

## Summary of Written Submissions on Public Consultation on Draft Enforcement Guidelines for the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012

Respondents' Comments / Suggestions	Enforcement Agencies' Response
<b>Part A – Compliance and Enforcement Policy Statement (Policy Statement)</b>	
<b>A1 Transitional Period</b> (Submissions No. 10 - HKRMA, 11 - CAHK, 12 - PCCW, 14 - CableTV, 15 - SmarTone, 16 - TVB Pay Vision, 17 - CSL and 20 - HKGCC)	
Respondents called for a transitional period of six to twelve months prior to the commencement of enforcement actions to allow time for review of business practices and internal processes, staff training and internal audit of compliance.	The Administration and Enforcement Agencies consulted relevant stakeholders on legislation to enhance protection for consumer against unfair trade practices since 15 July 2010 and the Legislative Council passed the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 in July 2012. During the public consultation on the draft Enforcement Guidelines from 7 December 2012 to 17 March 2013, the Enforcement Agencies (i.e. Customs and Excise Department (C&ED) and Office of the Communications Authority (OFCA)) had, through conducting briefing/consultation sessions with various trades, explained the operation of the new legislative requirements. Sufficient time has been given to the business sectors to comprehend the new legislative requirements and tender their comments on the draft Enforcement Guidelines. The Enforcement Agencies published the final draft of the Enforcement Guidelines for reference by all stakeholders on 14 June 2013 and issued the final version of the Enforcement Guidelines on 15 July 2013.
<b>A2 Investigation Priorities</b> (Submissions No. 10 - HKRMA, 11 - CAHK, 12 - PCCW, 14 - CableTV and 17 - CSL)	
Respondents requested additional transparency by detailing the investigation priorities and investigation phases.  A few respondents expressed concerns on the powers delegated to the enforcement officers in carrying out blitz check and on-site inspection which could constitute excessive intrusion of privacy. Balance must be maintained between the protection of traders' rights to privacy and enforcement actions.	To address these concerns, paragraphs 8 and 9 of the Policy Statement have been revised to set out how the Enforcement Agencies would prioritise its enforcement actions and how they would investigate complaints. Paragraph 9.4 of the General Guidelines has also been suitably revised to outline the powers exercisable by the Enforcement Agencies under the amended TDO.
Respondents proposed setting out how unmeritorious and vexatious complaints or complaints lacking relevant information would be handled, and mentioned the need to avoid unnecessary and unfair burden on traders in responding to enquiries relating to such complaints.	Paragraph 9 of the Policy Statement has been revised to make clear that the Enforcement Agency may, as an initial enquiry, request complainants to provide sufficient details and/or further information for making an assessment of whether it can take further action; and to stipulate that where it is clear to the Enforcement Agency that a complaint is unfounded and unmeritorious, the Enforcement Agency may not pursue it.
<b>A3 Enforcement Tools</b> (Submissions No. 3 - Hin Sang Hong Company Limited , 10 - HKRMA, 11 - CAHK, 17 - CSL , 20 - HKGCC and 21 - The Law Society of Hong Kong)	
Respondents expressed their views/concerns over the use of undertakings, injunction and criminal proceedings and suggested putting in place informal remedies for minor offences, having regard to the principle of proportionality. Some respondents suggested that the Enforcement Agencies should clearly advise at the outset of the investigatory actions whether the criminal or civil route would be adopted and the thresholds for using the different enforcement tools stated in the Policy Statement.	Paragraph 12 has been added to the Policy Statement to clearly state that the Enforcement Agency will adopt the most appropriate enforcement tools for handling a case under investigation having regard to the particular circumstances of the case. Where appropriate, the Enforcement Agency may also consider issuing warning or advisory letters to the traders or groups of traders concerned. Traders under investigation will have no legitimate expectation of which enforcement tool/measure

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<p>On the other hand, there was a view that notwithstanding the introduction of a compliance-based enforcement mechanism, emphasis should be made that the Enforcement Agency has not softened its stance on criminal prosecution against offending traders and that traders should have no right of election over enforcement measures.</p> <p>Certain respondents were concerned that there is no standard procedure or guiding principle for commencing an investigation. As such, persons being investigated may not know his rights of silence and legal representation, and the right against self-incrimination. Clarifications on the right of silence and self-discrimination are required.</p>	<p>would be adopted by the Enforcement Agency for the particular cases being investigated. It is within the Enforcement Agencies' prerogative to consider how enforcement actions should be taken based on the circumstances of individual cases.</p> <p>The Enforcement Agencies will ensure proper exercise of powers in the course of conducting investigation, including administering appropriate cautions in appropriate circumstances. The rights of silence and legal representation and against self-incrimination are not fettered.</p>
<p><b>A4 Undertaking/Criminal Sanctions</b> (Submissions No. 10 - HKRMA, 11 - CAHK, 12 - PCCW, 14 – CableTV, 16 - TVB Pay Vision, 17 - CSL and 21 - The Law Society of Hong Kong)</p>	
<p>A few respondents took the stance that acknowledgements or admissions of the facts in relation to the conducts concerned in an undertaking amount to self-incrimination. Some considered that such admission of such facts and the publication of undertakings would induce private actions for damages, undermining the willingness of traders to opt for the route of compliance-based mechanism and thus the effectiveness of the mechanism. In addition, these respondents were of the view that the compliance programme required in an undertaking is too broad an obligation and is in effect an admission that the trader concerned has not complied with the TDO.</p> <p>Some respondents advocated that negotiations between the trader concerned and the Enforcement Agency on the terms of an undertaking are expected to be conducted on a “without prejudice basis”/“without admission of any liability” basis, and information collated cannot be subsequently used for any future prosecution. A few respondents suggested that the belief or suspicion of the Enforcement Agency should not be the appropriate basis for determining the withdrawal of the acceptance of an undertaking.</p>	<p>An undertaking is a consensual arrangement between the Enforcement Agency (subject to the consent of the Secretary for Justice (SJ)) and the trader concerned with a view to encouraging compliance by the trader and resolving the matter more expeditiously. The giving of an undertaking by a trader is always voluntary. The necessary elements to be included in an undertaking are based on section 30L of the amended TDO (hereinafter, all sections mentioned in this document refer to the sections in the amended TDO unless otherwise stated). Section 30L(2) requires that an undertaking is an undertaking given by a trader not to continue or repeat the conduct or commercial practice of concern. It may also be a commitment by a trader not to engage in conduct or commercial practice of the kind or of a substantially similar kind of concern. Section 30L(5) empowers the Enforcement Agency to cause an undertaking to be published in any form and manner, and to any extent as the Enforcement Agency thinks appropriate.</p> <p>A compliance programme is for the trader concerned to ensure its staff's implementation of an undertaking it has given.</p> <p>The negotiations on an undertaking will be conducted on a “without prejudice” basis. A footnote on this aspect has been added under paragraph 17 of the Policy Statement.</p> <p>Section 30N sets out that the Enforcement Agency may withdraw acceptance of an undertaking if the authorized officer has reasonable grounds for believing or suspecting the circumstances or situation as laid down in that section. Such withdrawal is subject to SJ's consent.</p>
<p><b>A5 Concurrent Jurisdiction</b> (Submissions No. 11 – CAHK, 12 – PCCW and 17 - CSL)</p>	
<p>Some respondents were concerned about how the concurrent jurisdiction would operate, and suggested that the delineation of responsibilities between C&amp;ED and the Communications Authority (CA) and the framework of their cooperation should be promulgated. It was further suggested that consultation on the Memorandum of Understanding (MoU) between C&amp;ED and CA should be conducted for the sake of transparency and consistency.</p>	<p>Pursuant to section 16G, the Commissioner of Customs &amp; Excise (CCE) and CA must prepare and sign a MoU for the purpose of coordinating the performance of their functions under the amended TDO. The MoU will be published on the websites of C&amp;ED and CA upon commencement of the amended TDO. For the sake of clarity, a new paragraph 4 has been added in the Policy Statement to</p>

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Some respondents raised that criminal prosecutions should be brought by C&ED, as OFCA may not be in the best position to exercise criminal sanctions under the TDO. CA shall refer cases warranting criminal prosecutions to C&ED for investigations.	<p>set out the delineation of enforcement responsibilities between the two Enforcement Agencies.</p> <p>Under section 16E, CA is conferred concurrent jurisdiction under the amended TDO in relation to commercial practices of licensees under the Telecommunications Ordinance or the Broadcasting Ordinance that are directly connected with the provision of a telecommunications service or broadcasting service.</p>

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<b>Part B General Guidelines</b>	
<b>B1 General Comments and Scope of Application</b>	
(Submissions No. 10 - HKRMA, 11 - CAHK, 12 – PCCW, 14 - CableTV, 15 – SmarTone, 16 - TVB Pay Vision and 17 – CSL)	
<p>Some respondents considered that the new offences are broad and vague. More clarifications, examples and guidance should be given taking into consideration the actual business operations.</p> <p>Some respondents sought clarification of the scope of application of the amended TDO in relation to business-to-business conduct and “give-away” promotion samples.</p>	<p>The General Guidelines aim to provide guidance on the operation of the new legislative provisions, and have been suitably revised, with the provision of additional examples, in the light of the comments received. However, it must be emphasized that the General Guidelines are not a substitute for, or a definitive interpretation of, the amended TDO. The examples therein are for illustration and reference purposes, seeking to illustrate the coverage and possible effect of the new legislative provisions and how such provisions may be enforced in practice. They do not cover each and every situation or practice which may or may not amount to a contravention.</p> <p>Paragraph 1.1 of the General Guidelines has been revised to clarify that sections 4 and 5 in relation to goods, and section 7 cover both “business-to-consumer” and “business-to-business” conduct while other fair trading sections only apply to “business-to-consumer” conduct.</p> <p>Separately, paragraph 1.3 of the General Guidelines has been revised to clearly state that “commercial practice” may include offer of free gifts or samples.</p>
<b>B2 Trade Descriptions of Goods and Services</b>	
(Submissions No. 08 - Institution of Dining Art, 10 – HKRMA and 11 – CAHK)	
<p>One respondent opined that the “original price” could be any reasonable price taking into account the costs, expected demand and profit margin. Besides, there was a suggestion that “recommended retail prices” which need not have been actually applied to the product concerned before may be referred to as the “original price”. Some respondents commented that the best practice that a previous higher price should be quoted only if it has been applied to the same goods or services for at least seven consecutive days in the same shop location is too rigid and should be deleted.</p> <p>One respondent suggested that typographical or inadvertent minor pricing mistakes or discrepancies would not be regarded as false trade descriptions.</p> <p>Some respondents sought clarification on what kind of celebrity endorsement would be considered as mere advertising</p>	<p>Paragraph 2.14 of the General Guidelines has been revised to draw traders’ attention that whether typographical or inadvertent errors in pricing constitute an offence of applying a false trade description to the goods or services concerned would depend on whether the falsity involved is to a material degree. Paragraphs 2.15 - 2.16 have also been revised to make the guidance clearer on price comparison. The reference to the “seven consecutive days” best practice, which may not be generally applicable to all goods and services, has been removed.</p> <p>Paragraph 2.11 of the General Guidelines has been revised to clarify the issue of celebrity endorsement.</p>

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<p>puff or brand building exercise not contravening section 7 and the kind which may constitute false trade descriptions, and suggested further examples on claims on country of origin. Some respondents also raised concern over the burden on retailers in respect of checking performance or origin claims on products made by suppliers or manufacturers and ensuring sufficient supporting evidence, and required clarification that retailers would not be liable if they “had no reason to suspect and could not with reasonable diligence have ascertained” that the products did not conform to the descriptions provided by the suppliers or manufacturers.</p>	<p>Examples on claims on origin of products under paragraph 2.26 of the General Guidelines are refined, and new examples have been added. New paragraphs 2.30-2.31 have been added in the General Guidelines to elaborate on the general and specific defences for false trade descriptions.</p>
<p><b>B3 Misleading Omissions</b> (Submissions No. 9 – The Cosmetic &amp; Perfumery Association of Hong Kong Limited, 10 - HKRMA, 11 - CAHK, 12 – PCCW, 16 – TVB Pay Vision, 17 – CSL and 20 - HKGCC)</p>	
<p>Some respondents were concerned about the clarity and interpretation of the requirements of professional diligence and the coverage of misleading omissions. The section on professional diligence seems to imply that there is a general duty of “professional diligence” and it is not clear if it is an offence not to use such diligence.</p>	<p>A new paragraph 3.29 has been added in the General Guidelines to further explain how “professional diligence” should be construed in section 13E.</p>
<p>Some respondents considered that the concept of “average consumer” is confusing and puts heavy burden on traders as it is difficult for traders to know what “material information” is needed by different consumers. The concept of “credulity” is hard for traders to predict, and specific examples should be provided. A criminal offence should only be committed if the unfair trade practice has actually caused the consumer to purchase the goods or services (as opposed to not purchase).</p> <p>Some respondents raised that a well informed/expert purchaser may not need the information which is generally required by the average consumer to make an informed decision. They expressed concern on whether the trader would commit an offence if such expert purchaser who has “above-average knowledge” explicitly states that he does not need the material information which the average consumer requires.</p>	<p>Section 13D provides for “average consumer” and paragraphs 3.6 – 3.12 of the General Guidelines provide guidance on how an “average consumer” should be construed. It is emphasized that an “average consumer” is reasonably well informed, reasonably observant and circumspect. An example has been added under paragraph 3.12 of the General Guidelines to illustrate the concept of an “average consumer” in a clearly identifiable group of consumers in the context of section 13D(2) and (3).</p> <p>The definition of “transactional decision” in section 2(1) and paragraph 3.14 of the General Guidelines have clearly stipulated that a consumer’s decision to purchase and a consumer’s decision not to purchase are both transactional decisions.</p>
<p>Some respondents suggested that as long as product information is available online or in a printed brochure or other media, and a trader has referred to it, the trader should have discharged its duty. For the avoidance of doubt, there should be clarification that a retailer will not be liable for misleading omissions, in respect of failing to provide information which goes beyond the specifications, product manuals or official websites provided by the suppliers or manufacturers concerned. It should be sufficient for a trader to discharge its duty by providing consumers with the opportunity to raise further queries and/or the relevant information publicly available on website(s) or other media. The Guidelines should also make it clear that the offence of misleading omissions only applies to omitting information about the specific product in question. Therefore if a similar product is on promotion and then trader does not tell the customer about the promotion for the other product, this would not be a misleading omission.</p> <p>There was also a view from respondents that the reference to “information already apparent from the context” is rather vague.</p> <p>It should be sufficient for a trader charging customer additional charges to put up signage and/or notice for such charges in store(s) and/or its website as a clear communication to customers before their purchase of the product.</p>	<p>Information may be material in one commercial practice but may not be so in others and should be judged on a case-by-case basis. In this regard, traders should exercise all due diligence and common sense. Paragraph 3.17 of the General Guidelines has been revised to provide that as a good practice, traders should provide opportunities for consumers to raise questions, and depending on the product types supply sufficient product information through suitable means (e.g. by reference to product specifications and official websites). New examples have been included under paragraphs 3.4 and 3.33 of the General Guidelines, and the example about “sophisticated product” under paragraph 3.17 of the General Guidelines and the example in paragraph 3.36 of the General Guidelines have been refined to illustrate the operation of the offence of “misleading omissions”.</p> <p>The concept of “information already apparent from the context” is not difficult to comprehend. The address of a trader is apparent from the context if the consumer is already there.</p> <p>Traders have the obligations to give consumers sufficient information about a product, including the price, any taxes, all additional charges like delivery and installation charges. Paragraph 3.28 has</p>

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	been beefed up to set out some means for doing so.
Some respondents required clarification on whether “advertorials” in which the trader’s commercial intent could be identified will be acceptable under the amended TDO.	We have no intention to ban “advertorials”, as long as they could be indentified as advertisement. Paragraph 3.40 has been refined to make this clear.
<b>B4 Aggressive Commercial Practices</b> (Submissions No. 11 - CAHK, 12 – PCCW and 17 – CSL)	
Some respondents considered that it is unfair to a trader if the complaint is made to the Enforcement Agencies after a long period, either for the purpose of frustrating the transactions for illegitimate reasons or possible retrospective persecution against traders. It is suggested that complaints against aggressive commercial practices must be made within 3 days from the date of the alleged conduct and be supported by evidence proving a prima facie case. More guidance on the factors for determining aggressive commercial practices, including the concepts of “harassment”, “coercion” and “undue influence”, is needed. “Assertive” selling should not be regarded as aggressive.	For clarity, a new paragraph 30 has been added in the Policy Statement on the statutory prosecution time bar stipulated in section 19. Whether a commercial practice uses “harassment”, “coercion” or “undue influence” is provided for in section 13F, and the General Guidelines have provided guidance to assist traders to understand the terms.
<b>B5 Bait Advertising</b> (submission No. 10 - HKRMA)	
<p>The respondent raised the following concerns:</p> <p>(a) It is very subjective to determine what is reasonable in the context of the “nature of the market”. How are traders expected to determine in advance what will be reasonable as such decisions generally rely on subjective factors only known after the event?</p> <p>(b) It is sometimes not commercially viable for a trader to arrive at an accurate projection of stock to meet the unpredictable market demand. This is particularly as a result of the manufacturers controlling stock or supply, and other replenishment constraints or because the product is new and untested in the market making it especially hard to predict demand. If a trader cannot predict the stock availability from a supplier for hot items, then it should not be bait advertising if the trader states clearly on the advertisement “subject to product availability from supplier”.</p>	<p>(a) Paragraph 5.4 of the General Guidelines provides guidance on how “nature of the market” is to be considered.</p> <p>(b) A new example on a popular product the overall supply of which is limited by the supplier has been added under paragraph 5.6 of the General Guidelines. For the defences, please see paragraphs 5.10 &amp; 5.11 of the General Guidelines.</p>
<b>B8 Liability of Parties Involved</b> (Submissions No. 10 - HKRMA, 11 - CAHK, 12 – PCCW, 14 – CableTV, 16 – TVB Pay Vision, 17 – CSL and 20 – HKGCC)	
Some respondents suggested that it is essential to state clearly in the Guidelines the circumstances under which a sales person, his manager, board directors or the company itself will be liable for committing an offence while those who have taken reasonable precautions to ensure compliance with the maintaining and participating in an internal compliance procedure shall be entitled to rely on a defence against prosecution. The Guidelines should also provide practicable examples to explain the circumstances under which these persons may be liable as well as guidance on what kind of evidence could be used by traders as defence.	<p>Paragraph 8.6 of the General Guidelines has been beefed up and new paragraphs 8.1, 8.8 and 8.9 have been added to set out the liability of parties involved and the available defences more clearly. A new example under paragraph 8.2 is also included for the purpose.</p> <p>As for the liability of the management of a trader, this is specifically provided for in section 20 and mentioned in paragraph 8.2 of the General Guidelines.</p>

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<b>B9 Sanctions and Powers Available to the Commissioner and the Communications Authority</b> (submission No. 16 – TVB Pay Vision)	
The respondent was concerned that it is easy for consumers to abuse the fair trading sections by making false allegations against the traders when they intend to cancel any transactions with traders.	The Enforcement Agencies will ensure optimal use of their resources, taking into account the investigation priorities set out in the Policy Statement. Further, paragraph 9 of the Policy Statement provides that, complainants will be requested to provide sufficient details/or further information, over an interview or through other means, in enabling the Enforcement Agency to make a fair and reasonable assessment of whether it can take further action in the light of the investigation priorities. Unfounded or unmeritorious complaints may not be pursued.