

Enhanced protection for consumers

Shop with peace of mind



商務及經濟發展局
Commerce and Economic Development Bureau



Introduction

To enhance protection for consumers, the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 was enacted in July 2012. It amends the Trade Descriptions Ordinance (Chapter 362) ("the Ordinance") by introducing new prohibitions and an enforcement mechanism to deter specified unfair trade practices that traders may deploy against consumers. The amended Ordinance has come into operation on 19 July 2013.

The Customs and Excise Department is the principal agency to enforce the Ordinance, while the Communications Authority has concurrent jurisdiction in relation to the commercial practices of licensees under the Telecommunications Ordinance (Chapter 106) and the Broadcasting Ordinance (Chapter 562) that are directly connected with the provision of a telecommunications service or broadcasting service.

Prohibited Unfair Trade Practices under the amended Ordinance

Under the existing Ordinance, a person commits an offence of false trade description of goods under section 7 of the Ordinance if he does the prohibited act in the course of his trade or business. This provision applies to (i) transactions between a person who acts in the course of his trade or business and a person who does not act as such (i.e. "business-to-consumer" conduct); and (ii) transactions between two persons who act in the course of their trade or business respectively for such purpose (i.e. "business-to-business" conduct).

Under the amended Ordinance, in addition to section 7, six new offences prohibiting specified unfair trade practices have been added (i.e. sections 7A, 13E, 13F, 13G, 13H and 13I) which generally cover commercial practices¹ directly connected with the sale or supply or promotion of goods or services by traders² to consumers³ (i.e. "business-to-consumer" conduct).

These new provisions do not apply to commercial practices engaged by an exempt person, i.e. a person acting in the capacity of a person described in an item of Schedule 3 to the Ordinance (e.g. accountants, dentists, lawyers, doctors etc). Furthermore, these new provisions do not apply to any goods or service covered by Schedule 4 to the Ordinance⁴.



Trade description of goods

Section 7 of the Ordinance provides that it is an offence for any person, in the course of his trade or business, to apply a false trade description to any goods; or supply or offer to supply any goods to which a false trade description is applied. It is also an offence for any person to have in his possession for any purpose of trade or manufacture any goods to which a false trade description is applied.

Trade description of services

Section 7A provides that it is an offence for a trader to apply a false trade description to a service supplied or offered to be supplied to a consumer; or supply or offer to supply to a consumer a service to which a false

¹ Under section 2(1) of the Ordinance, a commercial practice (營業行為) means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or the sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.

² Under section 2(1) of the Ordinance, a trader (商戶) means any person (other than an exempt person) who, in relation to a commercial practice, is acting, or purporting to act, for purposes relating to the person's trade or business. A trader can be a natural person, a company or other form of a body corporate, and that a reference to trader includes any person acting in the name of, or on behalf of, a trader [section 2(5) of the Ordinance].

³ Under section 2(1) of the Ordinance, a consumer (消費者) means an individual who, in relation to a commercial practice, is acting, or purporting to act, primarily for purposes that are unrelated to the person's trade or business.

⁴ Under Schedule 4 to the Ordinance, these excluded goods and services are goods or services sold or supplied by a person regulated, licensed, registered, recognized or authorized under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485) or the Securities and Futures Ordinance (Cap. 571), being goods or services the sale or supply of which by that person is itself regulated under an Ordinance that is referred to in this item and under which the person is regulated, licensed, registered, recognized or authorized.

trade description is applied.

Meaning of trade description & false trade description

Section 2 of the Ordinance defines “trade description” to mean an indication, direct or indirect, and by whatever means given, with respect to the goods or services or any part of the goods or services (e.g. compliance with a standard specified or recognized by any person; and the price, how price is calculated or the existence of any price advantage or discount); and “false trade description” to mean a trade description which is false to a material degree; or which, though not false, is misleading.

In short, a trade description in relation to both goods and services can be by whatever means and in whatever form. Traders should not give any false or misleading product information to consumers.



Section 13E(1) of the Ordinance provides that a trader who engages in relation to a consumer in a commercial practice that is a misleading omission commits an offence.

Misleading omission in general

Pursuant to section 13E(2), a commercial practice is a misleading omission if, in its factual context, taking into account relevant matters:

- (a) it omits or hides material information;
- (b) it provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
- (c) it fails to identify its commercial intent unless this is already apparent from the context,

and as a result, it causes or is likely to cause, the **average consumer**⁵ to make a transactional decision that he would not have made otherwise.

Such relevant matters are set out in section 13E(3) and as follows:

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice; and
- (c) if the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

Special case of an invitation to purchase

Section 13E(4) provides that if a commercial practice is an invitation to purchase⁶, the following information is regarded as material and must be made available unless such information is apparent from the context -

- the main characteristics of the product, to the extent appropriate to the product and to the medium by which the invitation to purchase is communicated (such as what the product is and what its main functions are);

⁵ Reference may be made to section 13D of the Ordinance for the meaning of “average consumer”. In brief, the concept of average consumer does not refer to any actual consumer and there is no requirement to show evidence of any actual consumer being affected by an unfair commercial practice. It is an objective reference which determines whether a commercial practice constitutes the offences of misleading omissions and aggressive commercial practices. It is the notional average consumer whom the commercial practice reaches or to whom it is directed that is relevant. In determining the effect on the average consumer of a commercial practice that reaches or is directed to a consumer or consumers, account must be taken of the material characteristics of such an average consumer including that the consumer is reasonably well informed, reasonably observant and circumspect.

⁶ Under section 2(1) of the Ordinance, “invitation to purchase” means a commercial communication that indicates characteristics of the product and its price in a way appropriate to the medium used for that communication and therefore enables the consumer to make a purchase.

- the identity (such as trading name) of the trader and of any other trader on whose behalf the trader is acting;
- the address (not including a postal box address) of the trader's usual place of business and of any other trader on whose behalf the trader is acting;
- either (i) the price, including any taxes; or (ii) if the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
- where appropriate, either (i) all additional freight, delivery or postal charges; or (ii) if those charges cannot reasonably be calculated in advance, the fact that they may be payable;
- any arrangements for payment, delivery of goods, supply of service that depart from the requirements of professional diligence; and
- for products in relation to which there is a right of withdrawal or cancellation, the existence of that right.

Traders should have the primary responsibility of presenting accurate, truthful and pertinent information in respect of their products to consumers.



Section 13F of the Ordinance prohibits aggressive commercial practices by traders. A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances, (a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the goods or service concerned through the use of harassment, coercion or undue influence; and (b) it therefore causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise.

In determining whether a commercial practice uses harassment, coercion or undue influence, account must be taken of (a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behaviour; (c) the exploitation by the trader of any specific misfortune or circumstance, which the trader is aware of and is of such gravity as to impair the consumer's judgment, to influence the consumer's decision with regard to the goods or service; (d) any onerous or disproportionate non-contractual barrier imposed by the trader against the exercise of the consumer's rights under the contract; and (e) any threat to take any action that cannot legally be taken.



Section 13G of the Ordinance prohibits a commercial practice by traders that constitutes bait advertising. Advertising by a trader of goods or services for supply at a specified price is bait advertising if there are no reasonable grounds for believing that the trader will be able to offer for supply those goods or services at that price, or the trader fails to offer those goods or services for supply at that price, for a period that is, and in quantities that are, reasonable, having regard to (a) the nature of the market in which the trader carries on business; and (b) the nature of the advertisement.

When advertising goods or services at a specified price, traders should ensure that the goods or services are available for a reasonable period and in quantities that are reasonable. It is **NOT** considered as bait advertising if the advertisement states clearly the period for which or the quantities in which the goods or services are offered for supply at that price; and the trader offers those goods and services for supply in the manner as stated in the advertisement accordingly.



Section 13H of the Ordinance prohibits a commercial practice by traders that constitutes bait and switch.

The making by a trader of an invitation to purchase goods or a service at a specified price is a bait and switch if, having made the invitation, the trader then, with the intention of promoting a different goods or service:

- refuses to show or demonstrate the goods or service to consumers;
- refuses to take orders for the goods or service or deliver it within a reasonable time; or
- shows or demonstrates a defective sample of the goods or service.

To establish the offence, it is necessary to prove the intention of the trader.



Section 13I of the Ordinance prohibits a commercial practice by traders that constitutes wrongly accepting payment.

A trader wrongly accepts payment for goods or a service if the trader accepts payment or other consideration for the goods or service and at the time of that acceptance:

- the trader intends not to supply the goods or service;
- the trader intends to supply goods or a service that is materially different; or
- there are no reasonable grounds for believing that the trader will be able to supply the goods or service (a) within the period specified by the trader at or before the time at which the payment or other consideration is accepted; or (b) if no period is specified at or before that time, within a reasonable period.

Traders should not accept pre-payments from consumers if at the time of such acceptance, they are uncertain whether the pertinent goods or services can be delivered to consumers at the agreed time or, if no time is agreed, within a reasonable time.

Defences

The Ordinance puts in place defences for a person charged of an offence under the Ordinance. Under the general provision in section 26(1), a person might be acquitted if sufficient evidence is adduced to raise an issue that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control. Where the defence involves an allegation that the commission was due to the act or default of another person or to reliance of information supplied by another person, the person charged may only rely on that defence if he has served adequate notice to the prosecutor giving information to identify or assist in the identification of that other person.

For the offence of “supplying or offering to supply any goods to which a false trade description is applied” [section 7(1)(a)(ii)], the offence of “having in possession for sale or for any purpose of trade or manufacture any goods to which a false trade description is applied” [section 7(1)(b)] or the offence of “supplying or offering to supply to a consumer a service to which a false trade description is applied” [section 7A(1)(b)], section 26(3) provides for a specific defence that a person might be acquitted if sufficient evidence is adduced to raise an issue that the person did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that the goods or service did not conform to the description or that the description had been applied to the goods or services.

Additional defences are available for the offences of “bait advertising” and “wrongly accepting payment” under sections 26A and 26B respectively. Regarding the offence of bait advertising, traders may be absolved from liability pursuant to section 26A if sufficient evidence is adduced to raise an issue that they have offered to supply additional stock or procure a third person to supply the additional stock of the goods or services concerned (or alternatively, an equivalent product) to meet the demand of consumers at the originally advertised price within a reasonable time.

For the offence of wrongly accepting payment, traders may also be absolved from liability pursuant to section 26B if sufficient evidence is adduced to raise an issue that they have offered to supply an equivalent goods or service, or procure a third person to supply the goods or services concerned (or alternatively, an equivalent product) to meet their obligations, or if a refund in full of the payment was made within a reasonable period after expiry of the specified period for supply (or if no such period is specified, within a reasonable period).

Traders may still be absolved from liability even if consumers do not accept the alternative offer so long as the traders can demonstrate that they are able to meet the terms of the offer if accepted by consumers.

Civil compliance-based mechanism

Depending on the circumstances of a case, as an alternative to initiating prosecution, the Customs and Excise Department or Communications Authority, as relevant (the Enforcement Agency) may, with the consent of the Secretary for Justice, 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 of an unfair trade practice under the Ordinance. An undertaking given by a trader is a commitment by him not to continue or repeat the conduct or commercial practice of concern. The Enforcement Agency may cause an undertaking to be published in any form and manner. Where necessary (e.g. if a trader has breached any of the terms of the undertaking given), the Enforcement Agency may seek an injunction from the court to order a trader not to continue or repeat the conduct concerned.

Penalties and consumer redress

Pursuant to section 18(1) of the Ordinance, any person who commits any of the above offences is liable:

- (1) on conviction on indictment to a fine of \$500,000 and imprisonment for 5 years; and
- (2) on summary conviction to a fine of \$100,000 and imprisonment for 2 years.

In addition to passing any sentence, the court may also order the convicted person to pay an amount of compensation that it thinks reasonable to any person who has suffered financial loss resulting from that offence [section 18A(1)]. Such compensation ordered to be paid to a person is recoverable as a civil debt [section 18A(2)].

Enforcement Guidelines

The Customs and Excise Department and the Communications Authority as the Enforcement Agencies have jointly published a set of Enforcement Guidelines which sets out the manner in which they may exercise their powers and provides guidance as to the operation of the amended Ordinance. The Enforcement Guidelines are available at the websites of the Customs and Excise Department (www.customs.gov.hk) and the Office of the Communications Authority (www.ofca.gov.hk).

Enquiries

For general enquiry on the policy of consumer protection under the Trade Descriptions Ordinance, please write to the Commerce and Economic Development Bureau at 23/F, West Wing, Central Government Offices, 2 Tim Mei Avenue, Tamar, Hong Kong; or email to citbenq@cedb.gov.hk.

Complaints in respect of a contravention of the Trade Descriptions Ordinance could be initiated by any of the following means:

Customs and Excise Department

Information Hotline: 2545 6182

Crime-reporting Email: crimereport@customs.gov.hk

Mail: Commissioner of Customs and Excise,

G.P.O. Box No. 1166

Office of the Communications Authority

(On broadcasting and telecommunications services)

Hotline: 2961 6333

Email: utp@ofca.gov.hk

Mail: Market & Competition Branch,

Office of the Communications Authority,

29/F, Wu Chung House, 213 Queen's Road East,

Wan Chai, Hong Kong

Note


This pamphlet is intended to highlight the new provisions under the amended Trade Descriptions Ordinance for information only. It does not serve to give any legal advice, nor does it have any legal effect in adding, supplementing or amending the statutory provisions of the Ordinance. You should refer to the Ordinance for the relevant statutory provisions and seek your own legal advice on matters arising from the interpretation or application of the Ordinance if necessary.

Commerce and Economic Development Bureau

Customs and Excise Department

Office of the Communications Authority

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