



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

Public Consultation

14 March 2013

Implementation of the Amended TDO

- The amended Trade Descriptions Ordinance (Cap. 362) (“Amended TDO”) will come into operation in 2013.
- New prohibitions on false trade descriptions related to “service” and specified unfair trade practices, and civil enforcement mechanism are introduced to protect consumers more effectively.
- Customs and Excise Department (“C&ED”) is the principal agency to enforce the Amended TDO.
- Concurrent jurisdiction is conferred on the Communications Authority (“CA”) to enforce the fair trading sections in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap. 106) (“TO”) and the Broadcasting Ordinance (Cap. 562) (“BO”) that are directly connected with the provision of a telecommunications or broadcasting service under the relevant Ordinances.

Major Amendments to the TDO

- Extending coverage of “False Trade Description”
 - To extend the coverage of “False Trade Description” to “services”
- Creation of new offences on specified unfair trade practices
 - Misleading omissions
 - Aggressive commercial practices
 - Bait advertising
 - Bait and switch
 - Wrongly accepting payment

False Trade Description

- “False trade description” means a trade description which is false to a material degree; or which, though not false, is misleading.
- A trader is prohibited under the TDO :
 - to apply a false trade description to a service supplied or offered to be supplied to a consumer; or
 - to supply or offer to supply to a consumer a service to which a false trade description is applied.

Misleading Omissions

- Any commercial practice of a trader should not :
 - omit or hide material information;
 - provide material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
 - fail to identify its commercial intent unless this is already apparent from the context;
 - as a result it causes, or is likely to cause, the average consumer to make a transactional decision that he would not have made otherwise.

Aggressive Commercial Practices

- A trader must not use harassment, coercion, or undue influence :
 - to impair or likely significantly impair the average consumer's freedom of choice,
 - thereby causing or likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise.
- Not covered under section 7M of the TO

Bait Advertising

- A trader must not advertise his/her products for supply at a specified price if :
 - there is no reasonable ground for believing that the trader will be able to offer the product at that price for a period that is, and in quantities that are, reasonable; or
 - the trader fails to offer those products for supply at that price for a period that is, and in quantities that are, reasonable

Bait and Switch

- A trader must not make an invitation to purchase a product at a specified price with the intention of promoting a different product by :
 - refusing to show or demonstrate the product;
 - refusing to take orders for the product or deliver it within a reasonable time; or
 - showing or demonstrating a defective sample of the product

Wrongly Accepting Payment

- A trader must not accept any payment for a product if at the time of that acceptance :
 - the trader intends not to supply, or to supply a materially different product; or
 - there is no reasonable ground for believing that the trader will be able to supply the product within the period specified by the trader, or within a reasonable period

Delineation of Responsibility between the CA and C&ED

- The CA will enforce the Amended TDO in relation to the commercial practices of licensees under the TO and BO that are directly connected with the provision of a telecommunications or broadcasting service under the two Ordinances
- C&ED will take up all other cases in relation to unfair trade practices involving goods or services
- In case of any suspected unfair trade practices of licensees under the TO and BO involving “goods” or “goods and telecommunications/broadcasting services”, C&ED will take up these cases and the CA will provide necessary support

Enforcement Mechanism

- In addition to criminal sanctions, a civil compliance-based mechanism will be put in place to encourage compliance of the Amended TDO by traders
- **Undertaking**
 - As an alternative to prosecution, the Enforcement Agency is empowered to accept an undertaking from a trader, whom the Enforcement Agency believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the Amended TDO, not to continue or repeat the conduct, or conduct of a substantially similar kind
- **Injunction**
 - The Enforcement Agency may apply to court for an injunction to order a trader not to continue or repeat or engage in the contravening conduct

Transitional Arrangements

- Upon commencement of the Amended TDO, section 7M of the TO which prohibits misleading or deceptive conduct of telecommunications licensees will be repealed
- Misleading or deceptive conduct of a licensee that had been engaged in before the commencement of the Amended TDO will continue to be handled under section 7M of the TO

Public Consultation on Draft Enforcement Guidelines

- The Amended TDO stipulates that the CA jointly with the Commissioner of Customs and Excise may issue enforcement guidelines
- C&ED and the Office of the Communications Authority (“OFCA”) commenced the public consultation on the Draft Enforcement Guidelines from 7 December 2012
 - Comprising the “Compliance and Enforcement Policy Statement” and “General Guidelines”
 - Applicable to both “goods” and “services” that are regulated under the Amended TDO
 - The consultation period will end on 17 March 2013
- OFCA held a consultation session on 19 December 2012 for the telecommunications and broadcasting sectors and participated in other sessions for different industries, trade associations, District Councils and the general public in order to introduce the Draft Enforcement Guidelines.

Contents of Draft Enforcement Guidelines

- “Compliance and Enforcement Policy Statement”
 - Objectives
 - Enhance the transparency in enforcement
 - Promote compliance of the fair trading sections
 - Contents
 - Objectives and guiding principles of taking enforcement actions
 - Factors that the Enforcement Agency takes into account in prioritizing enforcement resources
 - Basic principles which guide the Enforcement Agency in the application of enforcement tools

Contents of Draft Enforcement Guidelines (2)

- “General Guidelines on the Fair Trading Sections of the TDO”
 - The General Guidelines serve as a guide as to when a conduct may constitute a contravention of the fair trading sections of the Amended TDO, with examples given as illustration.
 - They set out the manner in which the authorized officers exercise their powers in respect of the fair trading sections.
 - The General Guidelines themselves are neither legally binding nor are they subsidiary legislation.
 - A person does not incur any civil or criminal liability only because the person contravenes any part of the General Guidelines.

Future Tasks

- To finalize the Enforcement Guidelines to prepare for the commencement of the Amended TDO
- OFCA and C&ED will jointly organize publicity and education campaigns, including
 - TV Commercials
 - Designated website and leaflets for consumers
 - Roving exhibitions in shopping malls
 - Posters and banners
 - Seminars for consumers

Thank you

Example 1 – False Trade Description

- A pay TV service provider promotes a 24-month sports channel package by claiming that it owns the exclusive right to broadcast live matches of the popular ABC football league for the 24-month duration.
- However, the pay TV service provider actually only holds the broadcasting right for one year and the ABC football league has not yet invited any interested parties to bid for the broadcasting right for the coming year.
- The pay TV service provider may commit an offence of applying a false trade description to a service.

Example 2 – False Trade Description

- In a newspaper advertisement, a telecommunications operator claims that its newly promoted service plan has the lowest price tag in Hong Kong by comparing the price of its plan with those offered by its competitors.
- However, the comparison is not made on a like-for-like basis in that the telecommunications operator has compared the service plans of the competitors which have material difference in service features (such as different contract durations), and such differences are not made known in the advertisement.
- The price comparison is likely considered to be a false trade description of service.

Example 3 – Misleading Omissions

- A mobile operator advertises an “unlimited mobile data plan” to the consumers. Nevertheless, the mobile operator does not mention that the unlimited mobile data plan is subject to a usage restriction, under which the download data rate of the service will be substantially limited if a certain usage threshold unilaterally set by the mobile operator is exceeded.
- The usage restriction is considered to be “material information” in the context of the mobile operator’s service promotion as this restriction is likely to be a piece of information that the average consumer needs in making his transactional decision.
- The omission of such material information is therefore likely considered to be a misleading omission.

Example 4 – Misleading Omissions

- In a telemarketing call made to a potential customer, an International Direct Dial (“IDD”) service provider promotes its IDD value plan by only informing the potential customer of the per minute usage charge for making IDD calls. The IDD service provider does not mention that it will also charge a fixed monthly fee upon customer’s subscription to the service.
- As fee charged is commonly recognized as a material information that the average consumer needs to make an informed transactional decision, the IDD service provider is likely to be considered as committing the offence of misleading omission.

Example 5 –

Aggressive Commercial Practices

- Two salespersons from a pay TV service provider conduct unsolicited doorstep marketing of pay TV services. They knock on the door of a flat late at night. An elderly man, who is alone in the flat and is woken up by the door knocking, opens the door.
- The two salespersons quickly enter into the flat and start promoting the pay TV services to the elderly man. Although the elderly man indicates that he is not interested in the services, the salespersons refuse to leave and keep on pressing him to sign the contract.
- The conduct of the salespersons is likely considered to be an aggressive commercial practice.

Example 6 – Wrongly Accepting Payment

- An Internet service provider offers 100 Mbps and 10 Mbps broadband Internet access services to consumers in Hong Kong, but it does not have coverage of both types of services in every residential building.
- A consumer is attracted to the 100 Mbps service plan and calls the Internet service provider to make subscription to the 100 Mbps service. The telesales staff of the service provider receiving the call is aware that the consumer is residing in a building where only 10 Mbps broadband Internet access service can be provided to the residents. However, the telesales staff still secures a service contract with the customer for the provision of 100 Mbps service and accepts payment of the monthly fee from the consumer. In the end, the service provider provides 10 Mbps service to the consumer.
- The service provider is likely to have committed the offence of wrongly accepting payment as it does not have any intention to supply the 100 Mbps service, or only intends to supply a service that is materially different from the 100 Mbps service, at the time of accepting payment.