

15/03/2013 18:00

To <guidelinescon@customs.gov.hk>


cc

bcc

Subject Re: Draft Enforcement Guidelines For the Trade
Description (Unfair Trade Practices) (Amendment)
Ordinance2012

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History:

 This message has been forwarded.

Dear Sirs,

With reference to the subject matter, please find attached our submission for your action.
Thank you for your kind attention.

Yours faithfully,
Legal and Regulatory Department
Hong Kong Cable Television Limited



TDD Guidelines-HKCTV Submission-15Mar 2013-1.doc

**Submission by Hong Kong Cable Television Limited on the
Draft Enforcement Guidelines For The Trade Descriptions(Unfair Trade
Practices) (Amendment) Ordinance 2012 (the “Amendment Ordinance”) :
Public Consultation Paper (the “Paper”)**

We have a number of major concerns on the Draft Enforcement Guidelines in the Paper which consists of (i) Compliance and Enforcement Policy Statement and; (ii) General Guidelines on the Fair Trading Sections of the Trade Descriptions Ordinance (the “Guidelines”) and would like to set out as follows our views and suggestions for your consideration.

1. Limits Imposed On Exercising Broad Scope Of Powers

The powers to be exercised by the Enforcement Agencies as stated in the Guidelines are very broad including, for example, carrying out regular inspection of trader premises and conducting targeted spot checks. This suggested power, without any threshold of suspicion or belief, is intrusive. We opine that the Enforcement Agency must therefore have reasonable cause to suspect that an offence under the Amendment Ordinance has been committed before exercising the power of entering and inspecting the premises, or requiring the production of relevant documents. A fair balance needs to be struck between the right to privacy and customer data on one hand, and the effective enforcement of the Amendment Ordinance on the other.

2. Eliminate Frivolous Or Vexatious Complaints

To minimize possible abuse of the redress system under the Amendment Ordinance and to discourage wastage of public resources, we urge the Enforcement Agency to set out clearly the consequences for all frivolous or vexatious complaints or complaints deficient in relevant information and ensure a robust mechanism in place to screen out all such complaints in the bud. The Guidelines should therefore spell out clearly that among other things the complainant must prove a prima facie case that a trader’s relevant conduct has breached relevant provisions before the Enforcement Agency will instigate a formal investigation.

We also suggest that greater details should be given on each particular step for dealing with complaints, enquiries and Enforcement Agency’s investigation.

3. 12-Month Grace Period

Given the wide impact on our business practices and many of us in the

telecommunications and broadcasting sector have complex organizational structures and complex goods and services, we suggest when the Amendment Ordinance coming into force, a grace period of 12 months to be introduced during which no enforcement actions will be taken and only warning letters issued for any alleged breaches.

4. Principle Of Proportionality

The relevant trader should be given with the opportunity to respond to the complaint at the outset and the Enforcement Agency should explore the feasibility of taking corrective action instead of escalating enforcement actions. If the infringement is of minor or technical nature, no further enforcement action will be taken after securing an informal assurance from the relevant trader to cease such conduct. For other cases, the following steps should be taken. Firstly, a formal written warning issued to the relevant trader to remedy the relevant conduct and an Undertaking should be sought if the relevant conduct not remedied as requested and if an Undertaking is not given then civil remedies should be sought. Criminal prosecutions should be reserved for the most serious breaches and should always be the last resort when all other means available exhausted and the Undertaking has been breached.

In line with the principle of proportionality, the Enforcement Agency's investigative action should be proportionate to the nature of the alleged infringement.

5. The Undertaking Not To Be Published

We are of the view that the Enforcement Agency should not publish the Undertaking if the relevant trader complies with the terms imposed by the Enforcement Agency under an Undertaking especially when remedial action has been taken by the trader to remedy the matter as there are worries of opening the floodgates of civil litigation with the publication of the Undertaking..

6. Information Not To Be Used In Future Prosecution

It should be spelt out clearly in the Guidelines that any negotiation or discussion between an Enforcement Agency and a trader for terms of an Undertaking is on an "without prejudice basis" and without admission of any liability on the part of the trader and no information obtained thereunder can be used in any future prosecution if an Undertaking is not accepted by the Enforcement Agency.

7. Clear Guidance On Who Will Be Liable

It is unclear in the Guidelines as to who will be liable for committing the offence and a clear guidance should be given on the circumstances in which a sales person, his/her manager, the company itself or one or more directors will be liable for an offence committed. Further, the Guidelines should include the suggestion that no liability on the part of company or board of directors if they have put in place reasonable measures to ensure compliance.

8. Greater Clarity And Detailed Guidance Necessary

The new offences in the Amendment Ordinance are too broad and vague, so greater clarifications, more examples and detailed guidance are needed on how the Amendment Ordinance would apply in everyday situations. We notice that, for instance, there is an unclear example about Pay-TV's changes to a programming line-up in the Guidelines trying to illustrate what constitutes false and misleading product information to consumer. Pay TV licensees have over 100 channels with different contract terms with different content providers. There are always changes to a programming line-up due to unforeseeable circumstances and something outside broadcaster's control but it is not clear whether this would constitute an offence. We therefore request clarifications on the changes to programming line-up will not constitute an offence except where the broadcasters have specifically represented something they know already that they cannot continuously provide throughout the term.

In addition to our foregoing views, we support all of the suggestions made by the Communication Association of Hong Kong on our behalf in its submission filed to the Government today. We hope the Government will take all our responses and suggestions into careful consideration so that a clear, practical and helpful Guidelines can be formulated for us to follow.

15 March 2013

Hong Kong Cable Television Limited