



15/03/2013 17:14

To <guidelinescon@customs.gov.hk>


cc

bcc

Subject Trade Descriptions (Unfair Trade Practices)  
(Amendment) Ordinance 2012 - Consultation on Draft  
Enforcement Guidelines

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History:

 This message has been forwarded.

Dear Sirs,

Please find attached as PCCW Limited's Submission Form of Trade Description (Unfair Trade Practices) Ordinance 2012 – Consultation on Draft Enforcement Guidelines.

Best Regards,



PCCW TDO submission form.pdf



**Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 –  
Consultation on Draft Enforcement Guidelines**  
**《2012年商品說明(不良營商手法)(修訂)條例》— 執法指引擬稿諮詢**

Submission Form 意見書

**Part I: Organization Details**

第一部份：機構資料

Name of Association / Organisation / Company 協會/機構/公司名稱:	(English) <u>PCCW Limited</u>
	(中文) <u>電訊盈科有限公司</u>
Address地址:	(English) <u>39/F PCCW Tower Taikoo Place</u> <u>979 King's Road Quarry Bay Hong Kong</u>
	(中文) <u>香港鰂魚涌太古坊電訊盈科中心39樓</u>

Name of Representative in  
English (Mr/Ms):

諮詢者  
中文姓名

Position 職位:

Phone No. 電話號碼:

Email Address 電郵地址:

**Part II: Your Views**

第二部份：您的意見

(Please attach extra sheets if necessary如空格不夠填寫，請另附紙)

**Overview**

The PCCW Group is committed to ensuring customer satisfaction. Ensuring an exceptional customer experience is a one of our core business drivers across our diverse businesses. Consistent with this, PCCW is supportive of measures to enhance consumer protection which fairly balance the rights and expectations of both buyers and traders. However, the guidelines need to provide much greater clarity in respect of how the enforcement powers will be exercised and what conduct will be caught by the provisions.

PCCW Group has had the opportunity of reviewing the detailed CAHK submissions and agrees with the points set out in that document. We also highlight the issues which we consider are of critical importance below.

Section A – Compliance and Enforcement Policy Statement

甲部 - 遵從與執法政策聲明

Views意見:

The timeframe for implementation is very short given the number of changes which will need to be made to business practices and internal processes (to give just one example, the sales process in all forms, i.e. online, at shops, by phone and in person will need to be reviewed to ensure that there is sufficient information provided to avoid a misleading

omission). We suggest that that a transition period of 12 months is adopted, during which time the Enforcement Agencies will focus on an education phase, and impose sanctions by issuing warning letters rather than commencing civil and/or criminal sanctions.

The remedy the Enforcement Agency intends to pursue needs to be communicated at the outset of an investigation. In particular, it is essential that a trader is told whether the sanction sought will be criminal or civil in order to preserve his or her legal rights. If a trader does not know whether the potential liability is civil or criminal it will make it very difficult to transparently co-operate and communicate with the Enforcement Agencies. At the same time, the enforcement approach of the Enforcement Agency must be clearly articulated. It would be appropriate to indicate that criminal sanctions would only be sought in the most egregious cases. We fully support the suggestions in the CAHK submission that the order of enforcement actions for “first instance” conduct is clearly set out (i.e. formal written warnings, followed by an Undertaking, then civil remedies if the conduct is not rectified).

The Policy Statement should make it clear which investigation powers the Enforcement Agencies are using during an investigation. It would be most useful if OFCA would take the same approach to enforcement priorities and processes as the Customs & Excise Department. It would also be helpful to clarify that OFCA could not use information collected for an investigation under the Telecommunications Ordinance for an investigation under the TDO (and vice versa).

The drafting of the Undertaking should be modified to encourage traders to adopt it. We support the measures CAHK has suggested in its submissions and in particular urge the Enforcement Agency to consider the suggested recommendations not to publish sensitive parts of the Undertaking (or publish it all absent a compelling reason to do so). We also echo the submissions that Enforcement Agencies should take into account co-operation levels and remedial actions taken before considering whether an Undertaking should be withdrawn under s.30N. Likewise, we consider it important that negotiations between a trader and an Enforcement Agency should not be used in any future prosecution or damages. It is also important that the Enforcement Agency produces credible evidence before withdrawing the acceptance of an Undertaking under s.30N(1). Undertakings, to be a useful tool, must not be used to open traders to private action damages suits. 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....”.

We believe C&ED is the appropriate Enforcement Agency to conduct criminal prosecutions. We also support the CAHK submissions in relation to greater clarity being required in terms of which agency will conduct an investigation and ensuring that there is a consistency in approach.

## Section B – General Guidelines

### 乙部 - 一般指引

#### 1. Fair Trading Sections of the Trade Descriptions Ordinance – Scope of Application 《商品說明條例》的公平營商條文 - 適用範圍

##### Views 意見:

The application of “concurrent jurisdiction” needs greater clarity. It should be made clear in what circumstances the C&ED as opposed to OFCA will conduct an investigation. It also needs to be made clear that OFCA enforcement priorities, approaches and processes will be similar to those adopted by the C&ED.

Much greater clarity is also required in respect of directors and managers liability. The guidelines should give more concrete examples of when it is likely that this provision will be invoked and what steps will provide an adequate defense. In particular, there needs to be specific recognition that have an adequate compliance plan, and taking reasonable precautions will be a defense for personal liability.

#### 2. Trade Descriptions of Goods and Services 貨品和服務的商品說明

##### Views 意見:

More concrete examples need to be given to provide better guidance. In particular, it needs to be clear when a trade description will be considered to be false or misleading “to a material degree”. Some examples are provided in the CAHK submission.

#### 3. Misleading Omissions 誤導性遺漏

##### Views 意見:

The offence of misleading omissions is both new and controversial, and has the potential having unintended consequences. This provision imposes a new standard upon traders (as they now have to assess what information might affect an “average” customer’s purchasing decision). While that may be straight forward for “simple” products and services, it is a much more difficult assessment to make for more complex products and services. The situation becomes more complex for bundled offerings with many different features and contract terms. What is important to one customer may be trivial (or even annoying) to another customer. Accordingly, more concrete “real life” examples are necessary in order to provide sufficient clarity to ensure compliance. Examples of both acceptable and unacceptable conduct should be included.

There needs to be more explanation about how the offence will operate in different selling environments. For example, information that can be provided in an online sales environment, where customers are free to click-through (or not) to relevant information is very different to an “in-person” sale, whether by phone, in a shop, or any other environment where a more limited time frame may be involved and a customer may not wish to listen to a long explanation of relevant information. In general, in “in-person” sales it should be clear that as long as an opportunity is given to ask further information, or information given on where that information can be obtained (e.g. a website), then that should be sufficient.

The examples given in relation to “invitation-to-treat” advertisements reflect more “brand building” exercises, rather than an invitation to treat. An invitation to treat should be regarded more properly as a price displayed next to a product or service in a shop, not in a TV advertisement, an online banner advertisement or an advertisement in print. It is unrealistic to expect all of the information required in an “invitation to treat” context in normal print or television environments. As currently drafted, where more complex products and services are provided, television advertisements would need to be full of fine print at the end of each advertisement, and printed ads would require 1/3 page of explanatory material.

Again, we agree with the points made in the CAHK submissions on this point and support the “Relevant Information” list it proposed, where it would be sufficient to provide customers with a sheet of paper listing an honestly compiled list of relevant information prior to a purchase. It should also be clear that it is sufficient for a trader discharge the obligation if it provides customers with the opportunity to raise further queries or provides a link to a website or fact sheet with further details.

It needs to be clarified that not giving a customer the “best offer” is not a misleading omission, especially in the context of industries where tiered offers are common. The smartphone example given in paragraph 3.16 also needs to be clarified. This could be used to contrast the difference in information required in information given in person before a contract is signed in an online versus “in person” environment (and the difference between a telephone sale and a shop sale), versus information required in a brand building exercise.

It should be clear that providing information at the time of entering into the contract, or included in the contract is sufficient “timing”, rather than “before” the purchase as currently specified in paragraph 3.23. This is particularly relevant in the telecommunication sector where all the major operators have agreed to comply with the Code of Practice in respect of Telecommunications Contracts.

A decision not to buy should not be one which would ordinarily give rise to any action by the Enforcement Agencies.

#### 4. Aggressive Commercial Practices 具威嚇性的營業行爲

Views 意見:

More detailed guidance is required in respect of what factors would indicate aggressive commercial practices in order to provide guidance on the line between “assertive” selling and conduct which is breach of this provision.

More concrete examples of both acceptable and unacceptable behavior would be welcome.

#### 5. Bait Advertising 餌誘式廣告宣傳

Views 意見:

We have not major issues with this section.

6. Bait and Switch 先誘後轉銷售行爲

Views 意見:

We have no major issues with this section.

7. Wrongly Accepting Payment 不當地接受付款

Views 意見:

We have no major issues with this section.

8. Liability of Parties Involved 有關人士的法律責任

Views 意見:

As set out above, we believe it is critical that the Policy Statement and General Guidelines provide more clarify on when personal liability will arise.

In particular, in order to give certainty to traders, their employees and stakeholders, it is essential to know what will provide a defense to these allegations. This will also encourage the development of comprehensive compliance plans if it is clearly set out what steps must be taken.

Concrete examples of what “due diligence” and compliance systems would be adequate (and not adequate) would be very helpful.

9. Sanctions and Powers Available to the Commissioner and the Communications Authority  
香港海關關長和通訊事務管理局可施加的懲處及獲賦予的權力

Views 意見:

We have no major issues with this section.

10. Consumer Redress 消費者可尋求糾正

Views 意見:

We have no major issues with this section.

Signature 簽署: \_\_\_\_\_

Date 日期: 15 March 2013

Please return us this form on **or before 17 January 2013** through any of the following means:  
請透過以下任何一項途徑於**2013年1月17日**或之前交回此表格:

Post 郵寄: Customs and Excise Department  
Trade Descriptions Ordinance Special Planning Group  
14/F., Trade and Industry Department Tower,  
700 Nathan Road, Mongkok, Kowloon

九龍旺角  
彌敦道700號  
工業貿易署大樓14字樓  
香港海關  
商品說明條例特別籌劃組

Fax 傳真: 2398 0596  
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Note: In providing us your views, please let us know in case you do not want to be attributed. Unless otherwise specified, all responses will be treated as public information and may be published in the future without further notice.

注意: 如不欲公開姓名, 請於提交意見時清楚表示。除非另加指明, 否則所有意見均視作公共資訊處理, 日後可能會在沒有通知下予以公開。