

Enhanced Consumer Protection in Hong Kong

July 2013

The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 ("the Ordinance") came into law in Hong Kong on 19 July 2013.

The original Trade Descriptions Ordinance, which has been in force since 2000, offered protection only in respect of unfair trade practices used in connection with the offer and sale of "goods". The protection it offered did not extend to cover "services". Crucially, in Hong Kong's service based economy, important descriptions such as those indicating price, the availability of products and services and the existence of any price advantage or discount were also not covered by the legislation. The Ordinance seeks to redress the balance by:

- Extending the prohibition on false trade descriptions to services as well as goods;
- Creating five new "unfair trade practices" offences;
- Strengthening the enforcement mechanisms available to the enforcement authorities to help deter specified unfair trade practices which jeopardise consumer rights.

We highlight the main changes to the law in this note.

Compliance and Enforcement Guidelines

There are two agencies tasked with enforcing the Ordinance - the Customs and Excise Department ("C&ED") and the Office of the Communications Authority ("OFCA") the executive arm of the Communications Authority. C&ED is the principal agency responsible for enforcing the Ordinance while OFCA is responsible for enforcing the fair trading sections in relation to the commercial practices of telecommunications and broadcasting providers, (C&ED and OFCA together, "the Enforcement Agencies").

On the day the Ordinance came into law, the Enforcement Agencies issued two supporting documents:

- a) a compliance and Enforcement Policy Statement, which sets out the enforcement objectives – the basic principles which guide the Enforcement Agencies in the application of the enforcement tools available under the Ordinance and the factors that the Enforcement Agencies can take into account in prioritising the enforcement resources; and
- b) a set of guidelines for traders to help them comply with the fair trading sections of the Ordinance and for consumers to help them understand how the Ordinance will better protect them. While the guidelines are deliberately not aimed at mandating traders to conduct their business in a particular way, they do serve as a guide for when conduct may constitute a contravention of the fair trading sections. The guidelines are not legally binding and a trader does not incur any civil or criminal liability if they contravene the guidelines. A court is permitted to apply the guidelines if it chooses to and contravention of, or adherence to, the guidelines may be relied on by a party as evidence in court proceedings.

Consumers and Traders

The fair trading provisions in the Ordinance apply to commercial practices directly connected with the sale, supply or promotion of goods or services by traders to consumers.

A consumer must be a natural person and cannot be a legal person such as a company. Whether an individual is a consumer will depend on whether the relevant activity or purchase is carried out primarily for a purpose that is aimed at the individual and is unrelated to his trade or business.

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A trader can be a natural person, a company or other corporate body. A reference to a trader includes any person acting in the name of, or on behalf of, a trader. The concept of "commercial practices" has also been introduced by the Ordinance. Commercial practices may include traders' activities like promotion sales, offers of discounts, price reductions, offers of free gifts or samples and advertising. Commercial practices may occur before or during a transaction, for example at the marketing, sale, supply and payment stages. They may also occur after a consumer transaction has been completed, for example through the provision of warranties, after-sales services and contract cancellation mechanisms.

Whether an entity is considered to be acting as a trader in relation to a commercial practice will depend on whether the relevant activities, or the goods sold, are carried out or sold for purposes relating to its trade or business. A person who sells goods or provides services to a consumer as an employee or a sales representative of a company will be regarded as a trader. In contrast, a person selling certain goods on the internet occasionally, for example to dispose of unwanted personal items on an online auction site, is unlikely to be held to be acting for purposes relating to his trade or business.

The fair trading provisions do not apply to "consumer-to-consumer" conduct. By way of example, the sale of a computer by a person who has been using that computer for his own private purposes and not for any business purposes, to another person who acquires it for the same purpose, is not regulated by the Ordinance.

Exclusions

The fair trading provisions do not apply to immovable property (real estate) and goods and services sold or supplied by a person regulated, licensed, registered, recognised or authorised 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). The sale or supply of goods or services is separately regulated under these Ordinances. In addition, commercial practices engaged by certain professionals (including accountants, dentists, pharmacists, solicitors and medical practitioners) are generally not regulated by the fair trading sections of the Ordinance.

Trade Descriptions

Under the original Trade Descriptions Ordinance it was an offence for any person, in the course of his trade or business, to apply a false trade description to any goods or to supply or offer to supply any goods to which a false trade description was applied. It was also an offence for any person to have in his possession for sale or for any purpose of trade or manufacture any goods to which a false trade description was applied. The Ordinance expands the protection against unfair practices and it is now an offence for a trader to apply a false trade description to a service supplied or offered to be supplied to a consumer or to supply, or to offer to supply to a consumer a service to which a false trade description is applied. Importantly, these offences apply to both business-to-consumer and business-to-business conduct.

Trade descriptions include anything that tell of the goods or services or any part of them and could include the price, how the price is calculated, the existence of any price advantage or discount, performance claims, claims as to the country of origin or 'puffery' claims that the product or service is "the best" or "the most popular". A trade description can be communicated through any means.

A false trade description is defined as a trade description which is false to a material degree; or which, though not false, is likely to be taken for a trade description of a kind that would be false to a material degree. Trivial errors or discrepancies in trade descriptions would not constitute an offence. What constitutes a material degree will vary with the facts.

Telecommunications

Under the Telecommunications Ordinance, telecommunications companies and providers have, for many years, been prohibited from engaging in conduct which was misleading or deceptive when providing or acquiring telecommunications networks, systems, installations, customer equipment or services. Misleading or deceptive promotions, marketing or advertising by telecoms companies were also prohibited. The introduction of the Ordinance means that there is no longer a need for sector specific regulations. Given the scope of the definition of "commercial practices" under the Ordinance and also the extension of the prohibition on false trade descriptions to cover services, section 7M of the Telecommunications Ordinance (which focused on anti-competitive and unfair practices) has been repealed.

What are the new "Unfair Trade Practices"?

The Ordinance creates five new offences:

1) Misleading omissions

A trader will commit an offence if it omits or hides material information regarding a product or service that causes, or is likely to cause, a consumer to enter into a transaction that he would otherwise not have entered into. Material information is information regarding the goods or service which the average consumer requires in order to make an informed transactional decision - such as the price and quantity. What is considered "material" will depend on the type of product or service. Complex products for example, such as computers or smartphones, require more information to be communicated to the consumer including detailed specifications and functionality.

2) Aggressive commercial practices

This offence is committed if a trader conducts a commercial practice that significantly impairs the consumer's freedom of choice through the use of harassment, coercion or undue influence, and results in the consumer making a decision that he would not have made otherwise. Examples include lengthy sales pitches, repeated approaches to a potential customer, using abusive or obscene language to humiliate a consumer, or the exploitation of any misfortune or other circumstance of a consumer.

3) Bait advertising

This offence (together with bait and switch, described below) seeks to stop sellers from advertising goods or services at a specified price if there are no reasonable grounds for that seller to believe that reasonable quantities of the goods/services can actually be offered at that price. A trader can avoid committing this offence by clearly stating the period for which, or the quantities in which, the products or services are offered for sale at the discounted price.

4) Bait and switch

A trader commits this offence if a product or service is advertised for a specific (usually heavily discounted) price to attract consumers, but the trader actually intends to promote a different product or service and:

- refuses to show or demonstrate the advertised product or service, or

- refuses to take orders for the advertised product or service; or
- shows or demonstrates a defective sample of the advertised product or service.

5) Wrongly accepting payment

Pre-payment for goods and services is becoming increasingly popular. Traders must not accept payment for a good or service if at the time of accepting payment, the trader does not intend to supply the good or service or has no reasonable grounds to believe that it will be able to supply the good or service at the agreed time. For example, a seller commits an offence if it has knowledge that the goods it is offering for sale cannot be delivered by the date required by the customer, but the seller nonetheless accepts payment from the customer and agrees to deliver those goods by the requested date.

Consequences

Traders who engage in unfair trade practices may be subject to both financial and criminal penalties. If successfully prosecuted, an organisation or individual will be liable to a penalty of up to HK\$500,000 and imprisonment for up to 5 years. It is important for directors, managers and other officers of a company to be aware that they may now have personal liability under the Ordinance. If an offence is committed by a company, and it is proved that the offence was committed with the consent or connivance, or is attributable to the neglect of, any director, manager or principal officer of that company, that person also commits the offence and may be punished accordingly.

Enforcement

With a view to enforcing the Ordinance effectively and ensuring that every actionable case is taken up by the appropriate party, the Enforcement Agencies have worked out a clear delineation of work. Generally speaking, OFCA will be responsible for cases in which suspected violations relate to the provision of licensed telecommunications and broadcasting services (continuing the role it had policing the 7M provision in the Telecommunications Ordinance). All other cases, including those in which suspected violations relate to goods (or goods bundled with services), will be taken up by C&ED. C&ED will continue to carry out inspections of businesses, identify any particular areas of concern and conduct undercover operations and targeted patrols as required. Certain enforcement

powers cannot be exercised by OFCA. These include the power to enter commercial premises to inspect goods, to seize, remove or detain any goods or to make arrests. For cases involving the provision of licensed telecommunications or broadcasting services, OFCA will continue to provide professional advice and assistance to C&ED during enforcement actions.

Enforcement strategy and powers

At present the Enforcement Agencies propose to adopt a "compliance based" approach to try and encourage future compliance from traders thereby leaving criminal sanctions as a last resort. To assist with this approach, the Ordinance provides the Enforcement Agencies with additional powers. The Enforcement Agencies may adopt the most appropriate enforcement tool for handling a case under investigation having regard to the particular circumstances of that case. Where appropriate the relevant agency may also consider issuing warning or advisory letters to the traders concerned:

Undertakings

Enforcement Agencies can now accept undertakings from trader organisations if they believe that the organisation has engaged, is engaging, or is likely to engage, in unfair trade practices. Every undertaking requires the consent of the Secretary for Justice and would be binding for at least 2 years. An undertaking will usually include the following elements:

- i. a description of the conduct that is the subject of the Enforcement Agency's investigation, and an explanation of why the Enforcement Agency believes that the trader's conduct constitutes an offence;
- ii. an acknowledgment of or admission from a trader that the trader has engaged, is engaging or is likely to engage in the conduct in question;
- iii. a positive commitment by the trader to cease the conduct and not to repeat it or to engage in conduct of a substantially similar kind; and
- iv. specific details of the corrective actions that will be taken by the trader to remedy the harm caused by the conduct (if any);

If the undertaking is accepted by the relevant Enforcement Agency, investigations or criminal proceedings will not be brought or can be discontinued

if those proceedings have already begun. An undertaking can be withdrawn by the Enforcement Agency if it has reasonable grounds to do so.

Injunctions

In addition, the Enforcement Agencies may now apply to the court for an injunction to stop a trader from continuing to engage in unfair trade practices. The court may grant an injunction if it is satisfied that a trader has engaged, or is likely to engage, in conduct that constitutes an offence.

Greater investigatory powers

Previously, Enforcement Agencies could only request a trader to produce books or documents relating to its business if the agency had reasonable grounds to believe that an offence had been committed. If there are reasonable grounds to suspect that an offence has been committed, the Ordinance now authorises the Enforcement Agencies to request such books or documents in order to ascertain whether any offence has been, or is being, committed.

Consumer Redress

In order to help consumers seek justice, the Ordinance also empowers the court to order the convicted trader to compensate the aggrieved consumer for any financial loss resulting from the offence. More significantly, the Ordinance also creates a private right of action for consumers allowing them to institute civil actions and seek damages against traders who are in breach of the new rules.

Criminal Proceedings

No prosecution for an offence under the Ordinance shall be brought after the expiration of 3 years from the date of commission of the offence or the expiration of 1 year from the date of discovery of the offence by the prosecutor, whichever is the earlier.

In determining whether to institute criminal proceedings, Enforcement Agencies must consider a number of factors, including:

- a) whether the trader has engaged in the unfair trade practice for a long period of time;
- b) the number of victims and the damage suffered by the victims;

- c) whether the unfair practice was premeditated;
- d) the impact of the unfair trade practice on the wider community;
- e) whether there are elements in the unfair trade practice exercised by the trader which caused or was likely to have caused anxiety or distress to the victims;
- f) whether the trader or a member of a trading organisation attempted to conceal his/her identity from the Enforcement Agency;
- g) the trader's compliance history; and
- h) whether the trader has obstructed the Enforcement Agency during any investigation.

How can we help you?

The Ordinance aims to provide better protection for consumers against unfair trade practices. If you are engaged in any consumer related business in Hong Kong, you need to be aware of these changes.

We can help suppliers to:

- a) conduct a review of the products you are offering to retailers. As part of that review we would consider the labelling and any claims being made on the packaging, examine any marketing or advertising materials being provided to retailers and help you draft any performance claims made on the products or in the marketing materials so that they comply with the Ordinance; and
- b) liaise with your retailers to help ensure that they have the assurances they require that the products and marketing materials you are supplying to them comply with the Ordinance;

We can help retailers/service providers to:

- a) ensure that you provide sufficient information to consumers regarding the goods or services you are offering;
- b) review your commercial practices, pricing policies and discount schemes to ensure that they comply with the Ordinance;

- c) conduct training for your employees and any third party agents engaged in selling products and services on your behalf on the requirements of the Ordinance; and
- d) liaise with your suppliers to help ensure that the products and marketing materials they are providing to you comply with the Ordinance.

For further information on how these changes may apply to your business, or if you require assistance evaluating your current practices and policies please contact:

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The Compliance and Enforcement Policy Statement and the Enforcement Guidelines can be found here:

http://www.customs.gov.hk/filemanager/common/pdf/pdf_forms/Enforcement_Guidelines_en.pdf