



15/03/2013 15:44

To <guidelinescon@customs.gov.hk>
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cc

bcc

Subject Recommendation from CAHK on Enforcement
Guidelines of TDO (Amendment) 2012

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History:

 This message has been forwarded.

Dear Sir/Madam

Please find attached the response from the Communications Association of Hong Kong for the Draft Enforcement Guidelines of TDO (Amendment) 2012.

Our representatives' contact for the issue are :

Should you have any questions, please feel free to contact us. Thank you.

Best Regards,



Communications Association of Hong Kong Draft Enforcement Guidelines of TDO (Amendment) 2012 - CAHK.pdf



Public Consultation on draft Enforcement Guidelines of TDO_Mar 15, 2013(Signed).pdf



香港通訊業聯會
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15 March 2013

By fax (2398 0596) and email (guidelinescon@customs.gov.hk)

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

Dear Sir/Madam,

**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" to be issued under the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 ("TDO(A)"), the Communications Association of Hong Kong (CAHK), in representing the industry members including the Telecommunications and Broadcasting operators, would like to submit the recommendations as attached to the Customs and Excise Department and the Communications Authority.

Service providers who participated in the discussion of the TDO(A) implementation through CAHK are as follows (in alphabetical order):

- China Mobile Hong Kong Company Limited
- CSL Limited
- China Motion Telecom (HK) Ltd
- China Unicom (Hong Kong) Operations Limited
- China-Hong Kong Telecom Limited
- CITIC Telecom International Limited
- Hong Kong Broadband Network Limited
- Hong Kong Telecommunications (HKT) Limited
- Hutchison Telephone Company Limited
- Hutchison Global Communications Limited
- i-CABLE
- IMC Networks Limited

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- New World Mobility Limited
- New World Telecommunications Limited
- PCCW Media Limited
- PCCW Mobile HK Limited
- SmarTone Mobile Communications Limited
- TVB Pay Vision Limited
- Wharf T&T Limited

Yours faithfully,

The Communications Association of Hong Kong

Encl.

**DRAFT ENFORCEMENT GUIDELINES FOR THE TRADE DESCRIPTIONS
(UNFAIR TRADE PRACTICES) (AMENDMENT) ORDINANCE 2012 (“THE
AMENDMENT ORDINANCE”):
PUBLIC CONSULTATION PAPER (“THE PAPER”)**

RESPONSE BY COMMUNICATIONS ASSOCIATION OF HONG KONG (“CAHK”)

Introduction

CAHK and its members are committed to fair trading, and support the intent behind the Amendment Ordinance. However, the draft Policy Statement and draft General Guidelines in the Paper lack specificity in a number of important areas and needs to be amended to provide clarity. It is crucial that this lack of clarity is rectified as the Amendment Ordinance has wide implications on how business will be conducted in Hong Kong. The framework and method of enforcement, as well as the interpretation of the provisions, must be clear, particularly given the strict criminal liability imposed.

We urge the Enforcement Agencies to take due consideration of our responses and suggestions, and the responses and suggestions of our members, in order to develop a workable enforcement framework and provide reasonable and realistic guidelines for traders to follow.

Executive Summary

Our detailed comments on the draft Policy Statement and draft General Guidelines, are attached in the Annex. Where appropriate, we have given constructive suggestions for improvement of these documents, which we hope the Government and Communications Authority will find useful. Our main points can be summarised as follows:

1. The new offences in the Amendment Ordinance are very broad and often vague, a point which has been made consistently by industry representatives (including CAHK) in the initial consultation, and during the passage of the Bill through Legco. This means that examples, and guidance of how the Amendment Ordinance will apply in real-life situations, are all the more important. As far as our members are concerned, the examples and guidance as applied to the telecommunications and broadcasting sectors are sparse, and insufficient consideration was given to the practical problems which the Amendment Ordinance will cause in these sectors. More examples and guidance need to be given providing further elaboration on the draft General Guidelines, and in particular directed to telecommunications and broadcasting sectors.
2. The new offence of misleading omissions is particularly troublesome when applied to the telecommunications sector, given the complexity of some of the products and services concerned, and the huge disparity in the level of knowledge amongst consumers

[as well as employees of the traders]. Both of these factors combine to make it extremely difficult in practice for sales staff to assess what an “average consumer” is, and what information is relevant to that consumer in deciding whether to buy, or not to buy a particular product/service. To make criminal liability hinge on such difficult assessments, especially when such liability is strict and unintentional breach is no excuse, is highly onerous, to say the least.

3. The wide nature of the misleading omissions offence, as interpreted by the draft General Guidelines, can give rise to absurd potential outcomes. For example, even if a highly knowledgeable consumer who expressly said to a sales agent that he did not wish to be given information about a product and just wanted to buy it, the law (as interpreted by paragraph 3.15 of the draft General Guidelines) would still require the sales agent to give the customer the information against the customer’s will if the “average consumer” would need the information – and hold the sales agent criminally liable if he did not do so. This cannot be right. The same result may occur if the customer indicated that he did not want to obtain further information (e.g. was in a hurry), and the sales agent acquiesced to the customer’s request to skip the provision of further/additional information.
4. In these circumstances, as noted above, many more examples and guidance as to how the Amendment Ordinance would apply in everyday situations are required. At present, the examples given are virtually all of situations which might be a breach of the law. Most of these examples are of conduct which most reasonable persons would regard as egregious, and which are suitable for prohibition. But there needs to be more examples of common situations in all sectors (including the telecommunications and broadcasting sectors) which would not be considered a breach, or at least not one which is suitable for enforcement action. We believe that many such examples have been brought to the attention of the Government and OFCA during the consultation process: these need to be encapsulated in the revised draft of the General Guidelines.
5. No guidance has been given as to which Enforcement Agency – the C&ED or the CA – will be enforcing the Amendment Ordinance in the telecommunications and broadcasting sectors. A consultation on any C&ED/OFCA concurrent jurisdiction memorandum of understanding should take place for both transparency and substantive reasons. It is important for our members to know which agency they will be dealing with potential implications under the Amendment Ordinance, so clarity on this issue is required. It is also essential that there is clarity in respect of the enforcement action to be taken at the very outset of an investigation. The consequences of a criminal sanction (and the accompanying process and the standard of proof required) are very different to a civil sanction. The undertaking process must also be practical and workable.

ANNEX

Part A – Compliance and Enforcement Policy Statement

Item No	Paragraph	Comment	Recommendation
1	6-10	<p>Contrary to what the heading suggests, this section does not just deal with the Enforcement Agency’s prioritisation of resources (in paragraph 7). It also touches on processes for dealing with complaints (paragraphs 8-10) and investigations (paragraph 6). The processes for dealing with complaints, enquiries and Enforcement Agency’s investigations, on the one hand, and enforcement priorities, on the other, merit separate sections. Greater detail is needed on the processes.</p>	<p>We recommend that (a) this section be re-headed “The Enforcement Agency’s Priorities”, (b) only the content of paragraph 7 is included in this section, and (c) a new section is included after this section (headed “Enforcement Agency’s Processes”) which explains the Enforcement Agency’s processes in dealing with complaints, conducting initial enquiries (if the Enforcement Agency decides to follow-up the complaint); and (if the Enforcement Agency has reasonable grounds for suspecting an infringement) conducting investigations. This section could start with what is now paragraphs 8, 9 and 10 (on complaints) and end with paragraph 6 (as amended per comments below) and these paragraphs should be developed further to provide further details on each particular step in the process. Nonetheless, we recommend that there should be reference to an intermediate phase between examining a complaint and conducting a formal investigation, namely, conducting initial informal inquiries. Reference could usefully be made to two detailed sets of guidelines which OFCA has published, setting out these phases in chronological order and explaining each of them.</p>
2	6	<p>This paragraph is very broadly worded, and would appear to allow the Enforcement Agency to conduct random spot checks to ensure compliance. While this might reflect the broad</p>	<p>As well as including this paragraph in a separate section on complaints, enquiries and investigations (see above), we suggest (and this should be made clear in the Policy Statement) that the Enforcement Agency’s power to</p>

Item No	Paragraph	Comment	Recommendation
		<p>scope of powers under section 15, the Policy Statement should explain the limits on the exercise of these powers, taking into account an appropriate balance between the right to privacy and customer data and the effective enforcement of the Amendment Ordinance.</p>	<p>enter and inspect premises, and to require the production of relevant documents, would only be exercised in practice if the Agency has <u>reasonable cause to suspect</u> that an offence under the Amendment Ordinance has been committed. This would constitute an appropriate balance between the need to respect privacy and customer data, on the one hand, and to ensure the effective enforcement of the Amendment Ordinance, on the other. This suggestion is also consistent with investigation processes under other Hong Kong ordinances such as the Competition Ordinance and the Securities and Futures Ordinance. At the same time, consistent with the guiding principle of proportionality, the Enforcement Agency's investigative actions should be proportionate to the nature of the alleged infringement, taking into account alternative options for information gathering.</p>
3	6-10	<p>More guidance needs to be provided on the investigation processes and procedures to be utilised by the Enforcement Agencies.</p>	<p>We consider that, in the lawful exercise its powers (and this needs to be clear in the Policy Statement), OFCA would only use its investigation powers under the Trade Descriptions Ordinance ("TDO") to investigate potential breaches of the TDO and/or the Amendment Ordinance rather than use its investigative powers under the Telecommunications Ordinance (Cap. 106) ("TO"). If the Enforcement Agencies disagree with this position, then clear guidance needs to be given under the Policy Statement to what extent OFCA is lawfully able to use information gathered under its power under the TO indirectly in a matter under the TDO/Amendment Ordinance and vice versa.</p>

Item No	Paragraph	Comment	Recommendation
			<p>The Draft Policy Statement should also provide clarification on whether the investigative powers under sections 15, 16 and 16A, which appear directed at alleged infringements in relation to goods, are applicable in relation to services. Furthermore, there should be guidance given on what particular investigative powers would the Enforcement Agencies rely upon in the case of an alleged infringement in relation to services.</p> <p>Further, we suggest under the section “Investigation Priorities” (paragraph 6 to 10) (and this needs to be set out clearly in the Draft Policy Statement) that complainants are required to prove a prima facie case that a trader’s relevant conduct has breached the Fair Trading Sections in order for the Enforcement Agencies to institute a formal investigation, and that the Enforcement Agencies would not commence any investigations on frivolous or vexatious complaints, or complaints lacking relevant information. We believe such a policy is essential to ensure an appropriate allocation of resources, and is consistent with the principle that it is for the Enforcement Agencies to prove the accused breached the law beyond reasonable doubt, not for the traders to prove their innocence.</p>
4	6-10	The Draft Policy Statement should set out the consequences for unsubstantiated, vexatious and frivolous complainants to discourage wasteful and ill-motivated complaints. It is established public policy to discourage the wastage of public resources (see for example it is an offence under s.91(2) Criminal Procedure Ordinance (Cap. 221)	We suggest that the consequences for unsubstantiated, vexatious and frivolous complaints are clearly set out.

Item No	Paragraph	Comment	Recommendation
		for causing wasteful employment to the police by knowingly making to any person a false report tending to show that an offence has been committed).	
5	6-10	The Amendment Ordinance will have a wide impact on the business practices of all our members and indeed all traders in Hong Kong, many of whom have complex organizational structures and complex goods and services. It is unrealistic to expect such organizations to be ready for full compliance of the Fair Trading Sections upon the effective date of the Amendment Ordinance if that is to occur before the end of the present calendar year. Considerable time is required for review of business practices and internal processes (such as services on offer, programme offers and sales scripts), as well as training of the relevant personnel and internal audit of compliance.	We believe it is reasonable for the Enforcement Agencies to introduce a grace/transition period of 12 months following the Amendment Ordinance coming into force. During that period, the Enforcement Agencies should refrain from commencing civil and/or criminal enforcement actions but should instead focus on encouraging traders to improve their conduct to comply with the Fair Trading Sections by issuing warning letters for alleged breaches with an explanation of the law and the offense, and remedial steps that might be relevant.
6	9	This paragraph explains how the Enforcement Agency will deal with complaints which do not constitute potential offences under the Amendment Ordinance, but does not mention how frivolous or vexatious complaints will be handled.	A clear statement should be added in this or a following separate paragraph that the Enforcement Agency will not pursue enquiries or investigations into frivolous or vexatious complaints.
7	11	Paragraphs 6 to 10 make it clear that, while the Agency will examine every complaint, it will not pursue every complaint, and will prioritise which cases to pursue according to the criteria in paragraph 7.	Consistent with the principle of prioritisation in the interests of ensuring efficient allocation of public resources and with the principle of proportionality, we suggest (and in paragraph 11 this should be made clear) that (a) where infringements are of a minor or technical

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			<p>nature, and/or have terminated, undertakings or enforcement proceedings (civil or criminal) may not be necessary, and informal assurance that the conduct has or will cease may be sufficient; and (b) in other cases, the steps set out below in respect of the enforcements steps to be implemented should apply.</p>
8	11-27	<p>It needs to be clear at the outset of an investigation which path of enforcement action the relevant Enforcement Agency intends to pursue. Traders are likely to have a higher degree of cooperation at the outset of investigations if the remedies are warning letters, undertakings and/or civil remedies, whereas if criminal penalties are being considered, then the trader needs to be aware in order to be able to protect its rights against self-incrimination.</p>	<p>We consider it is prudent for the Policy Statement to set out clearly the order of enforcement actions for “first instance” conduct, which is suggested as follows:</p> <ul style="list-style-type: none"> (i) the Enforcement Agency would first issue formal written warnings to the relevant persons in respect of certain conduct which might breach the relevant Fair Trading Sections and provide opportunities for such persons to remedy the relevant conduct prior to commencing civil and/or criminal enforcement; (ii) if the relevant persons do not remedy such conduct, then an Undertaking should be sought; (iii) if an Undertaking is not given then civil remedies should be sought. <p>We consider that the Enforcement Agencies should always at the outset explore the feasibility of giving the relevant trader(s) the opportunity to take corrective action, rather than escalate enforcement action.</p> <p>We suggest that criminal prosecution should not normally be pursued unless an Undertaking is already in</p>

Item No	Paragraph	Comment	Recommendation
			<p>place and that it has been breached, or in the case of unusual and egregious circumstances outlined in paragraph 27 of the Draft Policy Statement. However, in those cases, if a criminal prosecution is being considered, that should be notified to the relevant trader at the instigation of the investigation. It should also be made clear at the outset, where possible, whether a custodial sentence will be sought in addition to a fine.</p> <p>If the above order of action is not accepted by the Enforcement Agencies, then we urge whatever order of processes they do intend to use to be very specifically set out in the Policy Statement rather than the vague guidance which currently appears in paragraph 12 onwards of the Draft Policy Statement under Part A of the Paper.</p>
9	12-23	<p>The Undertaking is presented under the Draft Policy Statement to be a more lenient form of civil sanction to absolve liabilities of the traders in exchange for their compliance of the Fair Trading Sections in the case of breaches of these provisions. However, the conditions of the Sample Undertaking, among others, requiring (i) traders to admit certain facts, (ii) allowing an authorized officer to publish an Undertaking will impede this purpose, as trader will be worried about giving an Undertaking for fear that it may be published and open the floodgates of civil litigation (i.e. private actions for damages).</p> <p>Section 30N(3)(c) of the Amendment Ordinance</p>	<p>We suggest that:</p> <p>(i) the Enforcement Agency should generally refrain from publishing the Undertaking provided the relevant trader complies with the terms imposed by the Enforcement Agency under an Undertaking, in particular, corrective actions that will be taken by the trader to remedy the harm by the conduct (as set out under paragraph 18 of the Draft Policy Statement). Should the Enforcement Agency decided to publish an Undertaking in view of public interest, we consider such form of Undertaking should not disclose relevant conduct that would have contravened the Fair Trading Sections by the trader (i.e. Item (3), (4), (5), (6),</p>

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		<p>provides that if an Undertaking is withdrawn “<i>a statement of any fact contained in the undertaking may be admitted in evidence in any proceedings referred to in paragraph (b)</i> [i.e. injunction and/or criminal proceedings] <i>and, on its admission, is <u>conclusive evidence</u> in those proceedings of the fact stated in the undertaking</i>”. While consumer redress by an aggrieved consumer under s.36A of the Amendment Ordinance can only be invoked against persons whose conduct <u>constituted an offence</u> under the Fair Trading Sections (emphasis added), that does not bar any actions for damages against such persons via civil action. In view of the drafting of s.30N(3)(c), should the Undertaking (in the current form) be published, it is highly likely that a civil court would find it credible evidence against the defendant trader (which in substance would practically be an admission of guilt by the trader) for a claimant relying on such Undertaking as evidence of facts when making a claim.</p> <p>Section 30N(1) sets out 4 scenarios which an acceptance of an Undertaking can be withdrawn. Having regard to s.30N(3)(c), we consider that a trader will be reluctant to accept an Undertaking and unwilling to provide frank cooperation at the investigation stage for fear of such admissions under the Undertaking will be used as evidence against such trader in subsequent civil and/or criminal proceedings as it appears an acceptance</p>	<p>(10)(a) and (10)(b)). We consider such public condemnation by the Enforcement Agency would be sufficient to punish the relevant trader and would encourage relevant trader to agree to acceptance of the Undertaking. In any event, the extent of information which is to be published should be disclosed to the trader at the beginning and throughout the negotiation of an Undertaking and should be part of that negotiation. We also suggest that paragraph 5 of the draft Undertaking be amended to “ the trader acknowledges/has been informed that C&ED/OFCA is of the view that the trader was likely to engage in....”;</p> <p>(ii) the Enforcement Agencies should include in the Policy Statement a statement that the conduct of a trader under investigation (such as willingness to cooperate and compliance with remedial actions) will be a factor for consideration in exercising the withdrawal power under s.30N in order to provide comfort for traders and encourage their cooperation during investigations;</p> <p>(iii) the Policy Statement should clearly set out that negotiation between an Enforcement Agency and a trader for terms of an Undertaking, reflecting expected practice, is on a “without prejudice basis” without admission of any liability, and that if an Enforcement Agency subsequently refuses to accept an Undertaking (whether on the advice of the Secretary of Justice or note) on a without prejudice basis, any information obtained under</p>

Item No	Paragraph	Comment	Recommendation
		<p>of an Undertaking could be withdrawn based on merely “reasonable grounds” for “believing” or “suspecting” by an authorised officer.</p>	<p>such negotiation shall not be used in any future prosecution; and</p> <p>(iv) For the purpose of s.30N, and given its quite exceptional nature, the Draft Policy Statement (para. 22 to 23) should clearly indicate that the Enforcement Agency must produce credible evidence before invoking any of the scenarios under s.30N(1) for the purpose of withdrawing the acceptance of an Undertaking when applying to the Secretary of Justice for such consent under s.30N(2).</p>
10	12-26	<p>Clarification is required in respect of the right of silence versus self-incrimination. s.17(5) of the TDO provides that a person shall not be excused, by reason that to do so may incriminate that person or the wife or husband of that person of an offence under the TDO from answering any question put to that person in <u>any civil proceedings</u> (emphasis added). Under s.17(1) of the TDO, it is stated any person who wilfully obstructs/fails to comply with requirement properly made by an authorized officer in the exercise of his powers or the performance of his duties under the TDO commits an offence. As such, the so called “right of silence” is removed for the purpose of investigation to institute civil proceedings, otherwise the relevant person(s) would commit an offence under s.17(1).</p> <p>Under the Draft Policy Statement, it appears that</p>	<p>We consider it is prudent for the Enforcement Agency to clearly set out under the Policy Statement as a guiding principle that the Enforcement Agency when conducting investigation in relation to enforcing the TDO and the Amendment Ordinance, is obliged to inform the persons (i) whether they will be seeking criminal or civil remedies whom are being investigated at the earliest possible time (ii) they cannot refuse to answer questions put to him/her by reason that to do so may incriminate that person and/or the relevant spouse in <u>any civil proceedings</u>, (iii) their right to seek legal representation at the outset of such investigation, and (iv) the right in respect of self-incrimination in respect of criminal charge. It also needs to be clarified whether invoking the right of self-incrimination will prejudice the chances of an Undertaking being accepted (although if our recommendations section out in (a) above are accepted, this would not be an issue as the trader will know whether civil or criminal sanctions are being pursued).</p>

Item No	Paragraph	Comment	Recommendation
		<p>there is no standard procedure and/or guiding principle in relation to commencing an investigation by authorized officers of the Enforcement Agency. There is a fear that person(s) being invited to attend an interview and/or responding to a written enquiry by the Enforcement Agency may not know the right of silence is removed for the purpose of <u>any civil proceedings</u> and that such information obtained by the Enforcement Agency would be only used for such purpose in that investigation or in any future investigation. On the other hand, it is also unclear under the Draft Policy Statement whether such authorized officer is obliged to inform the interviewee and/or recipient of written enquiries that such person would commit an offence for obstruction under s.17(1) TDO and the rights to seek legal representation. It is also unclear whether invoking the right against self-incrimination might be considered as non-cooperation by the trader during an investigation and acts as an adverse factor against them when considering whether to subsequently accept an Undertaking under paragraph 14 of the Draft Policy Statement.</p>	
11	27	<p>Criminal Prosecutions to be bought by CE&D:</p> <p>Section 16E(2) of the TDO provides that the Chief Executive in Council may, by notice published in the Gazette, specify powers covered by s.16E(1) under the TDO (as amended) that are</p>	<p>We suggest that it is appropriate (and the Policy Statement should reflect this) that the CA shall refer cases that warrant criminal prosecutions to CE&D for investigations, where OFCA should be restrained to its traditional role is facilitating the licensees under the TO and BO to comply with the relevant regulations via</p>

Item No	Paragraph	Comment	Recommendation
		<p>not exercisable by the CA. The Draft Policy Statement does not mention any such powers being excluded.</p> <p>We believe that OFCA may not be in the best position to exercise the criminal sanctions under the TDO (despite CA having concurrent jurisdiction with CE&D under the Amendment Ordinance). Since the inception of Telecommunications Authority (the predecessor of the CA), there has been a tendency for strong and early cooperation with the TA and OFTA (predecessor of OFCA) upon their investigations for alleged breaches under the TO, in particular, in relation to consumer protection issues (under the existing s.7M TO). OFCA would impose civil sanctions against TO licensees for their relevant breaches under the TO, which until now has been a satisfactory approach in procuring TO licensees to conduct business in a non-deceptive and non-misleading manner in safeguarding consumer interests. There is a danger that the new criminal sanctions under the Amendment Ordinance would destroy this established robust interaction between OFCA and the TO licensees. Further, OFCA is inexperienced in instituting criminal investigations compared to C&ED who has expertise having regard to its existing law enforcement practice and framework.</p>	<p>available civil remedies. A relevant notice would also need to be published in the Gazette under Section 16E(2) of the TDO to reflect this policy.</p>
12		Memorandum of Understanding between C&ED and CA (“ MoU ”):	We suggest that, consistent with the guiding principles of consistency and transparency in the Policy Statement,

Item No	Paragraph	Comment	Recommendation
		Under Section 16G of the Amendment Ordinance, it is stated that C&ED and CA must prepare and sign the MoU for the purpose of coordinating the performance of their respective functions under the TDO. However, the draft MoU was not included in the Paper for public consultation.	a draft MoU should be released for the purpose of public consultation as soon as possible, which shall include, among others, the proposed division of labour between CE&D and the CA in relation to enforcement of the TDO. The draft MoU should cover matters such as (i) ensuring consistency of approach in investigation and prosecution between the two Enforcement Agencies, and (ii) making it clear to whom consumers should make their complaints to and in which cases complaints will be transferred between the Enforcement Agencies (surely a “whoever gets it first” approach will lead to confusion and inconsistency).

Part B – Draft General Guidelines on the Fair Trading Sections of the Trade Descriptions Ordinance

Item No	Paragraph	Comment	Recommendation
1	Introduction paragraph II	It is not clear what conferring “concurrent jurisdiction” on C&ED and the CA means in practice. For example, will the Enforcement Agency which first receives a complaint be the one which deals with it, or will C&ED refer all cases it receives which involve the telecommunications or broadcasting sectors to the CA for any follow up action? We believe the latter is the more sensible approach (except for criminal prosecutions), given that CA’s sector-specific expertise.	This paragraph should make it clear that the CA will be the Enforcement Agency which deals with cases involving the telecommunications and broadcasting sectors where criminal sanctions are not being consider, and that any complaints or other cases which C&ED receives concerning these sectors will be referred to the CA for potential follow-up (except for those where criminal sanctions are imposed).
2	1.5	It is not clear from this section, or from section 8 of the draft General Guidelines, the circumstances in which (a) an individual such as a sales person, (b) that individual’s	This paragraph (and/or section of the draft General Guidelines) should give guidance on the circumstances in which an individual, his/her manager, one or more directors and/or the company itself, will be liable for

Item No	Paragraph	Comment	Recommendation
		<p>manager, (c) a board director, or (d) the company itself will commit the offence. Certainly there should be no liability on the part of the company or board of directors if they have put in place reasonable measures to ensure compliance.</p>	<p>committing the offence. The General Guidelines should make it clear that provided the directors or managers of the company have taken reasonable precautions to ensure their staff comply with the law, there should be no liability on their part (or the company) if such staff choose to ignore these precautions.</p>
3	2.1	<p>This paragraph, relating to false descriptions in relation to goods under section 7, applies to both business-to-consumers, and business-to-business conduct. However, it does not state whether the other offences in the Ordinance apply to both categories of conduct.</p> <p>In addition, it is unclear whether any gifts provided under a business transaction are covered under section 7 or section 7A of the Amendment Ordinance.</p>	<p>This paragraph should make it clear that the Ordinance does not apply to business-to-business conduct, except in relation to the section 7 offence. For the avoidance of doubt, the “Scope of Application” section should also clearly state that the Amendment Ordinance does not apply to business-to-business conducts except in relation to the s.7 offence.</p> <p>Further, it should be clearly set out whether “gifts” are within the scope of false trade descriptions of goods/services or not.</p>
4	2.11	<p>Paragraph 2.11 cites an example where advertising via celebrity endorsement may constitute a false description offence. We consider that the vast majority of consumers in Hong Kong would regard celebrity advertising as mere advertising puff, e.g. no-one would anticipate Ms. Joey Yung, a famous Hong Kong singer and celebrity, would purchase every electronic and electrical appliance through Broadway Electrical Store, in which she featured in their television advertisements for several years. Such commercial practice should not be barred <i>per se</i>. It should be</p>	<p>We suggest that the example cited under paragraph 2.11 should be refined and further elaborated as to what kind of celebrity endorsement would be considered as mere advertising puff or brand building exercise (e.g. the example of Joey Yung cited opposite) which would not contravene the Fair Trading Sections, and the kind which may constitute the false description offence (e.g. a celebrity claimed to have consumed a slimming product for 3 months and lost 10 pounds but in fact it was found out she never used the product and/or apart from consuming the product, she also uses slimming pills prescribed by a doctor).</p>

Item No	Paragraph	Comment	Recommendation
		judged on a case-by-case basis in the context of such advertisement in relation to the presentation of material information.	
5	2.12	It is not clear whether the “person providing the service” is the person contracting with the customer (which we believe is the statutory intention) or physically delivering a service. For example, in the telecommunications sector, “mobile virtual network operator” (“MVNO”) contracts to provide a service to the consumer, even although it is a mobile network operator which physically delivers the telecommunications signals to the consumer. Similarly, telecoms operators frequently outsource specific functions to third party contractors (such as customer services and network operations), but remain contractually responsible for providing the service to the customer.	It should be made clear in this paragraph that the person supplying the service for the purpose of the law is the person who is contractually liable to the customer, and that disclosure of that person’s identity alone will be considered sufficient, even if elements of the service are physically provided by third parties. The MVNO and sub-contracting examples given opposite could be used to illustrate this point.
6	2.15	Regarding price comparisons, it is not clear that price comparisons on a “per channel” basis are acceptable. For example, in the telecommunications sector, an advertisement may compare the price of an operator’s service at its retail shops favourably with the retail shop prices of other operators – even although the comparison at other sales channels might produce different results. Provided the “per channel” comparison is clear and accurate, it should not be regarded as false or misleading.	This paragraph should make it clear that comparisons on a “per sales channel” basis are acceptable, provided they are clear and accurate. The mobile telecoms example given opposite could be used to illustrate this point.

Item No	Paragraph	Comment	Recommendation
7	2.16	The “seven consecutive days” guideline in the last sentence is too arbitrary and inflexible: the reasonable test is sufficient because what is reasonable may vary from case to case depending on the facts.	Delete the last sentence of this paragraph containing the “7 days” guideline. More flexible guideline would be welcome. We recommend insisting a 3 day rule, but will room for flexibility depending on the circumstances.
8	2.16	Paragraph 2.16 sets out a “reasonableness test” in applying the representation “original price”.	We suggest the Enforcement Agencies provide clarification that the tariffs for the services on offer which telecommunications licensees are required to be published pursuant to their licence conditions (which are available for public access at OFCA’s website) could be regarded as the “original price” or price reference.
9	2.6-2.7	The draft General Guidelines do not provide sufficient clarity as to when a trade description will be considered to be false or misleading “to a material degree”:	<p>Further clarification needs to be given by examples to give a clear idea of situations which would be considered false or misleading to a material degree. Some situations common in the telecommunications sector are set out below. Guidance in respect of these situations would be particularly welcomed:</p> <p>(i) does the service availability of a particular technology need to be set out in detail in promotion materials? For example, a telecom service provider is providing both fibre-to-the-home (“FTTH”) service and non-fibre access service to certain geographical areas (perhaps on a building by building basis). Would the promotion with emphasis on FTTH alone amount to false trade description?</p> <p>(ii) some consumers may be attracted by the FTTH</p>

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			<p>advertisement and approach the service provider, but the service provider may only provide non-fibre access to some consumers (perhaps on a building by building basis). Would this technology or network limitation fully disclosed to the customer upon inquiry, amount to false trade description?</p> <p>(iii) do well-known technical facts/specifications still need to be set out in an advertisement? Examples:</p> <ul style="list-style-type: none"> - a telecom service provider is providing Internet access service using Asymmetric Digital Subscriber Line (ADSL). Does it amount to false trade description if the service provider does not specifically mention the lower upload speed in the promotion material? - when a telecom service provider provides 100Mbps service, the actual payload available for the end subscriber is lower than 100Mbps for a variety of technical/network reasons. Does it amount to false trade description if the service provider still labels it 100Mbps service? <p>(iv) does a promotion in relation to technology/specification instead of actual performance constitute misleading / false trade description? (e.g. a telecom service provider is promoting its 100Mbps FTTH service alone. However, 100Mbps FTTH broadband Internet service may be no faster in performance than non-FTTH 100Mbps in terms of testing speed depending on a variety of factors).</p>

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10	2.9	It is not clear from the pay TV example in this paragraph whether changes to a programming line-up due to circumstances which are unforeseeable and outside the control of the broadcaster would constitute an offence. For example, a pay TV service provider may renew a contract with an exclusive rights content provider annually. When promoting the content a number of customers would sign 24-month contracts. However, due to commercial and other unforeseeable issues, the content may not be renewed as anticipated. The pay TV service provider will try to provide alternative/substitutable content with similar nature to its customers, but this may not be acceptable to its customers.	It should be made clear, in this example or another example, that changes to programming line-up will not constitute an offence, except where the broadcaster has specifically represented to the customer that the content will be available during the entire contract period. In context, pay TV licensees have 150-200 channels with different contract terms with different content providers. At the same customers sign contracts ranging from 12-30 months in duration.
11	2.19	Paragraph 2.19 provides an example that it is not appropriate to state “Up to 50% off” if less than 10% of products are on sale within the same shop.	We suggest the Enforcement Agencies should state clearly in this example that when 10% or more products are on sale, whether it is permissible to say “Up to 50% Off Sale” without the need of adding extra disclaimer.
12	3.1-3.4 (Misleading Omissions)	Overall, this provision is the one which is causing the most concern to our members, as it effectively introduces a new obligation upon traders to evaluate their products and services to try and identify any element(s) which might cause the average consumer to make a different purchasing decision (even if decision is not to buy) if it is not disclosed, or they risk criminal prosecution.	This section should: <ul style="list-style-type: none"> include more examples which would portray a potential breach of Fair Trading Sections, as well as examples in which a breach would not be considered to occur, or be worthy of enforcement action. Such examples should include more detailed analysis as to why the Enforcement Agencies consider such commercial practices would constitute breaches of such provisions, or

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		<p>We do not concede that this process might be straightforward for a simple “product” (i.e. an item of clothing or household good) since such products may have many features or many good substitute products. In any event, it is much more difficult given some of the complicated service offerings provided by telecommunications and broadcasting operators. Complex products often have a high degree of customization and variation, such as mobile, broadband and pay TV packages. For example, the latter would include a variety of channels bundled as one or more packages and/or standalone channels which may be bundled with other electronic products. Due to the high degree of variability of such services (as programmes on offer can change from time to time subject to a variety of factors which may not be foreseeable by the service providers), it is hard to define on what would constitute “material information” over the entire contract period by the relevant frontline telesales staff to convey to the consumers in order not to fall within potential breach of this offence, as such staff may not have the requisite update of information despite the effort of management of the corporate trader in striving to comply with the Fair Trading Sections.</p>	<p>not to be breaches or not to merit enforcement action;</p> <ul style="list-style-type: none"> • set out more practical recommended practices in handling selling of complex goods/services (including reference to a detailed website/factsheet for further information); and • make it clear that, in general, if the consumer’s decision is <u>not</u> to buy, this would not normally merit action by the Agency in terms of its enforcement priorities.
13	3.13-3.15	The “ <i>transactional decision test</i> ” under paragraph 3.13 to 3.15, i.e. the effect or the	We suggest that the “ <i>transactional decision test</i> ” under paragraph 3.15 and example cited under paragraph 3.16

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		<p>likely effect on the average consumer’s transactional decision because of the omission/hiding of “material information”, is not well demonstrated via the examples under paragraph 3.16 (to be discussed below). In particular, they fail to demonstrate the Enforcement Agencies’ analysis in finding any potential misleading omissions in the event of certain material information being omitted. Indeed, there are widely accepted and legitimate business practices that might fail this test. For example, it is normal that traders do not offer the best offers to consumers when they are approached for invitation to purchase a good/service unless the consumers press for better bargains. It makes perfect business sense to traders to offer discretionary/tiers of discount/gifts to consumers in facilitating the closing of a business transaction. We consider any “<i>average consumer</i>” would anticipate that bargains can only be found if they ask for more and press the traders further. However, applying the transactional decision test, one would expect the purchase decision would be different if all the offers for the same good/service are made known to the consumer – any “<i>average consumer</i>” would have always picked the lowest-priced offer. This appears to be a <i>prima facie</i> breach of misleading omissions offence. If that was the case, it would mean all traders would only provide one offer for a particular good/service</p>	<p>should be refined and further elaborated that:</p> <ul style="list-style-type: none"> • It should be clear a decision not to buy should rarely, if ever, result in prosecution. • it is required to expressly specify under paragraph 3.15 that common and widely accepted commercial practices which would be anticipated by an average consumer (such as the above example in different tiers of discounts for the same good/service) would <u>not</u> fail the transactional decision test. • traders are required to decide on a list of relevant material information (“Relevant Information”) for disclosure in sales script/advertising material in relation to a good/service which they honestly believe would cause or likely to cause a customer to make a purchase decision. Such list is not definite and varies from industry to industry. The General Guidelines should expressly state that any conduct resulting in disclosure of Relevant Information to the consumer would be sufficient in avoiding breaching of the misleading omissions offence. Customers should also have the right to waive receiving that information. • More examples need to be provided in respect of conduct which the Enforcement Agencies consider to constitute misleading omissions offence in a hypothetical manner. In this regard, we submit that it is sufficient that the most relevant material information, e.g. price, model, and key functions such as voice and camera are sufficient for the

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		<p>without variation in order to avoid committing the offence. This would fetter genuine commercial activities as well as undermining competition among traders, which the end result would undoubtedly be detrimental to consumer benefits as a whole.</p> <p>Further, Section 13E(4) provides a list of material information which must accompany invitations to purchase. This is illustrated by an example under paragraph 3.16, which cites information to be disclosed in relation to a smartphone on the website. The example sets out an extensive list of what are the “main characteristics” of a smartphone (such as the processor, memory, graphics, software and operating system and its functions) which are expected to be communicated to the customer in order for them to make an informed decision in purchase. It implies that omitting certain of such material information might constitute the misleading omissions offence.</p> <p>However, we consider that to expect traders to communicate all the above information is impractical for the following reasons:</p> <ul style="list-style-type: none"> • certain commercial practices (e.g. telesales and person-to-person selling) only involve limited timeframe for presentation of material information to the consumer. It is impractical to verbally inform all such 	<p>smartphone example.</p> <ul style="list-style-type: none"> • in any event, the examples should also provide 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) providing a website/factsheet/hyperlink for consumer to find out further details of the relevant good/service (on the assumption that such website/factsheet/hyperlink would provide the material information expected). • it would be desirable to include certain recommended practices in relation to telesales/person-to-person selling for traders to benchmark in reducing the risk of contravening misleading omissions (as well as other provisions under the Fair Trading Sections). <p>Further examples should also be given analogous to the SMS example in paragraph 3.4, in what other media would this approach be acceptable (e.g. billboard advertisement, television commercials, etc.) in relation to the extent of information to be disclosed to discharge duty in respect of misleading omissions offence.</p>

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		<p>information of a good or service prior to the consumer making the purchase decision – otherwise salesmen would have to talk for an exceedingly long time to the consumer to discharge their duty, in relation to matters not of interest to most consumers. On the other hand, if an impatient consumer stops the salesman from giving further information (which could be the material information). It is unclear whether it would amount to misleading omission offence.</p> <ul style="list-style-type: none"> • in relation to telesales/ person-to-person selling, in general the relevant salesmen would present the key features of a good/ product to the consumer and would expect them to raise further questions only when clarification is required. It would be onerous for salesmen to regurgitate incredibly long sales scripts in a selling process to discharge their duty. • for advertisements, it is also unrealistic to disclose every single detail anticipated under the example in paragraph 3.16 due to the extra financial impact (i.e. more advertising space is required) as well as oversupply of information would also confuse the consumer in making a purchase decision. In relation to the smartphone example cited, our members’ 	

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		<p>experience is that the “average” consumer does not place much importance on the minor functions and features of the smartphone.</p> <p>We consider this section is <u>unhelpful</u> to traders to understand the implications of misleading omissions offence in relation to their day-to-day business practice, whilst the examples cited are putting onerous pressure on traders without achieving the objective of safeguarding consumer interests.</p>	
14	3.23	<p>This paragraph states:</p> <p><i>Timing of provision of material information</i></p> <p><i>“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”.</i></p> <p>This is unrealistic in the commercial world as information changes frequently and regularly. It is common for consumers to change their minds to make purchasing decision in the last minute. Provided they receive all the material information immediately prior to purchase and/or they acknowledge that such material information is set out in the relevant contract which they could peruse subsequently, we</p>	<p>The drafting under paragraph 3.23 should be changed from “<i>before</i>” to “<i>at the time of entering the contract or included in the contract</i>” to reflect commercial reality.</p>

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		believe an average consumer is unlikely to be misled.	
15	3.27 – 3.34 (Invitations to Purchase)	<p>There is great concern about how the draft General Guidelines interpret the concept of “invitation to purchase”, particularly with regard to the examples given in paragraph 3.29. It is impracticable, and inappropriate, for price labels and newspaper, online as part of a “banner advertisement” or TV advertisements to include all of the information listed in Section 13E(4) (and paragraph 3.30). For example, many transactions of telecom products/services are conducted in retail shops. It is confusing to include in advertisements the address of trader’s usual place of business which is always the headquarters of a company where a purchase transaction will normally not be taken. Nor is it practicable or appropriate to list out the address of all retail shops in Hong Kong.</p> <p>It would in many cases be better to see such labels or advertisements as invitations to ask more questions.</p>	<p>It should be made clear that a general advertisement in the press, in an online environment as part of a “banner advertisement” or on radio or television, should not be regarded as an invitation to purchase for the purpose of section 2(1) and therefore the information requirements in section 13(E)(4) do not apply. Advertisements of this kind should be treated as invitations to make further inquiries or as brand-building exercises rather than specific invitations to purchase. Equally, a price label in itself should not be regarded as such, and it would be clearly impracticable for it to contain all of the information set out in section 13(E)(4): this example should be deleted. A price label is a price label. It does not purport to be anything more. Often information would come from other labels, tags, user guides the sales person, web sites, etc.</p>
16	3.38 (“advertorial”)	It is unclear from this paragraph the circumstances in which “advertorials” will be acceptable.	A clear statement should be made that an “advertorial” which clearly indicates that it is an advertisement and revealing the trader’s identity will be accepted as identifying a commercial intent. An example to illustrate this would be helpful. For example, a description of the advertisement being an

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			“advertisement” or “advertorial” should be enough.
	3.40	The example needs to be clarified to allow “legitimate” comments by employees.	Chat rooms need to distinguish replies by employees from gratuitous favourable comments via disguise.
17	4	<p>Time to raise complaint on alleged aggressive commercial practices is not specified under this section. We consider it would be unfair to traders if the complaints were made to the Enforcement Agencies after a long period, either for the purpose of frustrating the transactions for illegitimate reasons or possible retrospective persecution against traders.</p> <p>Further, more concrete guidance is required to indicate what factors would give rise the alleged aggressive commercial practices (some positive as well as negative examples are required). Having second thoughts about a purchase must be clearly rejected as a basis of a complaint.</p>	We suggest to clearly indicated that complaints arising out of the alleged conduct in breach of s.13F(2) be made within 3 days from such conduct was made to the complainant and be supported by evidence proving a prima facie case.
18	8	<p>Liability of the parties involved (Section 8):</p> <p>Section 8 provides an account of which persons may be personally liable under s.20 of the Amendment Ordinance for an offence committed by a corporate trader/unincorporated trader under the Fair Trading Sections. In particular, it states that in order to establish their liability, it is necessary to prove that the offence has been committed with their consent or connivance or was attributable to</p>	Given the possibility of imprisonment under a criminal conviction it is important for the General Guidelines to clearly delineate that the Enforcement Agency has the burden of proof in seeking any civil or criminal remedies. It should be specified that this is “on the balance of probabilities” for civil offences and “beyond reasonable doubt” for criminal prosecutions. We also suggest it is <u>essential</u> for the Enforcement Agencies to indicate clearly in both the Policy Statement and General Guidelines that corporate traders and their

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		<p>their neglect.</p> <p>As the criminal liability of contravening an offence is potentially widespread (i.e. persons which are connected with the relevant commercial practice, which include the wrongdoer(s) as well as innocent participant(s)), for large business organizations, it would be a great concern in managing the business processes to comply with regulatory requirements to safeguard the employees who are not intending to breach the law. It is also an issue for relevant staff that criminal liability would be imposed on them on the ground of “<i>committed with their consent or connivance or was attributable to their neglect</i>” for a conduct which subsequently found to be breaching the Fair Trading Sections.</p> <p>We consider that Section 8 does not provide a clear guidance to traders on what they ought to do to safeguard their employees and senior management in reliance on the defence under s.26(2) that the relevant person(s) have taken “<i>reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control</i>”. Having said that, we believe that the intention of the Amendment Ordinance is not to criminally prosecute wrongdoers <i>per se</i>, but to encourage corporate traders to comply and</p>	<p>respective employees who have no intent to commit fraud or mislead and who have taken reasonable endeavours and due diligence to maintain and participate in an internal compliance procedure as to its business practices to comply with the Fair Trading Sections may be an example of a defence for person(s) being charged in case of criminal prosecution in relation to committing offences under the Fair Trading Sections, and provide practicable example(s) to explain the circumstances under which these persons may be liable.</p>

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		enhance consumer protection.	

In order to exercise good trade practices, traders would gladly incur reasonable operation costs to meet statutory requirements if they are legitimate and justified. However, the lack of clarity in the General Guidelines might press traders to impose overly sensitive and draconian measures and procedures at high costs to them. These unnecessary and redundant costs might eventually be partly transferred to consumers, which we believe is not preferred. It would be wastage of resources and might hinder normal business operations.

**** End ****