

**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 Company	(English)	<u>TVB Pay Vision Limited</u>
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Name of Representative in English (Mr/Ms):

諮詢者中文姓名 (先生/女士):

Position 職位:

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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)

**Overall views on Section A – Compliance and Enforcement Policy Statement and Section B
– General Guidelines on the Fair Trading Sections of the Trade Descriptions Ordinance**

As a pay TV operator in Hong Kong, we have serious concerns on the following issues:

- 1) The Fair Trading Sections of the Amendment Ordinance are indeed rather strict, vague and wide-reaching. We consider that the implementation and enforcement of the Fair Trading Sections of the Amendment Ordinance should not obstruct the fair and normal business operation of local traders.
- 2) The draft Enforcement Guidelines mainly focus on what kind of unfair trade practices

should be avoided. However, it shows a lack of clear directions and guidelines on what kind of positive commercial practices and measures which the traders could adopt so as to avoid contravention of the Fair Trading Sections. The Enforcement Agency should give the traders some specific, unambiguous and easy-to-follow guidelines on such conducts which would be regarded as fair trade practices so that the traders can have a point of reference to adjust their commercial practices. Without such clear guidelines of positive conducts, the traders have no way to know how far and how much should they do to prevent themselves from contravening the Fair Trading Sections of the Amendment Ordinance.

3) In the pay TV industry, direct sale of subscription service to consumers is a common business model. We can anticipate that a lot of issues would arise if there is no clear guidance on what kind of commercial practices would be regarded as fair trade practices.

4) We note in the consultation paper that the Enforcement Agency generally accords a higher priority to cases involving, *inter alia*, the conduct that is targeted at disadvantaged or vulnerable consumer groups. Further, the Enforcement Agency is more likely to institute criminal proceedings against a trader if the victims are particularly vulnerable. Unfortunately, the draft Enforcement Guidelines do not define nor give any indication of which group of people would likely be regarded as disadvantaged or vulnerable. Our target customers range from teenage to retired people. Some of them are more educated and some are less. Would a senior and retired citizen with only primary education be regarded as a disadvantaged or vulnerable consumer? Would a housewife with little or no education but having very rich experience in subscribing pay TV services in the past also be regarded as disadvantaged or vulnerable? How about a low-income family living in public estate? Is it disadvantaged or vulnerable? How can our salespeople judge by sight whether a target customer is disadvantaged or vulnerable? Is it only by common sense? Do we need to ask some embarrassing questions, such as age, education background, mental condition and financial capacity, to ascertain whether a potential customer is disadvantaged or vulnerable before selling our service to him/her? If we have doubt on the ability of the potential customer in apprehension of our description of service or on his/her ability to pay the monthly subscription fee, and then we refrain from providing the service to that potential customer, would it constitute unfair treatment or discrimination against that potential customer? The Enforcement Agency should consider different scenarios and give proper guidelines to traders, otherwise traders may unwittingly violate the laws.

5) In the Fair Trading Sections, it makes reference to the average consumer. Since our targeted group of customers covers a wide range of people with different social backgrounds and education levels, we wonder who the average consumer is in our targeted group of

customers. We appeal for a more specific guideline and definition to enable us to grasp the concept of average consumer in our industry.

6) In the draft Enforcement Guidelines, there is no general guidance (not to mention a specific one) on what kind of evidence which might be acceptable and could be used by the traders to defend themselves against the claims of contravention of the Fair Trading Sections. In our industry, in most cases of direct sales, only the potential customer and his/her one or two family members and one or two salespersons are present at the spot. Usually, no independent third party is present to witness the sales. Do we need to record all conversations between the salespeople and the potential customer during the whole selling process each time? Would audio recording of the process be sufficient enough and admissible in proving our compliance with the Fair Trading Sections of the Amendment Ordinance when there is a complaint of unfair trade practice?

7) Further, in our practice, our salespeople usually verbally explain the service details to customers. In case of complaint, what kind of evidence would the Enforcement Agency expect to receive to prove that we have adopted a fair trade practice? The complaining customer may just tell one side of the story and our salesperson may tell the other side. The complaining customer may just deny the fact that the salesperson has explained clearly the details of the service. If there is no recording or witness to provide evidence, how would the Enforcement Agency handle the complaint in this situation? These are practicable issues we may encounter and we do not find any guidance in the draft Enforcement Guidelines in this respect. We believe that not only the pay TV industry would come across this problem, but those traders who are adopting direct sales model would also have the same queries and difficulties.

8) We appreciate the enactment of legislations to enhance protection for consumers. However, it should not be achieved at the expense of the legitimate interests of bona fide traders. The approach to be taken by the Enforcement Agency in the enforcement of the Fair Trading Sections of the Amendment Ordinance as reflected in the draft Enforcement Guidelines will inevitably pose a serious threat to traders' normal business operations. It appears that the Enforcement Agency would adopt a stringent approach against any unfair trade practices. However, unfortunately, there is no specific guideline on what kind of conducts would be regarded as fair trade practices. The traders would easily be caught under such legal framework. Does the Enforcement Agency expect the traders to exhaust all resources to put in place all kinds of measures to avoid any possible claim of unfair trade practices? 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 Guidelines might press the traders to implement overtly sensitive and draconian measures and procedures at high costs to them. These unnecessary and redundant costs might eventually be partly transferred to the consumers, which we believe is not desirable. Furthermore, if the Enforcement Agency adopts the approach as stated in the draft Enforcement Guidelines, it will only impose extra burden on traders in terms of running costs and time and will eventually force some traders to go out of business because the business cost of avoiding unfair trade practices is too high and unaffordable. We don't believe it is in the interest of the general consumers as a whole.

9) In handling an unfair trade practice complaint, would the Enforcement Agency take into consideration the actual business operations and the constraints of the traders? For instance, for trade description of goods and services and misleading omissions, would the Enforcement Agency expect the traders to use up all possible resources to avoid any possible false description or hiding of material information? How can the Enforcement Agency evaluate whether the traders have done sufficiently enough under the Enforcement Guidelines? Under the draft Enforcement Guidelines, we don't know to what extent we should do in order to keep ourselves from being prosecuted.

10) Has the Enforcement Agency thought of a scenario that consumers may abuse the Fair Trading Sections of the Amendment Ordinance by making false allegations against the traders when they intend to withdraw from the business transactions with traders? If the Fair Trading Sections are narrowly interpreted and are strictly enforced as stated in the draft Enforcement Guidelines, it is readily easy to find faults with the traders by alleging that they are providing a false description of goods/services, deliberately hiding some information or using aggressive commercial practices, etc. It is especially the case when there is no specific provision in the Enforcement Guidelines to protect or defend the position of traders against false allegations. If a consumer wishes to cancel a business deal with a trader, he/she can just simply file a complaint with the Enforcement Agency alleging that the trader has committed a breach of the Enforcement Guidelines. Since there is no sufficient protection to the traders against false allegations, the consumer may easily get out of the transaction without hassle. On the other hand, if false allegations are proved to be made by consumers, would the Enforcement Agency or other authorities be empowered to impose any sanction on the abusive consumers?

11) The Fair Trading Sections of the Amendment Ordinance are new to local traders and we need sufficient time to revise or adjust our internal commercial practices and procedures and to provide proper training to our staff to accommodate to the requirements of the new Sections and the Enforcement Guidelines. Hence, we appeal for the grant of a 12-month

transition period before the enforcement of the Fair Trading Sections and the implementation of the Enforcement Guidelines so that different industries affected by the Amendment Ordinance would have enough time to get themselves ready to comply with the new requirements.

12) In relation to the Undertaking to be given by a trader not to continue, repeat or engage in an unfair trade conduct, we appeal to the Enforcement Agency to allow the trader to provide the Undertaking in strict confidence to the Enforcement Agency or the Secretary of Justice only and not to publish the Undertaking to the public or make public reference to it. Otherwise, it would just discourage the traders to provide an Undertaking in fear of publication and then most of the complaint cases would need to go through a full range of investigation process which is time consuming and wastage of cost and might not be to the benefit of the victims of unfair trade practices.

Signature 簽署:

Date 日期: 15 March 2013

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