 2(2)(a)(ii), goods shall be deemed to have been produced in the place in which they were wholly grown or mined

#### Example

*There is a reasonable expectation that the geographic denomination of “陽澄湖大閘 ” would refer to Chinese mitten crabs bred and harvested in Yangcheng Lake (陽澄湖). US strawberries should refer to those wholly grown in the USA.*

*On the other hand, “Yangzhou” (揚州) in Yangzhou fried rice, a popular Chinese-style dish served in many restaurants merely refers to a particular cooking style originated in Yangzhou and would unlikely be taken as the place of manufacture.*

Concern: We find these examples confusing and may not assist trader to be able to draw distinction between the ‘cooking style’ of Yangzhou fried rice and the commonly use geographic denomination of “陽澄湖大 ” (Yangcheng Lake crab).

Suggestion: delete the above two examples of Yancheng Lake crab and Yanzhou fried rice. We suggest the following examples as alternatives.

#### Examples:

(i) “陽澄湖大閘蟹” would refer to Chinese mitten crabs bred and harvested in Yangcheng Lake (陽澄湖) instead of Chinese mitten crabs bred and harvested in other provinces/regions like Tai Lake (太湖) as there is a reasonable expectation to the geographic denomination of the bred

which is a material factor determining the product price.

(ii) On the other hand, “Fuji apple”, a popular kind of apple merely refers to a particular apple variety, instead of place in which they were wholly grown. Therefore, the traders can apply the description of “Fuji apple” from Japan to the variety grown in Japan as well as “Fuji apple” from Shandong to the variety grown in Shandong 山東, China to indicate its country of origin.

(iii) “麥西哥包”, a common local bun, is not made in Mexico, nor does it refer to a particular cooking style. Similar names should not be caught under the amended Ordinance.

2.27 If traders have doubts on the origin claims of the goods they supply, they are advised to seek clarifications from their suppliers, including obtaining copies of certificates of origin to support the claims. If traders are not certain of the place of manufacture of the goods they supply, it will be legitimate to tell consumers that they do not know.

Concern: Similar to the concern regarding performance claims, it is too onerous an obligation for retailers to check and verify all origin claims made by the suppliers or manufacturers of the product.

Suggestion: Similar to para. 2.21 above we suggest that clarification is required in the Guidelines that retailers would not be liable if they “had no reason to suspect and could not with reasonable diligence have ascertained” that the product did not conform to the description. It is too onerous an obligation for retailers to check and verify all origin claims and to determine which place the product last underwent treatment / processing.

### **Puffery**

2.28 Some advertisements may include such puffery claims as “the best” and “the most popular”. Common advertising practice of making exaggerated statements are legitimate as these statements are not meant to be taken literally and the average consumer would unlikely take literally the meaning of these obvious exaggerations or puffery, for example, “the best car in the world”, or “it energizes you instantly”.

2.29 Nevertheless, these claims should be used with caution when they are used with quantifiable standards or reference, for example, “the best-selling book in 2011”. Traders should be prepared to give sufficient evidence to show that the book was sold in a quantity in 2011 which has out-numbered the sales of the others.

### 3. MISLEADING OMISSIONS

**Traders run the risk of misleading omissions if they fail to give consumers sufficient information about the product that is necessary for them to make an informed transactional decision.**

3.1 Traders have the primary responsibility of providing accurate, truthful and pertinent information in respect of their products to consumers in a clear, intelligible and timely manner to enable consumers to make informed transactional decisions.

3.2 Section 13E(1) provides that a trader who engages in relation to a consumer in a commercial practice that is a misleading omission commits an offence. Section 13E(2) and (3) further provide that a commercial practice is a misleading omission if, in its factual context, taking into account the factors stated in paragraph 3.3 below:

- (a) it omits or hides material information;
- (b) it provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
- (c) it fails to identify its commercial intent unless this is already apparent from the context,

and as a result, it causes or is likely to cause, the average consumer to make a transactional decision that he would not have made otherwise.

3.3 The factors to be considered as referred in paragraph 3.2 above are:

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice including limitations of space or time; and
- (c) if the medium used to communicate the commercial practices imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

3.4 Thus, if it is impracticable for traders to provide all the necessary information to consumers due to limitations of the communication medium available, other means of communication medium should be used by the traders to make the information available to consumers to enable them to make informed transactional decisions. For example, traders promoting their products by short message service (SMS) may find it difficult to include in the message all the necessary information due to the constraints on the

message length<sup>7</sup>. Traders are less likely to commit a misleading omission if they make it clear where omitted information can be found. For instance, traders may provide their website address or a hotline telephone number in the SMS and invite consumers to browse it for more detailed information on the products they are promoting.

3.5 For a commercial practice described in paragraph 3.2 (a) to (c) to amount to a misleading omission, it has to “cause or likely to cause the average consumer to make a transactional decision that he would not have made otherwise”. Similar requirement is also applicable to the offence of aggressive commercial practice. Hence, to understand the operation of the offence of misleading omission (and also the offence of aggressive commercial practices which is dealt with in Chapter 4), it is necessary to understand the concepts of “average consumer” and “transactional decision”.

#### **Average consumer**

3.6 The concept of average consumer does not refer to any actual consumer and there is no requirement to show evidence of any actual consumer being affected by an unfair commercial practice. It is an objective reference which determines whether a commercial practice breaches the offences of misleading omissions and aggressive commercial practices. It is the notional average consumer whom the commercial practice reaches or to whom it is directed that is relevant. Section 13D provides that *“In determining the effect on the average consumer of a commercial practice that reaches or is directed to a consumer or consumers, account must be taken of the material characteristics of such an average consumer, including that the consumer is reasonably well informed and reasonably observant and circumspect”*. The term “average” does not mean a statistically average consumer; and the average consumer is not ill-informed, ignorant or reckless.

**Concerns:** The concept of “average consumer” is confusing and puts heavy burden on the traders as it is difficult for a trader to know how different consumers will react to advertising claims or what information is material to one may not be to another. Strict liability offences should only be committed if some harm has been done to consumers, as opposed to situations where there is no loss or damage suffered in the case of a hypothetical consumer.

**Suggestion:** The Guidelines should make clear that the general contract law principle of ‘caveat emptor’ still applies (i.e. the buyer beware). The Government itself acknowledged in the original consultation on the Bill that consumers have a responsibility to seek information as necessary before they purchase, and so the Guidelines should not attribute all the responsibility on the trader to anticipate what information the consumer wants or needs.

3.7 On the other hand, since a commercial practice may have different impact on consumers depending on the type or group of consumers the practice reaches or directed to, section 13D(3)(a) and (b) sets out the circumstances in which the “average consumer” refers to one that is in a particular smaller group instead of the population as a whole. It is the characteristics of the average

member of these particular groups that are relevant. The above-mentioned circumstances are (a) *where the commercial practice is directed to a particular group of consumers (paragraph 3.8 refers); or (b) where a clearly identifiable group of consumers is particularly vulnerable to the*

---

<sup>7</sup> It is a form of space restriction - the length of a SMS message is restricted to 160 English characters, or 70 Chinese characters, including punctuation and space.

*commercial practice or the underlying product because of mental or physical infirmity, age or credulity in a way which the trader could reasonable be expected to foresee (paragraphs 3.9-3.12 refer). This is intended to help a court of law decide if a practice is prohibited due to the impact or potential impact it has on a particular group of consumers, while the practices might not change the decision of consumers at large.*

### **Average member of a targeted group of consumers**

3.8 In determining the effect on the average consumer of a commercial practice that is directed to a particular group of consumers, it is the material characteristics of the average consumer of that particular group that is relevant. Indications of what group of consumers a commercial practice is directed to may be found, for example, in the way advertising is placed, the language of a commercial communication, the nature of the product and the context.

#### Example

*For a Japanese language life-style magazine, the main characteristics of an average consumer of the target group may likely be someone who can read Japanese. On the other hand, the target group of a Japanese magazine for children, and hence the characteristics of an average consumer of that group, can be very different.*

#### Example

*Certain retail shops registered with the Tourist Industries Council (TIC) predominantly serve Mainland tourists. The characteristics of Mainland tourists, such as their knowledge in marketing practices commonly adopted in Hong Kong, may be different from those of the Hong Kong residents. If a commercial practice is held to be directed to Mainland tourists as a particular group, in the determination of whether the practice amounts to a misleading omission or an aggressive commercial practice, it is the characteristics of the average member of this group which should be taken as the benchmark for assessing the practice's impact.*

#### Example

*Different television programmes aim at reaching different target audiences and the programmes are broadcast in different timeslots to maximize their impacts on the target audiences. For example, television advertisements on toys broadcast during children's programmes may likely be considered as being directed to children (and/or their parents).*

### Example

*Consumers who need to use corrective lens might be considered as a target group in relation to advertising claims about corrective lens with built-in sun-glasses function.*

### **Average member of a vulnerable group of consumers**

3.9 Where a clearly identifiable group of consumers is particularly vulnerable to the practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, then it is the average member of that group that is the relevant average consumer. It is not necessary that the trader actually foresees the effect (or likely effect) on the vulnerable group; it is sufficient if he could reasonably be expected to do so.

3.10 Infirmity (mental or physical) covers a range of infirmities including sensory impairment, limited mobility and other disabilities. For example, consumers who need to use wheelchairs might be a vulnerable group in relation to a commercial practice promoting a mobility aid, or those with a hearing impairment may be a particularly vulnerable group in relation to commercial practices involving the supply of hearing aids.

3.11 Age may be appropriate to consider a practice from the perspective of an older or younger consumer. For example, the elderly might be particularly vulnerable to certain commercial practices connected with burglar alarm sales, or children might be particularly vulnerable to advertisements relating to toys shown on daytime television.

3.12 Credulity covers groups of consumers who may more readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims. An instance might be members of a group who, because of a particular misfortune (e.g. certain severe illness), might believe certain claims more readily than others. The concept of credulity may also apply to the education level of the consumers, if the group of consumers is clearly identifiable.

*Concerns: This concept of credulity is very hard for traders to predict. It also seems to conflict with section 2.28 of the Guidelines which refers to 'puffery' claims. How can the trader be expected to know in advance whether his claim may be taken too literally by consumers of particular credulity?*

*Suggestion: Please provide specific examples of what types of scenario this section may cover.*

### **Transactional decision test**

3.13 For a commercial practice described in paragraphs 3.2(a) to (c) to amount to misleading omissions in contravention of section 13E (and also that on aggressive commercial practices in Chapter 4), the practice must cause, or is likely to cause, the average consumer to make a

transactional decision that the consumer would not have made otherwise. In other words, the effect or the likely effect on the average consumer's transactional decision is critical.

3.14 Section 2(1) defines transactional decision as "any decision made by a consumer, whether it is to act or to refrain from acting, concerning (a) whether, how or on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or (b) whether, how or on what terms to exercise a contractual right in relation to a product." For instance, a decision to purchase a product, as well as a decision not to purchase the product, are both transactional decisions. A decision to terminate a service in accordance with the relevant provisions in the service contract is also a transactional decision.

Concerns: A criminal offence should only be committed if the unfair trade practice has actually caused the consumer to purchase the goods or services (as opposed to not purchase), since otherwise no material harm is actually done.

Suggestion: The Guidelines should make it clear that if for example there is a misleading omission by a trader which leads the customer to decide not to proceed with the purchase, and hence the customer suffered no loss, then the trader should not be liable.

3.15 In essence, the transactional decision test would mean the following question: "Would the average consumer make the same transactional decision if not because of the commercial practice of the trader?" It is not necessary to prove that an individual consumer has actually made a different transactional decision as a result of a commercial practice and therefore suffers. It is sufficient if the commercial practice causes, or is likely to cause, the average consumer to make a transactional decision that he would not have made but for the commercial practice.

Concern: (1) This does not take account of the well informed / expert purchaser. For example, if a customer, who is an expert on cameras, goes into a camera store and asks to buy the latest Canon 6D. If the sales person starts to give him the usual product information which would be given to all customers but he says he doesn't need the information, would the trader commit an offence as he may not be providing all the material information which the average consumer requires, even though this Consumer had 'above-average' knowledge?!

(2) There are widely accepted and legitimate business practices that might now be said to have contravened the section.

Suggestion: The Guidelines should include examples to clarify the above point (1); and to expressly specify that common and widely commercial practices anticipated by an average consumer would not fail this transactional decision test.

: is

## Material information

3.16 What information is material depends on the circumstances and the nature of the products involved, including for instance the products' characteristics, where and how they are offered for sale and who the target consumers are. Generally speaking, material information is information that the average consumer needs, according to the factual context, to make an informed transactional decision. Information may be material in one commercial practice but may not be so in others and should be judged on a case-by-case basis. As a general rule, for simple products, information on the basic characteristics of the product, if it is not already apparent from the context, should be sufficient. More information will be needed for sophisticated products for the average consumer to make an informed transactional decision.

Concerns: Traders are required to decide on a list of "material information" for disclosure to customers which they honestly believe would affect the customers "transactional decision". Such a list is not finite and will vary from industry-to-industry, and from product-to-product. It is impractical and unfair for a retailer to be required to provide information which is additional to the specifications that come from the supplier or manufacturer of the product.

Suggestion: The Guidelines should clarify for the avoidance of doubt that a retailer will not be liable for misleading omission, in respect of failing to provide information which goes beyond the specifications provided by the supplier or manufacturer concerned. The Guidelines should also make it clear that it is sufficient for traders to discharge their duty by (i) providing the consumer with the opportunity to raise further queries, and/or (ii) the relevant product information is publicly available on website(s) or other media.

Example:

Individual sales staff is serving customer in the store. Customer buys a smart phone based on the information provided by the sales staff but subsequently finds out that it does not support "Flash" and alleges that material information has been omitted. As the sales staff was simply following the product descriptions of the manufacturer the sales staff should not be liable for an offence as it was reasonable for him to rely on such information.

Example - simple product

A boutique offers for sale different styles of apparel items. The basic information an average consumer needs to know is the price, size, major materials used in manufacture and washing instructions for the apparel items.

### Example - sophisticated product

A trader offers for sale computers and smartphones on its website. Its homepage shows the pictures of each of the products with a link to a detailed page which gives all the necessary information on the computers and smartphones that a consumer needs to decide whether to make a purchase, including:

- ❖ *the main characteristics of the electronic gadget (for example the computer and the smartphone model, the processor, memory, graphics, software and operating system) including its function (for example communication, camera, home multimedia, word processing and games etc. );*
- ❖ *the full price (include any freight or delivery charge and insurance cost) if this was not given on the previous page;*
- ❖ *the trader's name and geographic address;*
- ❖ *the delivery of goods and payment arrangements;*
- ❖ *a right of cancellation (if the trader provides such cancellation policy); and*
- ❖ *after sale service (maintenance policy and terms).*

Concern: The Guidelines are not clear as to whether it is sufficient at the point of sale to refer customers to the trader's or manufacturer's website for the detailed product specification rather than providing all such information at the point of sale in store, which is not practical.

Suggestion: An example similar to the above should be given, but referring to sale of 'sophisticated' products like electronics in a physical store. As long as the product information is available on-line or in a printed brochure or other media, and the trader has referred the customer to it, the trader should have discharged its duty.

### Example:

Brand A is popular in professional cameras. However, no camera of Brand A contains the latest function of "multiple exposure", while some other brands of professional camera do have such function. The product information of Brand A cameras do not mention about "multiple exposure" at all. Traders should not be liable for the offence of material omission for not telling the customer about the lacking of the function, as the trader should not be obliged to give more information than what is supplied by the manufacturer.

### **Omission or hiding of material information**

3.17 Omitting or hiding material information is misleading omission in contravention of section 13E if as a result, it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise.

Concern: Similar concerns as those set out under para. 3.16 above. The potential contravention in the event of omission of material information is particularly onerous for a retailer. The retailer relies on the manufacturer's product information and should not be liable for failure to provide information which was not generally available from the manufacturer.

An example is that a mobile phone manufacturer's product information does not state that its smartphone battery cannot be changed or that it does not support "Flash". Another example is smart TV sets, the product information of which usually claims that it has internet capabilities, namely access to all websites. The reality is that many websites block access by smart TVs.

Suggestion: The Guidelines to clarify that the offence of misleading omissions of material information should not extend beyond product information generally available in the manufacturer's product manual, specifications or official website.

Concern: The Guidelines should make it clear that this offence only applies to omitting information about the specific product in question. Therefore if a similar product is on promotion and the trader does not tell the customer about the promotion for the other product, this would not be a misleading omission.

Suggestion: It would be helpful if the Guidelines provide specific examples to illustrate this scenario.

Example:

If a wine bar is having a Chilean wine promotion and a customer specifically orders red wine from Bordeaux, the bar should not be liable for material omission if the bar staff do not inform the customer that red wine from Chile is on a buy-one-get-one-free promotion.

Example

*A mobile operator advertises an "unlimited mobile data plan" to the consumers. Nevertheless, the mobile operator does not mention that the unlimited mobile data plan is subject to a usage restriction, under which the download data rate of the service will be substantially limited if a certain usage threshold unilaterally set by the mobile operator is exceeded. The usage restriction is considered to be "material information" in the context of the mobile operator's service promotion as this restriction is likely to be a piece of information that the average consumer needs in making his transactional decision. The omission of such material information is therefore likely considered to be a misleading omission.*

Example

*In a telemarketing call made to a potential customer, an International Direct Dial*

删除: For instance,

删除: i

*("IDD") service provider promotes its IDD value plan by only informing the potential customer of the per minute usage charge for making IDD calls. The IDD service provider does not mention that it will also charge a fixed monthly fee upon customer's subscription to the service. As fee charged is commonly recognized as a material information that the average consumer needs to make an informed transactional decision, the IDD service provider is likely to be considered as committing the offence of misleading omission.*

Example

*A trader offers smartphones for sale. The smartphones are second-hand or have been reconditioned but they look like brand new. The trader offers them for sale at prices at which new smartphones of identical models are normally sold and does not disclose that they are not new. In this case, the fact that the smartphones are second-hand or reconditioned is likely to be material information that the average consumer needs, the omission of which would likely be held as committing the offence of misleading omission.*

3.18 In most circumstances, the **price and unit of sale** of the product are material information. The sale of goods usually requires reference to a unit of quantity, including length, width, height, area, volume, capacity, weight and number, for example the retail price of a tael/catty of fish, a litre of milk and a tael of Korean ginseng. The sale of service may require reference to, for example, the charge of body massage on an hourly basis, and the charge of an IDD service on a per minute basis. To the average consumer, the price per unit of quantity/sale is material information and will have a direct bearing on their decisions whether to buy the product. Mere provision of the selling price of products without the unit of quantity/sale is likely a misleading omission unless the unit of quantity/sale is apparent from the type of products involved, for example a price tag attached to a handbag would likely connote that the price is for one handbag.

3.19 It is advisable for traders to review their commercial practices and determine what information is required for the average consumer to make an informed transactional decision, taking into account the context<sup>8</sup>. As practitioners in the sectors in which they operate their businesses, traders are expected to exercise their common sense and professional diligence and make use of their experience and expertise to develop a set of material information that consumers should generally require to make

---

<sup>8</sup> In the event of an invitation to purchase, certain information is deemed to be material. Please refer to paragraphs 3.27.

an informed transactional decision. They should put themselves in the position of their customers and consider whether omitting a certain piece of information would likely impair the average consumer's ability to make an informed transactional decision or would likely cause the average consumer to make a decision to purchase or acquire products that he would not have made if the information were disclosed to him.

### **Provision of material information in a manner that is unclear, unintelligible, or ambiguous**

3.20 Provision of material information in a manner that is unclear, unintelligible, ambiguous is a misleading omission in breach of section 13E, if it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise.

3.21 Material information should be provided in a clear, intelligible and unambiguous manner, unless apparent from the context. Information that is obscured or partially obscured may be held to be unclear, unintelligible or ambiguous.

#### Example

*A trader uses small fine print to state the unit of quantity for its goods. Although the price is given in a clear manner, the unit of quantity is so small that an average consumer could not read it in a readily comprehensible manner. The trader is likely considered to have committed an offence of misleading omission.*

3.22 Apart from printed or written media, ambiguity and unintelligibility of information may arise out of the language and/or graphics used in the presentation of the information. For example, Mainland tourists may have difficulties in understanding the price per unit of quantity in Cantonese if the price is communicated verbally and the price indication is not readily available. The trader can avoid committing misleading omission by stating the price in Chinese say "\$500/斤" on a price tag and show it to the consumers. Another example would be using Quick Response Code (QR code) in product advertisement and product information could only be obtained by consumers using their smartphones equipped with QR code reader. Traders are advised to provide the same material information by other media so that consumers without smartphones can still have access to the same information to enable them to make informed decisions.

*Concern: To take the above example one step further, even when the basic and essential information of a product, has been clearly indicated on the price tag relating to the product, tourists from the Mainland who speak dialects other than Cantonese and Putonghua may still have difficulty in understanding the product information, which is in traditional Chinese characters and communicated to them in Cantonese and Putonghua. In any event, there are so many different nationalities of tourists in Hong Kong who may not speak Chinese or English and we are concerned this example places an unreasonable burden on traders to account for the language abilities of their customers.*

### **Untimely provision of material information**

3.23 Provision of material information in an untimely manner is also a misleading omission in breach of section 13E, if it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise. Traders should clearly inform consumers of the price of products and how the price and any discount available are calculated before the consumers decide whether or not to buy or acquire them.

Example

*A beauty group promotes a stem cell transfusion service performed by a medical practitioner to its consumer without disclosing the risk of the medical treatment and suitability of applying such treatment to a particular consumer (which requires advice from a medical practitioner) until after the consumer pays for the service. If the commercial practice is structured in such a way that this material information is not disclosed to its consumer in a timely manner, the beauty group risks contravening the misleading omission offence.*

Example

*A trader operates a car park. The parking fee is material information. The trader should clearly display the parking fee, for example, in terms of hourly parking rate at a conspicuous location at the entrance of the car park to enable consumers to decide whether or not they wish to park their cars there before they enter the car park.*

Example

*A promotion agent acting for a trader promotes the sale of discounted buffet coupons at \$128 each. The agent tells a consumer that \$128 is the only payment required for a coupon. The consumer gives his personal details and his permission to pay for the transaction by credit card to the agent, who only then informs the consumer that to be eligible for the discounted offer, an amount of \$1,536 (i.e. \$128 x 12 coupons) has to be paid in advance. The agent may have committed the offence of misleading omission.*

3.24 **Duration of contract** can also be material information. Some services are provided over a period of time and as a legitimate marketing technique, the longer the duration of the service contract is, the lower the unit price will be charged. For example, for a beauty treatment contract, the duration of the contract and frequency/extent of the treatment to be provided is material information and should be disclosed to consumers before the contract is concluded.

Example

*A fitness centre encourages its customers to renew their service contracts by offering them a very*

*favourable monthly plan. However, the manager of the centre omits to inform the customers that the new contract will last for 15 years and early termination is subject to a penalty. The average consumer is likely to take a different decision if he knows he would be bound for such a long period of time. Omitting the period of a contract and termination penalty is likely considered to be a misleading omission offence.*

3.25 Where service fees can only be ascertained after some testing or inspection work has been undertaken, for example **repair service**, traders should inform their customers in advance of the calculation of the fees, including whether fees are required for the testing and inspection work before the repair service is commenced. Some traders sell second-hand, reconditioned goods or parallel imports and are not able to provide after-sale services such as maintenance as comprehensively as those offered by the authorized dealer or the original manufacturer. Failing to disclose such information prior to the sale of goods would likely contravene the offence of misleading omission.

#### **Information required by other laws**

3.26 Material information also includes information that should be mandatorily provided in accordance with the requirements of other provisions of Hong Kong Laws. For example, the Accreditation of Academic and Vocational Qualifications Ordinance, Cap. 592 requires that advertisements promoting learning programmes recognized under the qualifications framework have to contain, among other things, information on the relevant level of the qualifications framework under which the qualification obtainable is recognized and the relevant registration number. Such information is material for the purpose of section 13E.

#### **Invitation to purchase**

3.27 Under section 2(1), an invitation to purchase is defined as a **commercial communication** that indicates the **characteristics of the product and its price** in a way appropriate to the medium used for that communication and **therefore enables** the consumer to make a purchase.

3.28 The term “therefore enables” primarily refers to enabling of a purchase through the provision of information. The amount of information that enables the consumer to make a purchase varies depending on the circumstances. Sophisticated products may require the provision of more information than simple ones before a

purchase is enabled.

3.29 Examples of invitations to purchase include a price label on a product displayed in a shop; an automobile advertisement in a newspaper that advertises the products' image and price; a menu in a restaurant in which the price and choice of dishes are listed; and an interactive TV advertisement showing images of the products and their prices.

3.30 Section 13E(4) provides that if a commercial practice is an invitation to purchase, the following information is regarded as material and must be made available unless such information is apparent from the context -

- ❖ *the main characteristics of the product, to the extent appropriate to the product and to the medium by which the invitation to purchase is communicated (such as what the product is and what are its main functions);*
- ❖ *the identity (such as trading name) of the trader and of any other trader on whose behalf the trader is acting;*
- ❖ *the address (not including a postal box address) of the trader's usual place of business and of any other trader on whose behalf the trader is acting;*
- ❖ *either (i) the price, including any taxes; or (ii) if the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;*
- ❖ *where appropriate, either (i) all additional freight, delivery or postal charges; or (ii) if those charges cannot reasonably be calculated in advance, the fact that they may be payable;*
- ❖ *any arrangements for payment, delivery of goods, supply of service (such as the way in which any work is to be carried out, or service provided) that depart from the requirements of professional diligence (see paragraph 3.35 below); and*
- ❖ *for products in relation to which there is a right of withdrawal or cancellation, the existence of that right.*

3.31 An invitation to purchase does not necessarily need to contain all the above information if the information is already apparent from the context.

Concern: This reference to "information already apparent from the context" is rather vague. Therefore it is useful to have the examples specified by C&ED below, but we would propose additional example as follows:

### Example

A fashion retailer with over 200 stores in Hong Kong, advertises in the newspaper for its new season collection. Of course, it is not practical to list, the address of all the stores and stock availability of individual store and it should be sufficient to include in the advertisement the retailers' website address or an enquiry hotline, to enable customers to check the website or hotline for the store locations and stock availability of a particular store.

### Example

*A boutique displays many different fashion items for sale with labels stating price,*

materials used and washing instructions attached. While this is an invitation to purchase, the boutique may not be required to indicate its address, trading name and delivery arrangements because it is apparent that consumers visiting the boutique know where they are and they have to take delivery of the items by themselves upon payment.

#### Example

The drink list of a bar placed on each table states the price in unit of quantity and any special offer or discount, for example “buy one get one free from five to eight o’clock on weekdays”. It provides consumers with the information they need to enable them to make decision as to what drinks to order. The name of the bar is already on the list, and the address is apparent because consumers are already in the bar.

3.32 If traders are making an invitation to purchase, but are unable to actually tell consumers the full price including tax or postal charges because the tax or the postal charges cannot reasonably be calculated in advance, traders must give information on the manner in which that full price is to be calculated.

3.33 Any additional charges that come with the supply of the goods or services should be clearly communicated to consumers before they make the purchase.

Concern: It should be sufficient for trader charging customer additional charges to put up signage and/or notice for such charges in store(s) and/or its website as a clear communication to customers before their purchase of the product.

#### Example:

A trader selling electronics or home furnishing products charges customers a fee for delivery of the product, as well as a fee for installation. Provided that the trader displays a notice at the checkout specifying the delivery and installation charges, this should be sufficient to make customers aware of the charges before they make the purchase.

#### Example

A restaurant promotes its steam whole chicken at the price of \$1 each. A consumer orders a chicken and after the meal when he pays the bill, he is informed that the spring onion and ginger paste which comes with the chicken is charged at \$50. The restaurant may be liable for providing misleading price information on the chicken.

Concern: This example may be too extreme. Of course if the paste is 50 times more expensive than the chicken this would be unreasonable, but what if the chicken was \$50 and the paste only \$1? Would the restaurant still be liable for misleading price information as the amount is so immaterial?

3.34 In making an invitation to purchase, a trader should cause consumers to be informed of any **right of cancelling** a transaction.

#### Example

*Shops registered with the Travel Industry Council undertake to provide an unconditional full refund to Mainland tour members who return their purchases within six months. Notices setting out the refund arrangements are displayed in conspicuous locations inside and outside the shops to enable consumers to make informed transactional decisions.*

#### **Professional diligence**

3.35 Under section 13E(5), professional diligence is defined as “the standard of skill and care that a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice in the trader’s field of activity or the general principle of good faith in that field”.

3.36 Professional diligence is an objective standard which may vary according to the context. However, poor current practice that is widespread in an industry or sector cannot be taken as an acceptable objective standard because this is not what a reasonable person would expect from a trader who is acting in accordance with honest market practice or good faith. Professional diligence requires traders to approach transactions professionally and fairly as judged by a reasonable person. A simple way of undertaking professional diligence would be to ask: “is the trader acting to a standard that a reasonable person would expect?”

3.37 A furniture store offers free delivery service and a reasonable person would expect that it covers most of the urban residential areas in Hong Kong. However, if the free delivery service is provided only where an address has lifts or the delivery schedule is fixed by the store, these arrangements depart from the requirements of professional diligence and should be disclosed to consumers in a clear and timely manner to enable them to make informed transactional decisions.

*Concern: This section on ‘professional diligence’ seems to imply that there is a general duty of ‘professional diligence’ and it is not clear if it is an offence not to use such diligence.*

*Suggestion: Clarify that the concept of ‘professional diligence’ is specific to assessing what information is material in an invitation to purchase and in particular relates to arrangements for (i) payment, (ii) delivery, (iii) performance pursuant to Section 13E(4)(f) of the Ordinance.*

#### **Failure to identify the commercial intent of a commercial practice**

3.38 As mentioned in paragraph 3.2 above, a trader may commit a misleading omission offence if he fails to identify the commercial intent of a commercial practice. While such an intent is apparent in the majority of cases (for example the presence of a price often notifies the commercial intent of the advertisement, or an TV advertisement is clearly perceived to be promoting a product, an “advertorial” may be considered as a misleading omission offence if its way of presentation makes it hardly distinguishable from the rest of the publication in which it appears. 25

3.39 The genuine engagement of celebrities in product promotions is a legitimate practice, but a trader may commit a misleading omission offence if he engages a celebrity to disguise himself or herself as a consumer and arranges for him or her to be photographed by the unsuspecting media at a product exhibition without disclosing any contractual relationship between the celebrity and the trader.

3.40 A trader may also commit a misleading omission offence if he or his agent disguises himself as a consumer and posts comments using pseudonyms in discussion forums or in social media in a bid to promote sales or “bad mouth” competitors.

Example

*A beauty company instructs its employees or a blogging agent to post on various online forums and social networking websites very favourable comments to promote its services. The comments are posted under a disguise as consumers who have patronized the services before. This practice may be in breach of a misleading omission offence by failing to identify the genuine commercial intent.*

Example

*A company launches a series of health seminars targeting senior citizens by offering free gifts to them. The elderly may be enticed by the practice to join the seminar to learn more about health maintenance. But the attendees were not told that the only activity throughout the whole seminar is to introduce and promote the trader’s health products.*

Concerns: We have some concern about this example as it may imply that traders cannot promote their products at all in conjunction with any seminar or discussion forum. However, it is surely a matter of degree and hence in the above example it states “the **only** activity **throughout the whole seminar** is to introduce and promote the trader’s health products”.

Suggestion: Add a clarificatory statement that limited product promotion in conjunction with a topical seminar or discussion forum is not intended to be caught by this offence.

#### 4. AGGRESSIVE COMMERCIAL PRACTICES

**Traders must not use harassment, coercion, and undue influence to restrict or impair the freedom of choice or conduct of consumers, which will cause or likely cause consumers to make a transactional decision that would not have been made otherwise.**

4.1 Under section 13F(2), *“a commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances, 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 or likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise”*.

##### **Harassment**

4.2 Generally speaking, harassment includes an infliction of physical and / or non-physical (including psychological) pressure. In the context of the section, it describes a range of conduct in connection with the supply of goods or services, which includes, but is not limited to, applying repeated pressure to a consumer who is under no obligation to acquire the goods or services, repeated unwelcome approaches to a potential customer of goods or services etc.

##### **Coercion**

4.3 A commercial practice may involve coercion if the consumer is subjected to pressure and threat. Coercion is not limited to deliberate intimidation. It may or may not involve the use of physical force. An example is the use of personally abusive or obscene language that has the effect of humiliating a consumer or subjecting a consumer to fears over his own safety or the safety of his next of kin and prejudicing his freedom of choice.

##### **Undue Influence**

4.4 It means an exploitation of a position of power in relation to a consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly impairs the consumer's ability to make an informed decision.

### Example

*A mechanic has a consumer's car at his garage and has done more work on the car than agreed. He refused to return the car to the consumer until he was paid in full for the work. The mechanic did not check with the consumer before he went ahead with the extra work. As the mechanic has the car, he has power over the consumer's decision to pay for the unauthorized work. He has exploited his position of power, by demanding payment for doing more than was agreed and refusing to return the car until the consumer has paid for all the work. The mechanic could be liable for exercising undue influence and / or coercion on the consumer.*

4.5 Offering some incentive to consumers, such as a free shuttle transfer to and from shopping centres, or the provision of some light refreshments free in shopping centres might influence consumers but it might **not** likely constitute undue influence as the consumers' ability to make an informed transactional decision would not be impaired. However, if a trader takes consumers to a resort for a health plan presentation which is situated at a distant location with no public transport available and after the presentation, the trader says he would arrange return transport only if consumers sign a contract to subscribe to a health plan, this could amount to coercion and/or undue influence.

### **Freedom of choice or conduct**

4.6 The concept of freedom of choice or conduct is not limited solely to decisions about whether to purchase a product or not. It covers a wide range of transactional decisions. For example, coercion might cause consumers to purchase the product at a much higher price or on disadvantageous terms, or from one trader instead of another.

### **Factors indicating an aggressive commercial practice**

4.7 Section 13F(3) stipulates that the following factors must be taken into account when determining whether a commercial practice is aggressive:

- ❖ timing, location, nature or persistence;
- ❖ the use of threatening or abusive language or behaviour;
- ❖ the exploitation by the trader of any specific misfortune or circumstance, of which the trader is aware and which is of such gravity as to impair the consumer's judgment, to influence the consumer's decision with regard to the product;
- ❖ any onerous or disproportionate non-contractual barrier imposed by the

- ❖ trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or switch to another product or another trader; and any threat to take any action that cannot legally be taken.

4.8 It is not necessary for all of these above factors to be present for a commercial practice to be aggressive. Furthermore, a court of law may consider any other relevant factors as it sees fit. Traders are advised to stop promoting their goods or services when consumers have explicitly rejected the offer.

#### Example

*A beautician persuaded a consumer B to pay slimming treatment fees by several credit cards, claiming that payment by different credit cards would entitle her more “fabulous offers”. B gave the beautician three credit cards which were then held in custody by the cashier. Twenty minutes later, when the slimming treatment was still in progress, the manageress of the beauty salon came into the treatment room and asked B if she was delighted with the treatment. B was embarrassed by the manageress’ abrupt move as her upper body was barely covered with body cream and ointment. The manageress and the beautician then kept promoting other slimming and beauty packages to B for more than 30 times during the two-hour treatment until B finally agreed to join one. B later changed her mind and asked for the cancellation of the transactions and return of her credit cards, but was denied unless she signed the agreements. Both the manageress and the beautician may be liable for using harassment and undue influence.*

#### Example

*Staff working in a private columbarium put pressure on a recently bereaved relative, who is looking for a funeral package and columbarium, to buy a more expensive package to avoid bringing bad fortune to him and other members of the family. This could amount to coercion or undue influence because the staff has exploited the misfortune of the bereaved relative to influence his decision at a time when he is in deep sorrow.*

#### Example

*Two salespersons from a pay TV service provider conduct unsolicited doorstep marketing of pay TV services. They knock on the door of a flat late at night. An elderly man, who is alone in the flat and is woken up by the door knocking, opens the door. The two salespersons quickly enter into the flat and start promoting the pay TV*

*services to the elderly man. Although the elderly man indicates that he is not interested in the services, the salespersons refuse to leave and keep on pressing him to sign the contract. The conduct of the salespersons is likely considered to be an aggressive commercial practice.*

#### Example

*A trader specialized in timeshare rights and long-term holiday products may offer its customers a three-day cooling-off period. However, many onerous or disproportionate non-contractual barriers arise when the customers try to exercise their contractual right to terminate the contract. For example, the termination form can only be obtained by fax or mail (not email) and the applicant together with the duly completed form are required to submit the form in person to a sub-office in Lantau Island during normal office hours. Traders are reminded that imposing these kind of non-contractual barriers, even occurring after the commercial transaction, may amount to an aggressive commercial practice.*

## 5. 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.**

5.1 Section 13G 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 the advertisement and the nature of the market in which the trader carries on business. The TDO also makes it an offence for the trader who **fails to offer those products for supply at that price, for a period that is, and in quantities that are reasonable** having regard to the **nature of the market** in which the trader carries on business and the **nature of the advertisement**.

5.2 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 attract consumers to come forward, but when arriving at the traders' premises or visiting the traders' websites intending to buy the advertised product (the bait), consumers only find out that the advertised product is no longer available (or perhaps has never been available). They may end up buying something that they might not have purchased if not for having been attracted by the bait in the first place.

5.3 A trader may commit an offence if he does not supply the advertised goods or services in reasonable quantities for a reasonable period. 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.

Concern: it is very subjective to determine what is "reasonable" in the context of the "nature of the market". How are traders expected to determine in advance what will be reasonable as such decisions generally rely on subjective factors only known after the event?

Suggestion: The factors listed below relating to the nature of the market should be expressly linked to the Section 26 Defence, and also backed-up by examples. Please refer to our detailed suggestions below.

### **Nature of the market**

5.4 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 are generally taken into account include, but are 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/or traders in the same market, demand elasticity at different

prices and the extent of reach of the advertisement. Factors which are not reasonably foreseeable by traders and may have a substantial impact on the size of demand, for example a sudden drop in temperature prompting a great number of consumers rushing for down jackets, are taken into account. In relation to the supply side, it is recognized that certain products are inherently limited in the quantities that could be made available to meet a sudden upsurge in market demand, for example perishables and other fast moving consumer goods the production of which is subject to capacity constraints. Further, constraints in replenishing supply that are beyond the traders' control are considered.

5.5 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 and to notify consumers as soon as possible such that no more unmet demand will be generated.

Concern: We acknowledge that ideally, traders should be certain when advertising products that they will be in a position to meet likely demand at the advertised price. However, it is sometimes not commercially viable for a trader to arrive at an accurate projection of stock to meet the unpredictable market demand. This is particularly as a result of the manufacturers controlling stock or supply, and other replenishment constraints or because the product is new and untested in the market making it especially hard to predict demand.

Suggestion: Given the general statutory defence under section 26, the Guidelines should expressly confirm that such defence applies to situations where the retailer has been unable to meet demand as a result of factors beyond its control, such as supplier restricting stocks or other replenishment constraints or unexpected high demand.

Suggested Example: Mobile phone retailer advertises a new generation smartphone which will go on sale on 1<sup>st</sup> June. This is designed to promote the "queuing effect" mentioned in section 5.8 below. However, the smartphone supplier controls the release of the stock and only released two-thirds of the expected stock to the retailer. There are lots of disappointed customers. The retailer should be able to avail itself of the defence that this resulted from causes beyond its control.

5.6 Traders are advised that the use of the disclaimer "while stocks last" will unlikely be sufficient to protect traders from committing the offence of bait advertising. If they are not able to supply the products at the specified price for a period that is, and in quantities that are, reasonable, they would still be liable to the offence.

#### **Nature of the advertisement**

5.7 As stated in paragraph 5.4 above, the size of the consumer demand for the advertised goods or services is generally subject to the extent of the 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 expected to be 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 have committed the offence of 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 participating in the annual computer festival creates 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 started 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 advertised 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 have committed the offence of 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**

5.8 There is 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, for example, 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) 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.

Suggestion: Add additional phrase at the end of Section 5.9 to make it that there is no obligation on trader to include such details in its advertisement if it is not practical to do so.

We would also propose that in respect of "hot items" if the trader cannot predict the stock availability from supplier then it should not be bait advertising if the trader states clearly on the advertisement "subject to product availability from supplier".

#### Example:

A new model of electronic product has launched in the US. Local retailer placed purchase order with the supplier. However, as a marketing strategy, the supplier deliberately withholds information on the quantity that will be supplied to the retailer, and further limits the supply of the new product to develop

a queuing effect. The retailer will not be liable for bait advertising if the retailer put the following wordings on the advertisement “subject to product availability from supplier” because the amount of stock is beyond the control of the retailer.

5.9 It must be emphasized that a mere absence of an indication in an advertisement of the period and the quantities in which the advertised product is available does not in itself amount to an offence of bait advertising.

### **Additional defence**

5.10 Besides the general defence under section 26 for all fair trading sections (please refer to paragraph 8.6 below), the TDO also provides additional defences under section 26A for traders, such as seeking the help of another supplier to provide the same product or offering an equivalent product to consumers if a trader fails to meet the legal requirement set out in paragraph 5.1. The effect of the additional defence is that when traders genuinely run out of stock, they may be absolved from liability if they can show that they have offered to supply additional stock or procure a third person to supply the additional stock of the specified product (or alternatively, an equivalent product) to meet the demand of consumers at the originally advertised price within a reasonable time. For avoidance of doubt, traders may still be absolved from liability although consumers do not accept the alternative offer so far as traders can demonstrate that they are able to meet the terms of the offer if accepted.

### **Equivalent products**

5.11 What are “equivalent products” will be determined on a case-by-case basis, and ultimately, is a matter of fact to be decided by a court of law. Generally speaking, equivalent products refer to products which possess characteristics, functions and performance similar to the products that traders have offered for sale to consumers, and with a similar selling price and similar after-sale services, if any.

## 6. BAIT AND SWITCH

**Traders must not make an invitation to purchase a product at a specified price and then refuse to show or demonstrate the product, refuse to take orders for the product, or demonstrate a defective sample of the product, with the intention of promoting a different product.**

6.1 Section 13H prohibits traders from engaging in a bait and switch. Traders engage themselves in a bait and switch if having made an invitation to purchase<sup>9</sup> a product at a specified price, they then with the **intention** of promoting a different product:

- (a) refuse to show or demonstrate the product;
- (b) refuse to take orders for the product or deliver it within a reasonable time; or
- (c) show or demonstrate a defective sample of the product.

6.2 The section does not seek to prohibit a trader from promoting products other than the product which is the subject of the invitation to purchase. The section prohibits a trader from taking any one of the three courses of conduct referred to in paragraph 6.1 above when he has the intention of promoting a different product after making an invitation to purchase a product at a specified price. In order to establish an offence under this section, it is necessary to prove the intention of the trader.

### Example

*A trader advertises to sell a television at his shop window for \$4,000, which is 30% less than the market price. He actually has no intention to sell the television he advertises. He only wants to use the advertisement as a bait to lure customers so that he can sell another television model. A consumer is attracted by the offer and orders one from the trader. However, the trader refuses to take the order and then refers the consumer to a different television model. If the trader is held to have intended to promote a product which is different from the one he offers to supply to consumers, he may commit an offence of bait and switch.*

<sup>9</sup> Please refer to paragraph 3.27 for the definition of invitation to purchase.

## 7. WRONGLY ACCEPTING PAYMENT

**A trader must not accept payments for a product if at the time of accepting the payments, he does not intend to supply it or intends to supply another product, or if there are no reasonable grounds for believing that he will be able to supply it at the agreed time or within a reasonable time.**

7.1 It is common for consumers to make pre-payments in the purchase of goods or services to be delivered at a later date. To boost business, some traders offer discounts for pre-payments, especially in bulk purchases. Traders are advised not to accept pre-payments from consumers if they are uncertain whether the pertinent goods or services can be delivered to consumers at the agreed time or, if no time is agreed, within a reasonable time.

7.2 Sections 131(2)(a) and (b) prohibit a trader from accepting payment in whole or in part and by whatever means for a product if at the time of accepting payment, the trader intends not to supply or intends to supply a materially different product. It is also an offence under section 131(2)(c) if at the time of accepting payment, there are no reasonable grounds for believing that the trader will be able to supply the products in the time specified or, if no time is specified, within a reasonable time.

7.3 In order to establish an offence under the section, it is necessary to prove that **at the time of accepting payment or other consideration for a product**, the trader intends not to supply the product or intends to supply a materially different product, or the circumstances are such that a common sense, right thinking member of the community would consider that there are no reasons to lead a person in the same position as the trader to believe that he would be able to supply the goods or services in the time specified or, if no time is specified, within a reasonable time.

### Example

*An Internet service provider offers 100 Mbps and 10 Mbps broadband Internet access services to consumers in Hong Kong, but it does not have coverage of both types of services in every residential building. A consumer is attracted to the 100 Mbps service plan and calls the Internet service provider to make subscription to the 100 Mbps service. The telesales staff of the service provider receiving the call is aware that the consumer is residing in a building where only 10 Mbps broadband Internet access service can be provided to the residents. However, the telesales staff still secures a service contract with the customer for the provision of 100 Mbps service and accepts*

*payment of the monthly fee from the consumer. In the end, the service provider provides 10 Mbps service to the consumer. The service provider is likely to have committed the offence of wrongly accepting payment as it does not have any intention to supply the 100 Mbps service, or only intends to supply a service that is materially different from the 100 Mbps service, at the time of accepting payment.*

#### Example

*A restaurant advertises the sale of dining vouchers at a discounted price of \$100. The condition of the voucher sets out that it should be redeemed within three months from the date of purchase. A total of 8,000 vouchers are eventually sold within a week. However, the restaurant has a capacity of 20 seats only. It is impossible for all vouchers to be deemed (even after discounting normal wastages) within the validity period of three months. The restaurant may have committed the offence of wrongly accepting payment because at the time of accepting payments for the vouchers, there are no reasonable grounds for believing that it can deliver the specified dining services within the specified time.*

#### Example

*A consumer intends to purchase a Country J-made 46" LCD 3D TV set from an AV shop. The requested model has been sold out and its availability of replenishment is not known. It was also widely reported that there was a natural disaster near the production facilities in Country J that had caused serious damages to the road facilities and power supply system of the area, and stock replenishment process might take much longer time. The AV shop accepts deposit from the consumer and undertook to deliver the TV in three days. The AV shop may be liable for the offence of wrongly accepting payment, if it is held that the circumstances are such that there are no reasonable grounds for believing that it can deliver the TV within the specified time at the time of accepting payment.*

*It may be a plausible defence under section 26 (please refer to paragraph 8.6 below) for the shop if it had checked with its wholesaler the availability of the model and the expected delivery time prior to accepting the deposit from consumers.*

#### **Reasonable time**

7.4 Traders are at liberty to agree with consumers the time of delivery of the goods or services even if the delivery time is long. Otherwise, the product has to be delivered within a reasonable time. What is reasonable time depends on the nature of

the goods or services involved and the facts of individual cases. A Christmas gift delivered to a consumer after Christmas would likely be outside a reasonable time, if the delivery time has not been specified.

7.5 Traders should always ensure that they have sufficient staff, equipment and facilities to meet the demand of consumers prior to accepting pre-payment for any goods or services to be delivered at a later stage. They should evaluate, on an on-going basis, their capacity and ability in supplying goods or providing services to new and existing customers, having regard to the potential growth of customers, demand pattern, change in market environment and difference in demand between seasons, peak and non-peak hours. Traders are advised to avoid overselling their goods or services to an extent that is beyond their capacity or ability to meet the demand.

#### Example

*A beauty salon promotes its service plan for facial treatment at a very competitive price to new customers. Despite that there are insufficient dedicated equipment and trained beauticians for providing the treatments, the salon oversells its service plan to its customers. When the customers request the facial treatment, the salon can only provide the service after 6 months (an unreasonable time). The salon may be held liable for the offence of wrongly accepting payment, as at the time of accepting payment, there are no reasonable grounds for believing that the beauty salon will be able to provide the facial treatment within a reasonable period of time.*

#### **Additional defence**

7.6 Besides the general defence available under section 26 for all fair trading sections (please refer to paragraph 8.6 below), the TDO also provides an additional defence under section 26B for the offence of wrongly accepting payment (section 13I) namely, (i) the traders offered to supply an equivalent product or (ii) the traders procures a third person to supply the specified product or an equivalent product if the traders fail to meet the legal requirement set out in paragraph 7.2 above. Traders may be absolved from liability if they can show that they have offered to supply additional stock or procure a third person to supply the additional stock of the specified product (or alternatively, an equivalent product) to meet their obligations. For avoidance of doubt, traders may still be absolved from liability although consumers do not accept the alternative offer so far as traders can demonstrate that<sup>39</sup> they are able to meet the terms of the offer if accepted.

7.7 Section 26B(2) provides a further additional defence for an offence under section 131(2)(c). A trader might be acquitted if a **refund in full** of the payment or consideration for the product was made within a reasonable period after the expiry of the period for supply that is specified before or at the time of payment, or if no period is specified, within a reasonable period.

## 8. LIABILITY OF PARTIES INVOLVED

### Liability of management

8.1 Section 20 sets out the circumstances under which certain classes of persons of a body corporate or an unincorporated body may also incur personal 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 a member 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 to prove that the offence has been committed with their consent or connivance or was attributable to their neglect.

8.2 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, the following factors would be taken into account:

- ❖ 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.

### Employees and agents of a trader

8.3 A trader includes any person acting in the name of or on behalf of a trader. If an employee, 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 to 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.

8.4 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 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.

8.5 The existence of an agent means that consumers do not always deal with the actual product supplier directly. Taking the online-group purchasing websites as an example, the companies operating the websites can either act as transaction platforms which earn service fee on a transactional basis or cooperate with the suppliers on a proceeds-sharing basis. The online-group purchasing companies accept payments from consumers (say hair-cut services) are separate entities from the one who actually supplies the services. Despite the presence of this intermediary in a commercial practice, it does not prevent the enforcement agencies from taking on both the intermediary and the supplier in the event of any breach of the fair trading sections.

### Defences

8.6 The TDO puts in place general defences for the person charged. Under section 26, a person might be acquitted if sufficient evidence is adduced to raise an issue that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control and adequate notice in writing is given and served on the prosecutor; and he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

### Example

*A tutorial company may involve in the inaccurate promotion of certain tutor relating to their tutorial service and the advertisement claims that the tutor possesses certain academic qualification which is in fact untrue. The tutorial school might be acquitted if sufficient evidence is adduced and adequate notice in writing is given and served on the prosecutor to show that the false academic qualification claim was made upon reliance on the information supplied by the tutor and the company took all reasonable steps to ascertain the accuracy of the tutor's qualification including reference check to the relevant university or institution and exercised all due diligence to avoid the false information.*

Concerns: Please refer to section 1.5 regarding definition of 'Trader'.

It is essential to state clearly in the Guidelines that corporate traders, their directors and respective employees who have taken reasonable precautions to ensure compliance with the maintaining and participating in an internal compliance procedure shall be entitled to rely on a defence against prosecution under the Ordinance. The Guidelines should also provide practicable examples to explain the circumstances under which these persons may be liable.

Suggestion: Additional examples should be provided.

刪除 to cover the following situation:

Example:

A trader engages a third party operator such as promoter, concessionaire or franchisee in its stores to promote that third party's branded products or the trader's products (as the case may be). Despite giving the third party operator a checklist of the trader's policies and procedures (which includes guidance on unfair trade practices), the third party operator in trader does not and/or neglects and/or omits to observe or comply with the trader's policies and procedure,

- (i) the third party operator offers unreasonably high commission to its staff or agent to promote sales of the particular products , the staff of the third party operator repeatedly approaches customers and puts pressure on them to buy the promoted products. The customer then complains of 'aggressive commercial practice'; or
- (ii) the third party operator in trader's store gives false description of the products to the customers.

It should be the third party operator in the trader's store, not the trader, who would have any liability in this instance.

**Additional defence**

8.7 For additional defences in proceedings on offences of bait advertising and wrongly accepting payment, please refer to paragraphs 5.10 and 7.6 to 7.7 respectively.

• A trader engages a third party promoter in its stores to promote that third party's branded products. Despite giving the promoter a checklist of the trader's policies and procedures (which includes guidance on unfair trade practices), .

• <#>the promoter repeatedly approaches customers and puts pressure on them to buy its promoted products. The customer then complains of 'aggressive commercial practice'; or .

• <#>the promoter or third party operator in trader's store still gives false description of the products to the customers. .

• It should be the promoter or the relevant third party operator in the trader's store, not the trader, who would have any liability in this instance. .

## 9. SANCTIONS AND POWERS AVAILABLE TO THE COMMISSIONER AND THE CA

9.1 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.

9.2 With the introduction of the compliance-based mechanism<sup>10</sup>, C&ED and OFCA are empowered to draw on civil measures viz. undertakings and injunctions, to deal with suspected contraventions. An undertaking is a court-enforceable agreement proposed by a trader (and accepted by C&ED or OFCA as the case may be) to undertake specific actions, including to stop the offending acts and not to repeat them in future. C&ED or OFCA, as the case may be, may also apply to a court of law for an injunction directing the trader to stop or refrain from continuing an offending act.

### Investigatory powers

9.3 Authorized Officers may 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.

9.4 C&ED, as the principal agency to enforce the TDO, has a full spectrum of enforcement powers. For example, they are empowered to enter non-domestic premises and inspect goods, and to inspect books and documents that are required to be kept under the TDO or its subsidiary legislation for the purpose of ascertaining whether any offence under the TDO has been or is being committed. If there are reasonable grounds to suspect that an offence has been committed, they may arrest suspects, require the production of books, documents or records and, when necessary, 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. As for the CA, it is conferred enforcement powers that commensurate with its jurisdiction under the TDO with respect to telecommunications and broadcasting services licensed under the TO or BO<sup>11</sup>.

<sup>10</sup> Please refer to the Compliance and Enforcement Policy Statement issued by the Commissioner and the CA which is available in their departmental websites: [www.customs.gov.hk](http://www.customs.gov.hk) or [www.coms-auth.hk](http://www.coms-auth.hk).

<sup>11</sup> Pursuant to section 16E(2), the Chief Executive in Council may, by notice published in the Gazette, specify that certain powers conferred on an Authorized Officer under the TDO are not exercisable by the CA.

9.5 Traders should cooperate with the enforcement agents during investigation. If individuals or traders obstruct Authorized Officers in the performance of their lawful duties, they may be liable to prosecution under section 17.

9.6 For more details on compliance and enforcements, please refer to the “Compliance and Enforcement Policy Statement” issued by the Commissioner and the CA setting out the objectives of enforcement actions, the basic principles which guide C&ED and OFCA in the application of enforcement tools available under the TDO and the factors that C&ED and OFCA take into account in prioritizing its enforcement resources in handling complaints.

*Suggestion: The Guidelines could clarify that the enforcement officers would only carry out inspection of the traders’ premises and conduct targeted spot checks when they have reasonable grounds for suspicion of an offence. This balancing exercise would give comfort to the traders that the enforcement authorities respect the trader’s fundamental rights to privacy while exercising their functions of investigating and taking enforcement actions only with valid reasons.*

## **10. CONSUMER REDRESS**

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

**Commissioner of Customs and Excise**

**Communications Authority**

**December 2012**