



17/03/2013 23:20

To "guidelinescon@customs.gov.hk"
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cc

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

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Dear Sir/Madam,

Please find attached the CSL's submission in response to the captioned consultation.

Regards



CSL Limited, a subsidiary of Telstra Corporation Limited

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CSL's Comment on Unfair Trade Practice Enforcement Guidelines_20130317.pdf

**CSL's Submission in response to the Public Consultation Paper on
the Draft Enforcement Guidelines for the Trade Descriptions
(Unfair Trade Practices) (Amendment) Ordinance 2012**

1. Introduction

1.1 CSL Limited (**CSL**) welcomes the opportunity to provide comments in response to the public consultation paper on the draft enforcement guidelines for the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (**Enforcement Guidelines**) jointly issued by the Customs and Excise Department (**C&ED**) and the Office of the Communications Authority (**OFCA**) on 7 December 2012.

1.2 In this submission, the issues set out are generally discussed in a level of principles and those of primary importance to CSL. CSL fully supports the submission made by the Communications Association of Hong Kong (**CAHK**) which provides consolidated comments and suggestions of the telecommunications and broadcasting sectors on the Enforcement Guidelines. CSL requests the C&ED and OFCA as the Enforcement Agencies to take into account the responses of CSL and CAHK prior to the finalization of the Enforcement Guidelines.

1.3 CSL supports the protection for consumer against unfair trade practices. However, the proposed offences in the amended Trade Descriptions Ordinance (**TDO**) are overly broad and vague without a clear guidance as to what actions or inactions are prohibited. These problems are shared by the majority of respondents to the previous consultation. It is a reasonable expectation that the C&ED and OFCA would provide in the Enforcement Guidelines more clarity and certainty to facilitate all traders to comply with the fair trading sections of the amended TDO. However, the draft Enforcement Guidelines fall short of this expectation. There still remain lots of grey areas which are subject to interpretation. Hence, CSL urges for a clearer Enforcement Guidelines which provide more practical examples as to which kinds of acts or omissions are prohibited. It is imperative that more clarity and certainty will be given in the Enforcement Guidelines. Otherwise, traders will inadvertently be caught even though they take all reasonable steps to ensure compliance. This is particularly so as non-compliance may attract criminal liability and the regulatory reach is so wide that any person who is a director, shadow director, company secretary, principal officer or manager may be imprisoned.

1.4 The amended TDO will come into operation when the Enforcement Guidelines are finalized after consultation. Given the proposed regulatory regime covers a wide range of business activities including sales, marketing

and customer service (including any written and oral representation) and the potential impacts of criminal liability on a wide range of persons, it is of vital importance that a sufficient transitional period be given after the issue of the Enforcement Guidelines in order to allow all traders to work around its business arrangement to comply with the amended TDO and the Enforcement Guidelines. A complete overview of all marketing-related materials and adequate trainings to all employees, particularly customer-facing employees are deemed to be essential in order not to be caught by the new law. The C&ED and OFCA took nearly 5 months to prepare and issue the draft Enforcement Guidelines for consultation after the new law had been passed in July 2012. CSL submits that the C&ED and OFCA will appreciate the implementation challenges and difficulties ahead for all traders to comply with all regulatory requirements. Hence, a sufficient transitional period must be given to implement changes to prevent trade practices that contravene the new law. CSL concurs with the recommendation of CAHK that it is reasonable to introduce a grace/transitional period of 12 months following the amended TDO coming into force.

2. Guiding Principle of the Policy Statement

Frivolous or vexatious complaints

2.1 It is stated in the Enforcement Guidelines that the Enforcement Agency examines all the complaints received. It is important that a complainant must provide sufficient evidence to prove that a trader's conduct has breached the relevant fair trading sections before the Enforcement Agency initiates an investigation. If the Enforcement Agency is of the view that a complaint is simply a bare allegation or the evidence is of little weight which is not warranted for further investigation, the Enforcement Agency should not be hesitated to reject the complaint. The burden of proof lies with the party who makes a complaint. The Enforcement Agency should not request information from a trader requiring him to prove his innocence.

2.2 The Enforcement Agency must strike out complaints which are frivolous or vexatious or made in bad faith. This will ensure the best use of the resources of the Enforcement Agency and relieve the unnecessary burden of traders.

Concurrent Jurisdiction

2.3 The C&ED is the principal agency responsible for enforcing the TDO. Concurrent jurisdiction is conferred on the Communications Authority, with OFCA as its executive arm. CSL understands that the C&ED and OFCA will soon sign a Memorandum of Understanding (**MoU**) in respect of enforcement issues. However, the MoU is not included in the Enforcement

Guidelines for consultation. Nor is concurrent jurisdiction fully explained in the Enforcement Guidelines. It remains unclear how C&ED and OFCA will handle complaints against telecommunications and broadcasting sectors. CSL urges the C&ED and OFCA to issue a draft MoU for consultation with the telecommunications and broadcasting sectors as soon as practicable. The resources with reference to the number of complaints to be received by these two Enforcement Agencies are different. The MoU must specify how a complaint related to telecommunications and broadcasting matters is handled by these two Enforcement Agencies and provide an effective mechanism to ensure consistency in their enforcement. For the purpose of transparency, the MoU (including any revisions) should be published in public domain. The two Enforcement Agencies should publish reports as to what have been done to ensure consistency in enforcement on an annual basis for public scrutiny.

3. Undertaking

Undertakings (civil) or proceedings (criminal)

3.1 CSL suggests that if a breach of relevant fair trading sections is found, the Enforcement Agency should offer an opportunity to relevant traders to take remedial action to rectify the breach rather than stepping up the enforcement actions. CSL also recommends that the Enforcement Agency should not pursue criminal proceedings unless an undertaking has been invoked and has been breached.

Element of an undertaking

3.2 As mentioned in the Enforcement Guidelines, *acceptance of undertaking is a means to encourage compliance and to resolve the matter more expeditiously*. CSL does not agree that an undertaking must require a trader to acknowledge or admit the engagement or likely engagement of the conduct of concern which the Enforcement Agency believes that it constitutes an offence. The essence of the undertaking is whether there is a commitment from the trader to cease the conduct of concern. Unless the trader acknowledges or admits the engagement or likely engagement voluntarily, it is unreasonable to mandate a trader to give an acknowledgment or admission of the conduct of concern in the undertaking. In any event, the undertaking cannot be used or seen to be used as a means to persuade, induce or influence the mind of “suspects” to confess to crimes (conduct of concern).

3.3 In particular, the Enforcement Agency may withdraw the acceptance of an undertaking under certain circumstances. A statement of any fact contained in the undertaking may be admitted in evidence in any proceedings. As such, an acknowledgement and admission of the conduct of concern in the undertaking amounts to self-incrimination. This is against the

principle that no one is to be compelled to incriminate himself. A confession or an admission is a very powerful piece of evidence and it is of itself a conclusive evidence for a conviction. It must be borne in mind that it is the duty of the prosecution to prove beyond reasonable doubts that a trader has committed an offence. Requiring a trader to make a confession as one of the conditions of accepting an undertaking is a miscarriage of justice.

Withdrawal of an undertaking

3.4 The Enforcement Agency may, with the consent of the Secretary for Justice, withdraw the acceptance of an undertaking if it has reasonable grounds for “believing” or “suspecting”. If an Enforcement Agency withdraws an undertaking, it must provide concrete evidence rather than relying on what it believes or suspects.

4. General Guidelines

Trade descriptions of goods and services

4.1 In the Enforcement Guidelines, it states that some superlative claims such as “the best” and “the most popular” are considered puffery which are common and legitimate advertising practices and do not constitute a false description of goods and services. On this basis, it is not necessary to provide substantiation to make such puffery claims.

4.2 It appears in the Enforcement Guidelines that the dividing line between a false description of good/service and a puffery when a superlative claim is made is whether the claim is used with quantifiable standards or reference. CSL urges the Enforcement Agency to provide more practicable examples with reference to quantifiable standards or reference.

Misleading Omissions

4.3 CSL has serious concern on the offence of misleading omissions. Liability for omission is not due to some conduct in the form of a positive act but rather is due to a failure to act or provide information. It is very difficult to circumscribe the type of material information, if omitted, leading to misleading omissions. This is particularly true in the telecommunications sectors where the services are diverse and complex and the degree of knowledge amongst different groups of consumers are vastly different.

4.4 The nature of misleading omissions is very broad. It is extremely difficult to interpret what type of information is material for an average consumer to make a purchase decision. The statement “*what information is material depends on the circumstances and the nature of the products*” in the

Enforcement Guidelines is unhelpful to frontline staff. The C&ED and OFCA attempt to provide in the Enforcement Guidelines some measures which can avoid the commission of misleading omissions. However, the measures quoted in some examples impose onerous obligations on traders and are impracticable. For instance, the example quoted in paragraph 3.22 is problematic:

“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.”

Tourists in Hong Kong may purchase mobile prepaid SIM services while they are in Hong Kong. It is unrealistic and impracticable for a mobile operator to provide product information or communicate in Russian language if a Russian tourist (who does not know English or Chinese) purchases a prepaid SIM card.

4.5 The definition of “invitation to purchase” is unclear and confusing. It appears that it only applies to products but not services. Also, the examples referred to in paragraph 3.29 suggest that an advertisement is a form of “invitation to purchase”. However, it is impracticable to include in an advertisement all information listed out in s.13E(4) of the amended TDO. CSL suggests that a general advertisement should not be regarded as an “invitation to purchase”.

Aggressive Commercial Practices

4.6 The concept of “harassment”, “coercion” and “undue influence” as explained in paragraphs 4.2, 4.3 and 4.4 respectively is not clear.

4.7 Harassment includes “*applying repeated pressure to a consumer who is under no obligation to acquire the goods or service*”. It is a legitimate business practice for a salesperson to use his or her best endeavours to persuade a consumer to purchase a product or service. How does “persuasion” differentiate from “applying repeated pressure”? The Enforcement Agency needs to further elaborate these concepts.

4.8 Undue influence means “*an exploitation of a position of power in relation to a consumer so as to apply pressure, even without or threatening to use physical force, in a way which significantly impairs the consumer’s ability to make an informed decision*”. Paragraph 4.4 shows an example of “*an exploitation of a position of power*”. However, it is unclear what needs to be shown in order to demonstrate that a trader is in a position of power. The

concept of undue influence must be further elaborated. Without a clear definition, it is extremely difficult for frontline and telesales staff to comply with the amended TDO.

5. Liability of Parties Involved

5.1 It appears that any persons who are connected with a commercial practice which is later found to have breached the relevant unfair trading sections may be criminally liable if the offence *has been committed with their consent or connivance or is attributable to their negligence*. In the circumstances, a wide range of persons may be imprisoned even though they have no intent to commit the offence. As explained above, the amended TDO and the Enforcement Guidelines introduce many concepts which are subject to interpretation and do not provide sufficient regulatory certainty to traders, particularly on the offence related to misleading omissions. This is unfair to the employees of traders.

5.2 CSL believes that the amended TDO aims at encouraging traders to comply with the new law for better consumer protection. Traders should be given an opportunity to rectify the breach if a breach of the fair trading sections is found. CSL urges the Enforcement Agency to refrain from pursuing criminal proceedings unless an undertaking has been invoked and has been breached.

**Submitted by CSL Limited
17 March 2013**