NEW OFFENCES RELATED TO TRADE DESCRIPTIONS IN HONG KONG - FUTURE ENFORCEMENT DIRECTIONS

The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance (the "Amendment Ordinance") will come into force in around mid-2013. Key changes of the Amendment Ordinance include widening of the definition of "trade description" to prohibit false trade descriptions to services as previously; the trade description was only applicable to goods. The Amendment Ordinance also introduces new unfair trade practices and enforcement mechanisms.

The Draft Enforcement Guidelines (the "Guidelines"), jointly issued by the Customs & Excise Department and the Communications Authority (either of them as the "Enforcement Agency"), shed light on what activities may be caught under the new law and how enforcement measures will be taken. The Guidelines are not to be regarded as laws or subsidiary regulations, and are currently under consultation until 17th March 2013.

NEW OFFENCES

The Amendment Ordinance sets out a number of new offences, which will apply to trades with end consumers, i.e. business-to-business trading is not covered. The offences shall apply even if the end consumer is not in Hong Kong, and will thus be applicable to online trades where trader is in Hong Kong or where Hong Kong is the trader's usual place of business.

Services rendered by certain registered professionals such as lawyers or doctors, are specifically excluded.

I. Misleading omissions

According to the Amendment Ordinance, it would be an offence if the trader:

- omits or hide material information;
- provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
- 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 decision that the consumer would not have made otherwise.

"Material information" is defined broadly and includes any information that the average consumer needs to make an informed decision on whether to conduct the transaction or not, taking into account the context. The standard of an average consumer is an objective one, taking into account the material characteristics of such an average consumer, who is reasonably well informed, observant and circumspect. As concisely suggested by the Guidelines, "the average consumer is not ill-informed, ignorant or reckless".

In most circumstances, the unit price, and features or restrictions on the products are likely to be regarded as material information. Related information such as the duration of contract or after-sales services may also be considered as material. The Amendment Ordinance provides a list of information regarded as material if the commercial practice in question is an "invitation to purchase". This term is broadly defined as "a commercial communication that indicates characteristics of the product and its price in a way appropriate to medium used for that communication and therefore enables the consumer to make a purchase". Therefore, this term includes advertisements showing the price and the goods or services on any printed matters, Internet or other media.

According to the Amendment Ordinance, material information in context where the commercial practice in question is an "invitation to purchase" includes:

- the main characteristics of the products;
- the identity and address of the trader;
- the price or any additional freight, delivery or postal charges (or the manner in which they are calculated); and
- the right to withdraw or cancel the transaction.

Therefore, omitting the above information or if it is not provided timely may be an offence. Nowadays, traders use Quick Response Code (QR code) in advertisement and product information can only be obtained through QR code reader on smart phones. The Guidelines suggest that the trader in such context may have committed the offence.

Usually, material information of goods or services should be communicated to the consumer before he makes the transactional decision. For example, for a trader operating a car park, the parking fee should be displayed clearly at the entrance of the car park.

In relation to failure to identify the trader's commercial intent, an example provided by the Guidelines is that a trader, or his agent or employee, disguises himself as a consumer and posts comments using pseudonyms in online discussion forums or in social media groups to promote sales or bad mouth competitors.

II. Aggressive commercial practices

According to the Amendment Ordinance, a commercial practice is aggressive if it impairs significantly or is likely to impair significantly the average consumers' freedom of choice or conduct through harassment, coercion or undue influence, and as a result causes or is likely to cause the consumer to make a transactional decision.

The Guidelines explains that "undue influence" in this context means an "exploitation of a position of power in relation to a consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly impairs the consumer's ability to make an informed decision". Position of power may arise due to possession of consumer's property (e.g. credit cards) at the time the consumer makes the transactional decision. This may be the case where trader further promotes his other products when the consumer has provided his credit card for payment for the products he has previously decided to buy. It will be an offence if the trader refuses to return the credit card unless the consumer agrees to buy his other goods or services.

Further, in deciding whether a commercial practice uses harassment, coercion or undue influence, the Amendment Ordinance provides a list of factors to be considered, including its timing, location, nature or persistence, or any onerous non-contractual barrier imposed by the trader where a consumer whishes to exercise rights under the contract, including rights to terminate the contract or to switch to another product or another trader.

As suggested by the Guidelines, salespersons refusing to leave the flat of an elderly person and pressing him to sign on a service provision contract when the elderly has already expressed his disinterest in the services, or any requirement that the contract termination form be submitted to the trader e.g. a remote location in person during office hours may be regarded as aggressive commercial practices.

III. Bait advertising

The Amendment Ordinance prohibits any advertising for goods or services at a specified price if there are no reasonable grounds for believing that the trader will be able to offer reasonable quantities of the goods or services at that price for a reasonable period, taking into account the nature of the market and the nature of the advertisement in question. It is also an offence if the trader fails to offer those products for supply at that price, for a period that is, and in quantities that are, reasonable, taking into account the similar considerations as above.

The concepts of "reasonable quantities" and "reasonable period" are to be decided in light of the nature of the market and nature of advertisement in question. The nature of the market is to be examined with reference to both the supply and demand of the goods or service in question. Unforeseeable factors affecting the demand or supply side will also be taken into account when determining what is reasonable in the context. That said, before putting up an advertisement, trader should review their previous sales trend and assess if the size of the stock in hand is sufficient to meet a reasonably expected demand. As suggested by the Guidelines, disclaimers like "while stocks last" will unlikely be sufficient to protect traders from committing bait advertising. As to the nature of advertisement, it is related to the size of readership of the advertisement, which may affect the demand of the products. Generally speaking, TV commercials are expected to have a wider reach than advertisements placed in the store.

However, it would be a defence for the trader if it provides to the consumer information of the quantities and period for the products to be sold at a specified price, even if the quantities or period is unreasonable. Further, evidence showing that the trader has procured a third party to supply additional stock of the specific products or their equivalent to meet the demand at the advertised price within a reasonable time is another defence available to the trader.

IV. Bait and switch

According to the Amendment Ordinance, a trader shall not, upon having made an invitation to purchase a product at a specified price, with the intention of promoting a different product:

- refuse to show or demonstrate the product;
- refuse to take orders for the product or deliver it within a reasonable time; or
- show or demonstrate a defective sample for the product.

However, to establish the offence, it must be shown that the trader has the intention of promoting a different product at the time the invitation to purchase is made. However, such intention is not easy to prove.

V. Wrongly accepting payment

According to the Amendment Ordinance, it would be an offence if the trader wrongly accepts payment for a product if 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 is accepted; or
- there are no reasonable grounds for believing that the trader will be able to supply the product within the period specified by the trader at or before the acceptance of payment or within a reasonable period if such a period is not so specified.

To establish the offence, it must be proved that there exists the above trader's intention or the lack of reasonable grounds at the time the payment is accepted. Such intention may be induced from any supply constraints known to, or that can be expected by the trader at the time of accepting the payment.

However, it is a plausible defence if the trader can show that he had checked with its supplier to ensure sufficient availability of the products in question, or that he had offered to supply additional stock or procure a third person to supply the additional stock of the specified product or the equivalent to meet his obligations. Further, it is a defence if full refund is made within a reasonable period after the specified period of supply or, in lack of it, any reasonable period.

SANCTION AND ENFORCEMENT

A trader who commits any of the above offences is subject to criminal sanctions, with the maximum penalty of HK$500,000 and imprisonment for 5 years.

In case the trader is a body corporate, apart from the trader, certain classes of persons of the trader may also incur personal liability if it can be proved that the offence has been committed with their consent or connivance or was attributable to their neglect. Those persons include the director, company secretary, principal officer or manager of the trader.

Apart from the criminal sanction, the Amendment Ordinance also introduces the court's power to award compensation to the consumer for financial loss resulting from the offence.

NEW ENFORCEMENT MEASURES

The Guidelines provides details of the enforcement mechanism newly introduced by the Amendment Ordinance, namely undertakings and injunctions.

i. Undertakings

An undertaking is a commitment provided by the trader not to continue, repeat or engage in the conduct of commercial practice which the Enforcement Agency believes that he has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the Amendment Ordinance. However, a trader cannot be compelled to give such undertaking. Once the undertaking is accepted, criminal proceedings relating to that subject matter may not be brought or continued.

The Guidelines provide a list of elements that the trader should include in the undertaking. The elements include:

- an acknowledgement of or admission from a trader that he has engaged, is engaging or is likely to engage in the conduct in question;
- a positive commitment by the trader to cease the conduct and not to repeat it or engage in similar conduct;
- details of corrective actions to be taken by the trader; and
- an acknowledgement by the trader that the Enforcement Agency may cause the undertaking be published in any form.

The Guidelines suggest that the validity of such undertaking not be shorter than 2 years.

That said, even if the trader gives undertaking, acceptance of the same is subject to written consent of the Secretary for Justice, having regarded to all the relevant circumstances. The acceptance can be withdrawn if there are reasonable grounds for believing that there has been a material change of circumstances or the trader has breached the terms of undertaking, etc. To ensure compliance of the undertaking, the Enforcement Agency may inspect the business premises of the trader.

ii. Injunctions

The Enforcement Agency may apply to District Court or Court of First Instance for an order that the trader not continue, repeat or engage in contravening conducts. The Court may also grant an interim injunction pending the determination of the application for the injunction if it thinks fit.