

# 政府決意打擊不良營商手法

## Government determines to combat unfair trade practices

香港海關 Customs and Excise Department

編按：《2012年商品說明(不良營商手法)(修訂)條例》生效在即，本刊為此邀請了香港海關撰文介紹該修訂條例的重點，以免會員旅行社、領隊及導遊誤墮法網。

Editor's note: As the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 is about to take effect, TheVoice has invited the Customs and Excise Department (C&ED) to write an article on the main points of the amended Ordinance in order that member agents, tour escorts and tourist guides will not inadvertently violate the law.

經修訂的《商品說明條例》將於今年七月實施，業者需要對商業行為加倍小心。

**Members of the industry need to be more careful about their business practices when the amended Trade Descriptions Ordinance comes into force this July.**

**現**行的《商品說明條例》(《香港法例》第362章，以下簡稱《條例》)只規管及禁止售賣、供應、管有或進口附有虛假商品說明的貨品。鑒於近年關於不良營商手法的投訴日趨嚴重，為了加強對消費者的保障，政府已修訂《條例》，藉以監管不良營商手法。

### 修訂《條例》簡介

《2012年商品說明(不良營商手法)(修訂)條例》已於二零一二年七月十七日獲立法會通過，並將於二零一三年七月十九日實施。《條例》經修訂後，主要有以下內容：

- ◆ 擴大有關貨品的「商品說明」的現有定義，即以任何方式就任何貨品或貨品任何部份作出直接或間接的顯示，例如標價；
- ◆ 擴大《條例》的適用範圍，禁止在消費服務交易中作出虛假商品說明，並界定「服務」一詞在消費合約中的法律定義；
- ◆ 禁止在營業行為中某些不良營商手法，即誤導性遺漏、具威嚇性的營業行為、餌誘式廣告宣傳、先誘後轉銷售行為及不當地接受付款；及
- ◆ 在刑事懲處外，設立「遵從為本」的民事執法機制，通過接受商戶作出書面承諾，即承諾停止和不重犯違規的行為，以達到鼓勵商戶遵從法例及更快

**T**he existing Trade Descriptions Ordinance (Chapter 362 of the Laws of Hong Kong; hereafter referred to as the Ordinance) only regulates and prohibits the selling, supplying, possessing or importing of goods bearing false trade descriptions. In view of the ever-increasing complaints in relation to unfair trade practices in recent years, the Government has amended the Ordinance in order to enhance protection for consumers by regulating such practices.

### Amended Ordinance in brief

The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 was passed by the Legislative Council on 17 July 2012 and will come into operation on 19 July 2013. The amended Ordinance covers the following major contents:

- ◆ the expansion of the definition of "trade description" of goods to any indication, direct or indirect, and by whatever means given, with respect to any goods or parts of goods, such as price indications;
- ◆ the extension of the coverage of the Ordinance to prohibit false trade descriptions in respect of services and also the provision of a legal definition of "service" in consumer contracts;
- ◆ the prohibition of certain unfair trade practices in commercial practices, viz. misleading omissions, aggressive commercial practices, bait advertising, bait and switch, and wrongly accepting payment; and
- ◆ the introduction of, in addition to criminal sanctions, a civil compliance-based enforcement mechanism, which allows the acceptance of an undertaking offered by a trader who promises to cease and not to repeat the contravening conduct. The aim is to encourage the trader to comply with the law and to resolve the contravening matters more expeditiously. In case the trader breaches any of the conditions of the

地解決違例事宜的目的。如商戶違反所作承諾的任何條件，執法機關可向法院申請強制令，命令商戶不得繼續或重犯或作出某違例行為。

如任何人士觸犯《條例》的條文，一經循公訴程序定罪，最高可被判罰款港幣五十萬元及監禁五年。

## 有關貨品和服務的商品說明

「商品說明」就貨品而言的定義已經擴大，任何與貨品有關的虛假顯示都被禁止；適用範圍亦伸延至禁止商戶就向消費者提供的服務作出虛假商品說明。要構成虛假商品說明，商品說明的虛假程度需要達關鍵程度。

### 虛假商品說明的例子

某旅行社的外遊旅行團行程表訂明，該團會入住當地旅遊局所評定的五星級酒店。可是，參加該團的旅客發現下榻的酒店為三星級，低於原定的住宿標準。由於住宿等級是一項服務的商品說明，旅行社可能觸犯虛假商品說明的罪行。

## 禁止不良營商手法

根據經修訂的《條例》，以下不良營商手法一律被禁止：

**誤導性遺漏：**商戶刻意隱瞞、遺漏關鍵資料或沒有對這些資料作清晰的陳述，誤導消費者。

### 誤導性遺漏的例子

陳小姐到某旅行社報名參加旅行團到菲律賓，職員辦理報名手續時，完全沒有向她提及保安局對菲律賓發出的外遊警示。有關外遊警示對於旅遊人士而言屬於重要資料，如旅行社推銷旅行團、機票或旅遊套票時沒有提及相關目的地的外遊警示，而導致或相當可能導致一般消費者作出某項交易決定，則該營業行為即屬誤導性遺漏。

**具威嚇性的營業行為：**商戶利用騷擾、威迫或施加不當影響的手法，導致消費者作出交易決定。

### 具威嚇性的營業行為的例子

導遊帶入境團的團員購物時，規定每人一定要消費

undertaking, the enforcement agency may apply to the court for an injunction to order the trader not to continue or repeat or engage in the contravening conduct.

Any person who commits an offence will be liable on conviction on indictment to a fine of HK\$500,000 and imprisonment for five years.

## Trade descriptions of goods and services

The definition of “trade description” in relation to goods has been expanded to the effect that false indications of any matters with respect to goods will be prohibited. The coverage has also been extended to prohibit traders from applying false trade descriptions to services for supply to consumers. To amount to a false trade description, a trade description has to be false to a material degree.

### Example of false trade descriptions

The itinerary of an outbound tour prepared by a travel agent states that the tour group will stay at five-star hotel accommodation assessed by the tourism authority in the destination. Nevertheless, participants of the outbound tour find out that their accommodation is a three-star hotel, which is lower than the original standard of accommodation. Since the hotel rating is a trade description of a service, the travel agent may commit an offence of false trade description.

## Prohibition of unfair trade practices

According to the amended Ordinance, the following unfair trade practices are prohibited:

**Misleading omissions:** Traders intentionally hide or omit material information, or provide such information in a manner that is unclear in order to mislead consumers.

### Example of misleading omissions

Miss Chan approaches a travel agent for joining an outbound tour to the Philippines. When processing the reservation for her, a staff member of the travel agent does not notify her of an Outbound Travel Alert for the Philippines that has been issued by the Security Bureau. The Outbound Travel Alert is material information for travellers. If the travel agent fails to mention the relevant Outbound Travel Alert in place when promoting outbound tours, air tickets or travel packages, which causes or is likely to cause the average consumer to make a certain transactional decision, then such a commercial practice may amount to a misleading omission.

**Aggressive commercial practices:** Traders make use of harassment, coercion or undue influence to cause consumers to make a transactional decision.

港幣一千元方可離開店舖。當有些團員不欲購物，並打算回旅遊車等待其他人時，導遊隨即諷刺他們是窮人，花少許金錢也不願意，結果他們在尷尬萬分的情況下被迫購物。在此情況下，導遊可能觸犯具威嚇性的營業行為的罪行。

**餌誘式廣告宣傳：**商戶以減價或非常優惠的條件宣傳或推廣產品，卻沒有合理數量或能力足以應付可以預期的需求。

### 餌誘式廣告宣傳的例子

某航空公司以港幣二百九十九元的優惠價提供特惠機票，消費者可在即將來臨的農曆新年假期乘搭該公司的任何航班前往馬來西亞。這項優惠在不同的媒體及互聯網上刊登了一個星期。與其他航空公司在同一時段就同一目的地收取的票價相比，有關優惠價大概便宜百分之七十，非常吸引。該航空公司去年曾推出類似的促銷活動，當時的票價大約是競爭對手所訂價格的一半，那次推廣最終出售了三千五百多張機票。可是，該公司這次只提供五百個機位。在顧及該航空公司經營業務的市場性質及其廣告宣傳的性質後，因為沒有合理理由相信該公司將能在合理期間內，要約按優惠價供應合理數量的機票，該公司可能觸犯餌誘式廣告宣傳的罪行。

**先誘後轉銷售行為：**商戶利用宣傳的產品餌誘消費者進入店舖，藉此以各種藉口推銷較昂貴或其他產品。

### 先誘後轉銷售的例子

某旅行社刊登廣告，以東京自由行、三日兩夜只需優惠價港幣一千九百九十九元作招徠，較市價低百分之二十。一名顧客被這項優惠吸引，向旅行社表示要購買此優惠套票，但該旅行社拒絕售賣此優惠套票予該顧客，繼而向他推介另一個較昂貴的日本旅遊套票。該旅行社其實沒有出售所宣傳的優惠套票的意圖，只想利用宣傳誘使消費者光顧，以便促銷其他較昂貴的日本旅遊套票。如旅行社意圖利用此手法向顧客推銷有別於要約供應的旅遊套票，該旅行社可能會觸犯先誘後轉銷售的罪行。

### Example of aggressive commercial practices

When taking an inbound tour group to shop, the tourist guide requires that each of the tour members spend HK\$1,000 before they are allowed to leave the shop. On seeing some tour members prefer waiting in the coach to buying things, the tourist guide taunts them about being poor people who are stingy. They are thus forced to make purchases in a very embarrassing situation. Under such circumstances, the tourist guide may commit an offence of aggressive commercial practice.

**Bait advertising:** Traders promote products by means of price reduction or exceedingly attractive conditions, yet they have no reasonable quantity of the products or ability to meet the expected demand.

### Example of bait advertising

An airline is offering a special promotion of HK\$299 on all flights to Malaysia during the coming Lunar New Year. This special promotion is advertised for one week in various types of media, including the Internet. Compared to the prices charged by other airlines for flights to the same destination during the same period, the promotional price is very attractive as it is about 70% cheaper. The airline conducted a similar promotion last year, setting the ticket price at about half of its competitors'. Eventually, over 3,500 tickets were sold. The number of seats available this time, however, is only 500. The airline may be held to have committed the offence of bait advertising as there are no reasonable grounds for believing that it will be able to offer for supply air tickets at the promotional price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the airline carries on business and that of its advertisements.

**Bait and switch:** Traders use promotional products to bait consumers into the stores, and then employ all kinds of excuses to sell other more expensive or different products to them.

### Example of bait and switch

A travel agent advertises a three-day air-plus-hotel package to Tokyo for only HK\$1,999 (20% less than the market price) to draw business. A consumer is attracted by the discount and intends to purchase that travel package. However, the travel agent refuses to offer the consumer a travel package at the specified price and instead convinces him to take another more expensive travel package to Japan. The travel agent actually has no intention to sell the advertised package, merely making use of the advertisement to lure consumers into purchasing another more expensive travel package to Japan. If the travel agent intends to use this method to promote a travel package different from the one it offers to supply to consumers, it may commit an offence of bait and switch.

**不當地接受付款：**商戶在接受付款時意圖不提供合約訂明的產品或服務，或提供與合約訂明產品有重大分別的其他貨品。

### 不當地接受付款的例子

某旅行社打算在本月結業，但仍收取下一個月出發的旅行團的團費。最後，旅行社於本月底結業，而受影響的客人均沒有獲得退款，旅行社亦沒有任何其他安排。如該旅行社在收取有關團費時，沒有合理理由相信它能在指明的時間內提供有關服務，該旅行社便可能已觸犯不當地接受付款的罪行。

**Wrongly accepting payment:** At the time of accepting payment, traders intend not to supply the goods or services stated in the contract, or intend to supply a materially different product.

### Example of wrongly accepting payment

A travel agent has planned to cease business within this month, but continues to accept payment for outbound tours that are scheduled for departure next month. Finally, it is closed at the end of this month, without refunding the affected consumers or making any other arrangements. In this case, the travel agent may be liable for an offence of wrongly accepting payment if there are no reasonable grounds for believing that it will be able to supply the services at the time specified when accepting payment from consumers.

## 免責辯護

《條例》為被控人訂定一般免責辯護。根據第 26 條，被控人如可舉出充份證據，證明所犯罪行是因錯誤、倚賴他所獲提供的資料、另一人的作為或失責、意外或其他非他所能控制的因由所引致，並已向檢控官給予和送達足夠書面通知，以及他已採取一切合理防範措施，並已盡一切應盡的努力以避免他本人或任何受他控制的人犯該罪行，他可能會被裁定罪名不成立。此外，第26A條及第26B條亦分別為餌誘式廣告宣傳及不當地接受付款列明額外免責辯護。

## Defences

The Ordinance puts in place general defences for the person charged. Under section 26, a person might be acquitted if sufficient evidence is adduced to prove that the commission of the offence is due to a mistake or due to reliance on information supplied to him or due to the act or default of another person, an accident or some other cause beyond his control and adequate notice in writing is given and served on the prosecutor; and 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. Additional defences are also provided under sections 26A and 26B for the offences of bait advertising and wrongly accepting payment respectively.

## 調查及執法

海關是執行《條例》的主要機關，擁有多項執法權力，獲授權人員可以檢查、取辦、試購、測試、扣留可疑貨品、調查及檢控等方式執行其職責。海關亦會致力教育商戶，使其瞭解《條例》修訂後的公平營商條文及不遵從規定的後果。

## Enforcement and investigation

The C&ED, as the principal agency to enforce the Ordinance, has a full spectrum of enforcement powers. Authorised officers may carry out their duties in various ways, including inspection, sampling, test-purchasing, testing, detention of suspicious goods, investigation and prosecution. The C&ED will also educate traders and help them understand the fair trading sections of the amended Ordinance and the consequence of non-compliance.

海關與《條例》的另一執法機關通訊事務管理局，已聯合制定一套包括「遵從與執法政策聲明」和「一般指引」的「執法指引」，以協助商戶遵從及提高執法透明度。有關內容請瀏覽海關網頁[www.customs.gov.hk](http://www.customs.gov.hk)，或通訊事務管理局網頁[www.coms-auth.hk](http://www.coms-auth.hk)。

To promote compliance with the Ordinance by traders and enhance transparency in its enforcement, the C&ED and the other enforcement agency - the Communications Authority ("CA") - have jointly published a set of Enforcement Guidelines, which consists of the Compliance and Enforcement Policy Statement and the General Guidelines. For details of the Enforcement Guidelines, please visit the C&ED's website at [www.customs.gov.hk](http://www.customs.gov.hk) or the CA's website at [www.coms-auth.hk](http://www.coms-auth.hk).