

For Information

**Subcommittee on Trade Descriptions (Powers Not Exercisable by
Communications Authority) Notice
and Trade Descriptions (Unfair Trade Practices) (Amendment)
Ordinance 2012 (Commencement) Notice**

**Draft Memorandum of Understanding between
the Commissioner of Customs and Excise and
the Communications Authority**

In response to the Subcommittee's request at the meeting on 11 June 2013, enclosed at Annex A is the draft Memorandum of Understanding ("MoU") between the Commissioner of Customs and Excise and the Communications Authority ("CA") for the purpose of coordinating the performance of their functions under the Trade Descriptions Ordinance as amended by the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 ("Amendment Ordinance") for Members' information.

2. The enclosed draft was jointly prepared by the Customs and Excise Department ("C&ED") and the Office of the Communications Authority ("OFCA"), the executive arm of CA. It is an exceptional arrangement that we provide the draft, which has yet to be endorsed by the independent statutory body, CA, to the Subcommittee for information in the context of considering the two pieces of subsidiary legislation.

3. Subject to the comments and endorsement of CA of the draft MoU, we aim to put it into operation immediately upon the commencement of the Amendment Ordinance and publish it on C&ED and OFCA's websites on the same date.

**Commerce and Economic Development Bureau
20 June 2013**

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MEMORANDUM OF UNDERSTANDING
BETWEEN
THE COMMISSIONER OF CUSTOMS AND EXCISE
AND
THE COMMUNICATIONS AUTHORITY

This MEMORANDUM OF UNDERSTANDING is entered into between the Commissioner of Customs and Excise and the Communications Authority on the [xxth] day of [xxx] 2013.

PREAMBLE

The Trade Descriptions Ordinance (Cap 362) (“TDO”) empowers the Commissioner of Customs and Excise (“CCE”) and public officers appointed by him as authorized officers to enforce the TDO.

Pursuant to section 16E of the TDO, the Communications Authority (“CA”) (and any public officers authorized by the CA) shares concurrent jurisdiction with the CCE (and his authorized officers) to enforce the TDO in relation to any commercial practices¹ of licensees under the Telecommunications Ordinance (Cap 106) (“TO”) or the Broadcasting Ordinance (Cap 562) (“BO”) that are directly connected with the provision of a telecommunications service or broadcasting service under the TO or the BO, as the case may be².

The CCE and the CA have respectively authorized public officers in the Customs and Excise Department (“C&ED”) and the Office of the Communications Authority (“OFCA”) (collectively the “Enforcement Agencies”) to enforce the TDO under their respective jurisdictions.

Section 16G of the TDO provides that the CCE and the CA must prepare

¹ “Commercial practice” is defined in section 2 of the TDO to mean “*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 Section 16E(1) and section 16E(4) expressly provide that powers under the TDO are not conferred on the CA to enforce section 9, section 12 and Part IIIA of the TDO.

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and sign a memorandum of understanding for the purpose of co-ordinating the performance of their functions under the TDO.

This Memorandum of Understanding (“MOU”) is entered into between the CCE and the CA pursuant to section 16G of the TDO.

1. DELINEATION OF RESPONSIBILITIES

- 1.1 C&ED will take up all cases³ suspected to be in contravention of the TDO, save for those cases that will be taken up by OFCA pursuant to clause 1.2.
- 1.2 OFCA will take up cases in relation to any commercial practices of licensees under the TO or the BO that are directly connected with the provision of a telecommunications service or broadcasting service under the TO or BO, as the case may be, and are suspected to be in contravention of the relevant sections of the TDO⁴.
- 1.3 For the avoidance of doubt,
 - (a) where the commercial practice of a licensee of the TO or BO involves the promotion of a telecommunications service or a broadcasting service under the TO or BO (whether or not such promotion takes place together with the promotion of other goods and/or services); and
 - (b) the commercial practice suspected to be in contravention of the relevant sections of the TDO concerns the telecommunications or broadcasting service only,

OFCA will be the responsible Enforcement Agency to deal with the case.⁵ C&ED will be the responsible Enforcement Agency for all other cases as given in clause 1.1 above. The delineation of responsibilities between C&ED and OFCA is illustrated in the Annex.

³ The reference to “cases” in this MOU includes complaints received by either C&ED or OFCA, proactive enquiries initiated by either of them, and matters that are otherwise brought to the attention of either of them.

⁴ By virtue of section 16E(4) of the TDO, the CA is not conferred powers to enforce sections 9 and 12 of the TDO.

⁵ Where an employee or agent of a licensee is acting in the name of or on behalf of the licensee, the CA may exercise its powers under TDO against the employee or agent. For the avoidance of doubt, section 16E(3) is not applicable in relation to (a) commercial practices which are not related to the trade or business of a licensee for which the relevant licence is granted or (b) acts of a licensee which are not directly connected with the promotion, sale or supply of products as defined under section 2(1) of the TDO.

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2. TRANSFER OF CASES

- 2.1 Where a complaint is received or a proactive enquiry is initiated by an Enforcement Agency, or a matter is otherwise brought to the attention of an Enforcement Agency, the Enforcement Agency in question will examine, and where necessary consult the other Enforcement Agency, as to which of the Enforcement Agencies should take up the case in accordance with Clause 1 above.
- 2.2 Where a case is referred from one Enforcement Agency to another, the referring Enforcement Agency will send to the other Enforcement Agency under confidential cover a brief description of the case as an advance notice. Within ten working days from the advance notice or within such other time as agreed between the two Enforcement Agencies, the referring Enforcement Agency will also send to the other Enforcement Agency under confidential cover any documents, articles, materials and information in relation to the case in its possession, including the information provided by the complainant, witness statements, and information collected from market intelligence or proactive enquiry (“Referral”).
- 2.3 The Enforcement Agency which receives a Referral from the other Enforcement Agency will respond to the Referral within ten working days, or within such other time as agreed between the two Enforcement Agencies, as to whether:
 - (a) the Referral is accepted;
 - (b) the Referral is rejected, with reasons given for the rejection; or
 - (c) further information is required before a decision on the Referral is made.
- 2.4 Where there are disputes as to which of the Enforcement Agencies is more appropriate to handle the complaint, the disputes will be dealt with in accordance with Clause 7 below.
- 2.5 The Enforcement Agency accepting a Referral will take over the case and keep the other Enforcement Agency informed of the progress of the case, where the other Enforcement Agency has concurrent jurisdiction over that case.

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- 2.6 For the avoidance of doubt, if an Enforcement Agency is performing or has performed a statutory function in relation to a case over which the other Enforcement Agency has concurrent jurisdiction, the other Enforcement Agency must not perform any statutory function in relation to that case unless there is an agreement between the Enforcement Agencies over the transfer of the case and only after such a transfer has been effected.

3. CO-ORDINATION AND COOPERATION

- 3.1 The Enforcement Agencies agree that there is a need to maintain consistency in handling cases as far as practicable.
- 3.2 The Enforcement Agencies will seek to align the factors to be taken into account when deciding whether to seek prosecution of a case, accept an undertaking under section 30L, withdraw an undertaking under section 30N⁶, and apply for an injunction under section 30P.
- 3.3 The Enforcement Agencies will regularly exchange enforcement information with a view to adopting harmonized codes and practices, in the light of their enforcement experiences, court judgments and rulings, legal advice, and policy issues that may arise.
- 3.4 The Enforcement Agencies will, where appropriate, consult each other in preparing responses to matters of media interests, and making arrangements for publication of information and consultation with stakeholders.
- 3.5 The Enforcement Agencies will provide each other with enforcement and technological support, including on-site support upon receipt of a request for assistance from one Enforcement Agency to the other.
- 3.6 The Enforcement Agencies will appoint liaison officers for the purposes of referral of cases, liaison, exchange of information and provision of assistance between them under the MOU. When either of the Enforcement Agencies intends to change its liaison officers, it will promptly inform the other Enforcement Agency.

⁶ Consent from the Secretary for Justice is required before an undertaking is to be accepted or withdrawn, see sections 30L(1) and 30N(2).

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4. JOINT OPERATION

- 4.1 The Enforcement Agencies agree that, where necessary, an investigation into a case may be conducted by means of a joint operation, whereby one Enforcement Agency will take the lead (the “Lead Enforcement Agency”) in the investigation by exercising the powers conferred on it under the TDO, and the other Enforcement Agency will play a supporting role in such manner as appropriate.
- 4.2 Where a joint operation is formed for a case, the Lead Enforcement Agency will agree with the other Enforcement Agency the strategies, time-frame, arrangements and resources required in the conduct of the investigation.

5. LIAISON MEETINGS

- 5.1 The Enforcement Agencies agree that there will be regular liaison meetings between them to discuss and co-ordinate matters under the MOU and those matters of mutual interests. The liaison meetings will be conducted at two levels:
- (a) meetings at the directorate level on a yearly basis, or on a more frequent interval as may otherwise be agreed between the Enforcement Agencies; and
 - (b) meetings at the working level on a need basis.

6. JOINT AUTHORSHIP OF EDUCATIONAL MATERIAL OR GUIDELINES ON MATTERS OVER WHICH THE ENFORCEMENT AGENCIES HAVE CONCURRENT JURISDICTION

- 6.1 It is the intention of the Enforcement Agencies to foster close cooperation between them over the development and issue of educational material or guidelines on matters over which the Enforcement Agencies have concurrent jurisdiction, such as the manner in which powers will be exercised by the Enforcement Agencies, and guidance on the operation of any provision of the TDO.

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- 6.2 Before jointly issuing any educational material or guidelines on matters over which the Enforcement Agencies have concurrent jurisdiction, the Enforcement Agencies will consult each other over the contents of the material or guidelines, and the manner in which such material or guidelines is to be consulted or published, as the case may be.
- 6.3 The Enforcement Agencies will have joint authorship of the educational material and guidelines which they jointly issue.

7. DISPUTES

- 7.1 Where there is a conflict or disagreement between the Enforcement Agencies over any issues relating to or covered by the MOU, the Enforcement Agencies will seek to resolve the issues by negotiation between the designated officer(s) at the Principal Trade Controls Officer level or above of C&ED and the designated officer(s) at the Principal Regulatory Affairs Manager / Senior Telecommunications Engineer level or above of OFCA. The Enforcement Agencies will appoint their designated officers and promptly inform each other if there is a change of designated officers.
- 7.2 If the issues cannot be resolved by agreement between the designated officers of C&ED and OFCA according to Clause 7.1, the matter will be escalated to officers at the directorate level of C&ED and OFCA respectively, or to the CCE and the Director-General of Communications for resolution.

8. REVIEW AND AMENDMENT OF MOU

- 8.1 The Enforcement Agencies will keep the operation of the MOU under regular review and will consult each other with a view to improving its operation and resolving any issues that may arise.

9. PUBLIC INFORMATION

- 9.1 The MOU will be published within six weeks of its execution on each of the Enforcement Agencies' respective websites after ratification. Any amendments that may be made thereafter will also be published in the same manner.

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Ambrose Ho
Chairman
for and on behalf of the
Communications Authority
[date]

Clement Cheung Wan-ching
Commissioner of
Customs and Excise
[date]

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Annex to Annex A

Delineation of Responsibilities between C&ED and OFCA

Cases in relation to Goods and/or Services	Responsible Enforcement Agency
Goods [#]	C&ED
Non-telecommunications, Non-broadcasting Services [#]	C&ED
Telecommunications/Broadcasting Services [#]	OFCA
Telecommunications/Broadcasting Services [#] bundled with Goods and/or Non-telecommunications, Non-broadcasting Services	OFCA
Telecommunications/Broadcasting Services bundled with Goods [#] and/or Non-telecommunications, Non-broadcasting Services [#]	C&ED
Telecommunications/Broadcasting Services [#] bundled with Goods [#] and/or Non-telecommunications, Non-broadcasting Services [#]	C&ED

the areas with which any unfair trade practice is concerned