



Hong Kong General Chamber of Commerce
香港總商會 1861

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

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Mr Clement Cheung, JP
Commissioner
Customs and Excise Department
32/F Customs Headquarters Building
222 Java Road
North Point, Hong Kong

Dear Clement

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

The Hong Kong General Chamber of Commerce supports the objective of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 of prohibiting specified unfair trade practices for consumer protection purposes. While we expressed our concerns on some of the proposed new offences on various occasions during the Bill Committee Stage and remained dissatisfied with the finally adopted legislation, we hope that the draft Enforcement Guidelines would place reasonable constraints on the overly-intrusive scope of the new offences, and remedy the vagueness. Nevertheless, there remains room for improvement with regard to the draft Enforcement Guidelines.

Enclosed are our views on how the Enforcement Guidelines can be improved to remedy or alleviate the over-intrusiveness and vagueness problems.

Yours sincerely,

**RESPONSE BY HONG KONG GENERAL CHAMBER OF COMMERCE
TO PUBLIC CONSULTATION PAPER “DRAFT ENFORCEMENT GUIDELINES
FOR THE TRADE DESCRIPTIONS (UNFAIR TRADE PRACTICES)
(AMENDMENT) ORDINANCE 2012”**

Introduction

HKGCC welcomes the opportunity to respond to this consultation.

2. In response to the Government’s initial consultation on the Bill and in submissions to LegCo’s Bills Committee, HKGCC (like many other organisations) - while supporting the objective of the new legislation of prohibiting specified unfair trade practices for consumer protection purposes - expressed concerns about the overly-intrusive and vague nature of certain of the proposed new offences. Regrettably, most of these concerns were not addressed in the legislation which was finally adopted.

3. Accordingly, HKGCC hopes that the draft Enforcement Guidelines, i.e. Guidelines and Policy Statement, will place reasonable constraints on the overly-intrusive scope of the new offences, and remedy the vagueness. Unfortunately, neither of these objectives have been realized in these documents as currently drafted. In particular, there is a need for more examples, not just the easy cases. In this submission, we therefore aim at providing constructive suggestions on how the Guidelines and Policy Statement can be improved to remedy these problems, or at least alleviate them.

Executive Summary

4. Our main points are as follows:

- The law is overly-intrusive and potentially makes many types of normal acceptable commercial conduct a criminal offence. The Guidelines must limit this over-intrusiveness.
- The law is too vague. It is not clear whether a variety of normal commercial conducts are legal or illegal. The Guidelines must rectify this vagueness, so that businesses can understand what they can and cannot do.
- Since there may be criminal liability (and perhaps strict criminal liability), the Guidelines need to be absolutely clear. This has a “due process” aspect as well. The right against self incrimination applies in criminal cases, and thus the Enforcement Agency needs to indicate whether a case is criminal or civil (or it will be presumed criminal if that is not clear).
- It is not clear who will be liable if an offence is committed. For example, in the case of the new offence of misleading omissions, will it be the sales person who commits the offence, or that person’s manager, or the company or its directors? Criminal offences should address clearly who is liable. If the law itself does not provide the clarity, the Guidelines should do so.
- It is not clear whether minor cases can be dealt with by an informal warning, or whether all conduct which constitutes an offence will be dealt with by way of either the “compliance-based mechanism” (undertakings), civil proceedings or criminal prosecution. The Policy Statement should make it clear that minor cases can be disposed of informally, in the interests of proportionality and saving resources, since even undertakings are formal legal instruments which carry significant implications.

- The Enforcement Agency's investigation powers are draconian and potentially over-intrusive. The Policy Statement should clarify that they should only be exercised if there is reasonable suspicion that an offence has been or is being committed, in common with other analogous Hong Kong Ordinances.

The Guidelines should limit the law's over-intrusiveness

5. The law is wide enough to capture most common situations, and in particular to make innocuous human errors of judgment a criminal offence. This is particularly the case with the new offence of misleading omissions. The Guidelines use the example of a customer buying drinks in a bar to illustrate how the law would work in practice (p.25). This scenario can also be used to illustrate the law's over-intrusiveness.

Example

6. *A customer in a bar asks what kind of red wine they have. The waiter shows the wine list to the customer but forgets to mention that they have a new wine on promotion which is not mentioned on the list, and is about 20% cheaper than the ones on the list. Unaware of this, the customer decides that the wines on the list are too expensive and he goes to another bar.*

7. Most reasonable persons would not think it right that the waiter in this situation would be committing an offence in forgetting to tell the customer about the wine on promotion, for at least two reasons:

- The waiter's omission was a mistake – he had no intention to deceive the customer; and
- The customer did not buy the higher-priced wine but decided to leave the bar, and therefore incurred no financial loss.

8. However, neither of these factors are relevant under the new law, and it appears that the waiter's omission of information which is material to the average consumer (the price of the wine on promotion) may be an offence. In particular:

- The offence is one of strict liability. The fact that the waiter made a mistake and did not intend to deceive the customer is irrelevant; and
- The fact that the customer did not buy the wine is irrelevant: even a decision not to purchase a product or service would be caught.

9. **The Guidelines should expressly state that the law is not intended to catch the common everyday situations, and that no enforcement action will be taken in such circumstances**, in order to give businesses and their staff reassurance. In other words, more examples should be given of cases where there would be no breach of the law, or at least no enforcement action. The examples in the current draft nearly all deal with cases where there would be a breach, many of which are uncontentious. This is of limited value to businesses – what is more important is **the provision of examples of cases where there would be no breach, to limit the broad scope of the offences.**

The Guidelines should rectify the vagueness in the law and provide clarity

10. There are many vague and subjective concepts in the new offences. For example, whether there is a misleading omission depends on whether the information omitted is information which the “average consumer” would need to buy the product or service. Clearly what the “average consumer” would need to know is a subjective assessment on which different people may have different views – it is not fair that criminal liability should depend on such assessments. The Guidelines should state that, **provided the trader believes reasonably and in good faith that the information would not be needed by the average consumer in making the purchasing decision, there will be no enforcement action.**

11. Another example of the vagueness of the law is the offence of aggressive commercial practices. This is not limited to harassing or coercing consumers into buying goods or services they do not want (i.e. “bullying”), which most people would regard as offensive. It also covers the vague, subjective concept of “undue influence”. It is every sales person’s job to influence customers into buying. But when does such influence become “undue”? The definition in the law does not shed any useful light on this, and it is clearly a matter of subjective assessment on which views may differ. For example, would a sales person trying to secure a sale by saying that there is limited stock left in the shop, or saying that the shop is closing in 10 minutes and that the customer needs to decide quickly, or following the customer around the shop, amount to undue influence, if it resulted in the customer purchasing goods? Or, since the law also covers decisions not to buy, what if the customer felt pressurized into leaving the shop because of the sales person’s conduct, and as a result missed out on buying a product the customer actually wanted? **Many more examples, and guidance, need to be provided to allow businesses to know what cases will be regarded as meriting enforcement, and, more importantly, those that will not do so.**

The Guidelines should make it clear who will be liable for committing the offence

12. The law is ambiguous not only as to what conduct will amount to an offence, but who will be liable if there is an offence: will it be the individual sales person, that person’s manager, the company itself, or one or more directors? The Guidelines do not give any clarity on this issue: Paragraph 1.5 of the Guidelines merely states that a “trader” can be a natural person or a company. **Criminal offences need to clearly indicate who is liable for committing them, as well as what conduct amounts to offence.** At the very least, the Guidelines should give some examples and guidance to address this issue. For example, the Guidelines should state that the company and its directors should be protected from any liability if the company has put in place reasonable compliance measures which a sales person disregards: only the sales person should be liable in these circumstances.

The Guidelines should make it clear that minor cases can be dealt with by way of an informal warning

13. Because of the wide scope of the new offences, they may catch many cases which are relatively minor, and/or which involve conduct which has terminated and is unlikely to be repeated. It should be possible to deal with such cases by means of confidential informal settlements or warnings, without having to resort to undertakings, injunctions or

criminal prosecution, in the interests of proportionality and efficiency. **Criminal prosecution should be reserved only for the most serious cases, where there is deliberate wrongdoing which causes substantial harm to consumers.** Under the heading on “Enforcement Tools”, the Policy Statement should make this clear.

14. The Enforcement Agency needs to articulate its priorities, and hopefully indicates at least **in the initial year(s)** that **warnings and education will be important**, and that criminal cases will occur only in the most extreme instances. This goes along with one-off mistakes not being treated the same as a repeated pattern of abuse/fraud.

The Guidelines should make it clear that the Enforcement Agency’s formal investigation powers will only be exercised if it has reasonable grounds to suspect an infringement

15. Paragraph 6 of the Policy Statement states that “C&ED will carry out regular inspections of traders’ premises and conduct targeted spot checks”. This is worrying from the point of view of the right to privacy, which is a Basic Law requirement. The Policy Statement should make it clear that **the Enforcement Agency will only in practice exercise its power to require entry to private business premises** (as opposed to premises open to public such as shops), **or to require the provision of information, where there is reasonable cause to suspect an infringement.**

Conclusion

16. We hope that the Government will find the above comments helpful, and that they will assist it in developing a revised set of Guidelines and Policy Statement which will meet the primary objective of helping businesses and their staff to comply with the new legislation.