



# **TRADE DESCRIPTIONS (UNFAIR TRADE PRACTICES) (AMENDMENT) ORDINANCE 2012**

## **新商品說明法如何打擊不良經營手法**

**Presenter: Wilfred Tsui**  
**主講：徐奇鵬律師**

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**何耀棣律師事務所**  
中國 · 香港

# Brief Introduction

- (a) Came into force on 19 July 2013
  
- (b) Relevant Authorities
  - Customs and Excise Department (“**C&E**”)
  - Communications Authority (“**CA**”)

# Scope

Applies to...

- traders-to-consumers (see S2(1): “**trader**” definition)
- business-to-business (Ss 4 and 5)

Does not apply to...

- immovable property
- regulated sectors
- professionals (e.g. accountants, lawyers, doctors, etc) (Schedule 3)

## Extra-territoriality (S21A)

- a trader who is in Hong Kong or has Hong Kong as its usual place of business at the time of engaging in the practice, even if it is targeting consumers outside Hong Kong, the new Ordinance applies
- especially designed to catch online transactions

## 6 New Offences

- Offences in respect of trade description of services (S7A)
- Misleading omissions (S13E)
- Aggressive commercial practices (S13F)
- Bait advertising (S13G)
- Bait and switch (S13H)
- Wrongly accepting payment (S13I)

# 1. False or misleading trade description of services (S7A)

- 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 trade description is applied.
- service = includes any right, benefit, privilege or facility that is, or is to be, provided, granted, conferred or offered under a contractual right other than one arising under a contract of employment as defined by S2(1) of the Employment Ordinance (Cap 57)

# Trade description under S2 now also includes:

- availability
- compliance with a standard specified or recognized by any person;
- price, how price is calculated or the existence of any price advantage or discount

- a person by whom they have been acquired, or who has agreed to acquire them
- their being of the same kind as goods supplied to a person
- performance claim
- claims as to place of manufacture/country of origin
- puffery

韓國BB cream大平賣，  
最後100支，買完就無!!!

## 2. Misleading Omissions (S13E)

- S13E(1) provides that a trader who engages in relation to a consumer in a commercial practice that is a misleading omission commits an offence.

- S13E(2) further provides that a commercial practice is a misleading omission if, in its factual context
  - (a) omits or hides material information;
  - (b) provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
  - (c) 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 to make a transactional decision that he would not have made otherwise

## Factors to be taken into account (S13E)

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

# Who are “average consumers” ?

- = not ill-informed, ignorant or reckless (see S13D(1))
- Relevancy: Ss13D(3)(a) and (b) also set out circumstances in which the “average consumer” refers to one that is in a particular smaller group instead of the population as a whole because different commercial practice may have different impact on consumers.

- E.g. Consumers who need to use corrective lens might be considered as a target group in relation to advertising claims about corrective lens with built-in sun-glasses function.
- If the trader can reasonably be expected to foresee that a clearly identifiable group of consumers is particularly vulnerable to the practice or to the underlying product, those are the relevant average consumers
  - E.g. Diabetes patients might more readily be attracted to food products claimed to be able to maintain a stable blood glucose level.

# Example

- *Omission or hiding of material information*
  - *unlimited mobile data plan*
    - *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*

### 3. Aggressive Commercial Practices (S13F)

Factual context (features and circumstances):

- significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product through **(1) harassment, (2) coercion** or **(3) undue influence**
- therefore causes or is likely to cause the consumer to make a transactional decision he would not have made otherwise

# Harassment, Coercion, Undue Influence

- Harassment
  - infliction of physical and/or non-physical (including psychological) pressure
  - (e.g. repeated pressure to a consumer not under obligation to buy)
- Coercion
  - consumer subjected to pressure and threat
  - (e.g. humiliating or subjecting a consumer to fears over his own safety or the safety of his next of kin → prejudices freedom of choice)
- Undue Influence
  - exploitation of a position of power to apply pressure → impairs ability to make an informed decision

# Example

*Ex-Mrs. Pretty going for a beauty talk...*

*Part 1 – The Pink Car*



*Part 2 – Free Treatment*

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## 4. Bait Advertising (S13G)

- (1) A trader who engages in relation to a consumer in a commercial practice that constitutes bait advertising commits an offence.

## (2) Bait advertising means supplying goods at a price where:-

- there are no reasonable grounds for believing that the trader will be able to offer for supply those products at that price, or
- the trader fails to offer those products 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 products at a specified price, traders should ensure that the products are available for a reasonable period and in quantities that are reasonable

# Example

*On [www.budget-tickets.com](http://www.budget-tickets.com)*



## 5. Bait-and-switch (S13H)

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

- (a) refuses to show or demonstrate the product to consumers;
- (b) refuses to take orders for the product or deliver it within a reasonable time; or
- (c) shows or demonstrates a defective sample of the product.

- Necessary to prove the intention of the trader
- Does not prohibit a trader from promoting products other than the product which is the subject of the invitation to purchase

# Example

*At Narrowway electronics shop...*



\$1000



\$3999

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## 6. Wrongly Accepting Payment (S13I)

- A trader wrongly accepts payment for a product if the trader accepts payment or other consideration for the product and at the time of that acceptance
  - the trader intends not to supply the product
  - the trader intends to supply a product that is materially different from the product in respect of which the payment or other consideration is accepted
  - no reasonable grounds for believing that the trader would be able to supply the product
    - within specified time, or
    - within reasonable time

# Example

- *Phone call with Group Coupons Christmas Dinner package supplier..*



# Liabilities of Parties Involved

- Management
- Employers and agents of a trader
- Specific and additional defences

# Personal liability of management of a co. (S20)

- if an offence under the Ordinance 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

# Co.' s liability for its employees' or agents' actions

- if the employee or agent acts in their scope of employment or assigned authority and it is intended for the benefit of the co.
- general defence for the co. against liability of an agent: if co. can show the offence was committed outside its control and it had made reasonable efforts to avoid the commission of the offence by the agent

## Investigatory Powers (Ss 15,16,16A,16B)

- Wide: inspection, sampling, test-purchasing, testing, detention of suspicious goods, investigation, prosecution, informing the public
- C&E: reasonable grounds to suspect that an offence has been committed → arrest suspects, require production of documents, seize or detain materials as evidence
- CA: TDO concurrent enforcement powers (ref: Trade Descriptions (Powers not exercisable by CA) Notice)
- Compliance and Policy Statement: objectives of enforcement actions, guiding principles, factors in prioritization

⇒ Obstruct Authorized Officers in lawful performance of their duties → liable to prosecution (S17)

# Civil Enforcement

- Undertaking
- Injunction

# Criminal prosecution

- Criminal proceedings can be brought against a co. or an individual for serious breaches of the Ordinance
- Factors to be considered
  - length of time over which the conduct continues
  - number of victims
  - financial loss or other damage suffered by victims
  - offender's compliance record
  - impact on the community

# Maximum penalty (s18)

- a fine of HK\$ 500,000
- imprisonment for five years

# Time limit for prosecution (S19)

No prosecution shall be brought after

- (a) the expiration of 3 years from the date of commission of the offence; or
- (b) the expiration of 1 year from the date of discovery of the offence by the prosecutor

Enhanced protection  for consumers  
Shop with peace of mind



# Q&A Session

**- THANK YOU -**