

PART 4 - DEFENCES

- 7.15. **Defences – Mistake, accident, etc:** Section 26 of the Ordinance provides a key defence to any offence under the Ordinance – both false trade descriptions and unfair trade practices. In summary, the defence provides that where a person is charged with an offence, it is a total defence if it can be proved that the offence was committed as a result of mistake or because of reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control and that he took all reasonable precautions to avoid the commission of the offence. The amended Ordinance has only made minor changes to this defence, primarily to ensure that a breach of Section 7A of the Ordinance (false trade descriptions in relation to services) is also covered by the defence.
- 7.16. **Cases:** There have been important recent cases dealing with the standard of proof that needs to be satisfied when relying upon Section 26 of the Ordinance. In the case of *Lee To Nei v HKSAR* (2012) 15 HKCFAR 162, the Court of Final Appeal held that since the burden of proof under s.26 is reversed and placed on the accused (which derogates from the ordinary presumption of innocence), Section 26(4) must be read down so as to only place an evidentiary burden on the accused. The Court went on to say:
- “The accused would still have to adduce or be able to point to credible evidence indicating that he did not know, had no reason to suspect and could not, with reasonable due diligence have ascertained that the trade marks were false...such evidence would have to be sufficiently substantial to raise a reasonable doubt as to his guilt. Where such evidence exists, it would be up to the prosecution to furnish sufficient evidence to prove the accused’s guilt beyond reasonable doubt”* (Per Ribeiro PJ at para 52).
- 7.17. This case of *Lee To Nei* strictly speaking, only applied to Section 26(4) of the Ordinance. However, the recent High Court case of *HKSAR v Telephone Est (HK) Company Limited* [2013] HKEC confirms that the same evidentiary burden as discussed in *Lee To Nei* also applies to the defence under s.26(1) (See para 25 of judgment).

PART 5 – ENFORCEMENT

8. Enforcement

- 8.1. **Introduction:** The amended TDO increases the enforcement powers available to both the enforcement agencies as well as the average consumer. In relation to Customs and the Communications Authority, additional powers have been provided to allow the acceptance of enforceable undertakings from traders who may have breached the Ordinance as an alternative to commencing or continuing legal proceedings. There are also some additional measures in relation to injunctions and modifications of time limits to commence actions. As to consumers, for the first time the Ordinance provides a specific right for consumer redress via commencement of civil proceedings for breach of the Ordinance. Finally, the Courts have been given additional powers to

award either compensation or damages to consumers who have been the “victim” of a breach of the Ordinance.

- 8.2. **Power to compel production of books and records:** Section 15 of the Ordinance has been amended to provide additional powers for Customs and the Communications Authority when investigating possible offences under the Ordinance. A new Section 15(1)(ca) has been added which now provides the enforcement agencies with the power to now require any person carrying on trade or business to produce any books or documents required to be kept under the Ordinance. At first blush this appears to be a very wide power. However, it should be kept in mind that the power is limited to books and records required to be kept under the Ordinance and any subsidiary legislation. It is not a general power to compel production of any type of book or record. At present, only the following subsidiary legislation and Orders specifically require maintaining certain books and records pursuant to the TDO. Accordingly, the new Section 15(1)(ca) of the Ordinance will only apply to these Orders:
- Records pursuant to s.6(2) of the *Trade Descriptions (Marking) (Gold and Gold Alloy) Order*;
 - S.6(2) of the *Trade Descriptions (Marking) (Platinum) Order*;
 - S.4 of the *Trade Descriptions (Provision of Information on Natural Fei Cui) Order*;
 - S.4 of the *Trade Descriptions (Provision of Information on Diamond) Order*; and
 - S.4 of the *Trade Descriptions (Provision of Information on Regulated Electronic Products) Order*.
- 8.3. **Injunctions:** The District Court has now been specifically empowered to order an injunction against a defendant for breach of both the false trade descriptions provisions and the unfair trade practices sections of the Ordinance. Section 30P of the Ordinance deals with the Court’s powers to issue an injunction and Section 30Q of the Ordinance deals with the issue of interim injunctions.
- 8.4. **Injunction or Undertaking:** Interestingly, Section 30P(2) of the Ordinance also provides the Court with an alternative – it may order an injunction or it may accept an undertaking from the defendant. The subsection relevantly reads as follows: “on an application...if satisfied that there are grounds for granting an injunction, instead of doings o accept an undertaking given by the Defendant not to continue or repeat the conduct...”. This provision gives the Court the power to order either an injunction or an undertaking from the defendant. It would appear however, that the preliminary words “on an application” (which in sub-section 1 is more fully written as “on an application by an authorised officer) means that this option is only available if an application to accept an undertaking is made by Customs. The wording suggests that the option will not be available pursuant to an offer from the Defendant to provide an undertaking rather than be the subject of an injunction.
- 8.5. **Interim Injunctions:** The power to grant interim injunctions in aid of the Ordinance is neatly described under Section 30Q of the Ordinance. It is a short section which says

little more than the Court may order an interim injunction upon an application “if it [the Court] considers it desirable to do so”. On its face, this provision appears to give the Court an extremely wide discretion or latitude to order an interim injunction. The wording “...if it considers desirable to do so...” could not be phrased more broadly and it is conceivable that a particularly zealous enforcement agency may apply for an interim injunction under Section 30Q in situations which would not ordinarily support the grant of an interim injunction. However, whilst we have yet to see how the Court will interpret this provision and exercise this power, it is suggested that the Courts are likely to adopt the ordinary and familiar principles of requiring the demonstration of a prima facie case and be satisfied that the balance of convenience favours the grant of the injunction.

- 8.6. **Liability of Directors, Partners, etc:** The former Section 20 which dealt with offences by a corporation has been repealed in its entirety and substituted with a new section 20. This new section is arguably wider than the previous section and now seeks to share liability with a wide range of persons where “it is proved that the offence has been committed with the consent or connivance or is attributable to the neglect of a person specified in subsection 2”. The specified persons include the directors of a company but now also include shadow directors, secretary, principal officer or manager (in relation to a body corporate) or a partner of an unincorporated body. This amended Section 20 has apparently wide scope and will conceivably capture a large pool of persons who are either directly or indirectly associated with the management and running of an enterprise.

Undertakings

- 8.7. **Undertakings:** Sections 30L – 30O of the Ordinance introduce a significant new enforcement tool for use by the Customs and Excise Department and the Communications Authority. In summary, where a trader is suspected of breaching one of the unfair trade practices under the TDO, the Customs and Excise Department may accept a statutory undertaking from the trader as an alternative of commencing or continuing investigations and legal proceedings. According to the Enforcement Guidelines “acceptance of an undertaking by the Enforcement Agency under section 30L is a means to encourage compliance by a trader and to resolve the matter more expeditiously”⁵. The use of undertakings as an enforcement option is modelled directly on section 87B of the Australian *Trade Practices Act* and its newer *Australian Consumer Law* equivalents. Whilst these provisions have only recently come into force, if Hong Kong does follow the Australian model it is expected that there may be widespread use of enforceable undertakings in Hong Kong, particularly in relation to minor or one-off breaches of the Ordinance.
- 8.8. **Provision of Undertaking:** Section 30L of the Ordinance establishes that the enforcement agencies may accept an undertaking from a trader who is engaging or is likely to engage in conduct which breaches one of the fair trading provisions (i.e. sections 4, 5, 7, 7A, 13E, 13F, 13G, 13H and 13I) of the Ordinance. To be effective, the undertaking must be in writing and will only be accepted with the written consent

⁵ Customs and Excise Department “Enforcement Guidelines” Part A para 16

of the Secretary of Justice. Further, Section 30L of the Ordinance provides that the person making the undertaking may (with the consent of the Authorized Officer) withdraw it at anytime.

- 8.9. **Factors for Acceptance of Undertakings:** The TDO does not set out what factors will be considered when deciding whether or not to accept an undertaking. However, the Guidelines describe a non-exhaustive list of factors that the Enforcement Agency will consider when deciding whether or not to accept an undertaking from a trader. These factors also apply where a trader voluntarily offers an undertaking. The factors are:
- The nature of the conduct of concern and the regulatory impact of the undertaking compared to that of criminal prosecution;
 - The extent of cooperation that the trader has given in the investigation, including the provision of complete information about the conduct of concern and any timely and appropriate remedial efforts taken;
 - Whether the undertaking contains an admission/ acknowledgment by the trader that the conduct of concern has occurred;
 - Whether the trader is likely to comply with the undertaking – the history of the complaints against or contraventions by and the general compliance record of the trader, including any relevant previous court proceedings, will be relevant;
 - Whether the trader is prepared to include in the undertaking a commitment to put in place a compliance training program (with details) for his staff, where appropriate; and
 - Whether and what enforcement measures have been taken against other parties with similar degree of culpability in the same incident.

It is suggested that practitioners should look carefully at these guidelines when advising clients in relation to offering an enforceable undertaking to ensure that to the extent possible the proffered undertaking addresses each of the considerations listed above. This will assist greatly in increasing the chances that the offered undertaking will be accepted by the enforcement agencies.

- 8.10. **Elements of an Undertaking:** Should an undertaking be accepted, it will typically include the following elements:
- A description of the conduct that is subject to the Enforcement Agency’s investigation, an explanation of why the enforcement Agency believes that the trader has engaged, is engaging or is likely to engage, in conduct which constitutes an offence (or offences) under the fair trading sections;
 - An acknowledgment or admission from a trader that the trader 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 conduct of a substantially similar kind;
 - Specific details of corrective actions that will be taken by the trader to remedy the harm caused by the conduct (if any); and

- (c) the provision of assistance by one party to the other;
 - (d) the allocation between the parties of responsibility for particular matters or classes of matters;
 - (e) arrangements for the supply by one party to the other of information relating to a matter over which they have concurrent jurisdiction;
 - (f) arrangements for keeping the other party informed about progress when one party is performing functions that may be performed concurrently under this Ordinance;
 - (g) the joint authorship of educational material or guidelines on matters over which the parties have concurrent jurisdiction.
- (3) The parties to a memorandum of understanding may amend or replace any memorandum of understanding prepared and signed under this section.
- (4) The parties to a memorandum of understanding must, within 6 weeks after the memorandum or any amendment of the memorandum is signed by both parties, publish it in any manner the parties consider appropriate.
- (5) The Commissioner and the Communications Authority must prepare and sign their first memorandum of understanding under this section as soon as is reasonably practicable after the coming into operation of section 27 of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (25 of 2012).

(Added 25 of 2012 s. 27)

Section:	16H	Guidelines—telecommunications/ broadcasting sector	L.N. 72 of 2013	19/07/2013
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- (1) The Communications Authority, or the Communications Authority jointly with the Commissioner, may issue guidelines on matters in relation to which the Communications Authority or any public officer authorized in writing by that Authority may exercise powers under section 16E(3).
- (2) Subsections (2) to (6) and (8) of section 16BA apply to guidelines issued under this section in the same way as they apply to guidelines issued under that section. For this purpose—
- (a) the reference in subsection (2)(a) of that section to authorized officers is to be taken to be a reference to the Communications Authority or any public officer authorized in writing by that Authority to exercise any of the powers that by virtue of section 16E are exercisable by that Authority; and
 - (b) any reference in subsection (3), (5) or (6) of that section to the Commissioner is to be taken to be a reference to the Communications Authority, or the Communications Authority jointly with the Commissioner, as the case requires.
- (3) The Communications Authority or, in the case of jointly issued guidelines, both the Communications Authority and the Commissioner must make copies of all guidelines and amendments of guidelines available to the public for inspection at their office during ordinary business hours.

(Added 25 of 2012 s. 27)

Section:	16I	Transitional provision	L.N. 72 of 2013	19/07/2013
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Subject to section 43 of the Telecommunications Ordinance (Cap 106), anything that was done under that Ordinance as in force immediately before the *commencement date as defined by subsection (1) of that section and that was in effect immediately before that date continues, in so far as it may be done under this Ordinance, to have effect as if it had been done under this Ordinance.

(Added 25 of 2012 s. 27)

Note:

* Commencement date: 19 July 2013.

Section:	17	Offences of obstruction and disclosure of information	E.R. 2 of 2012	02/08/2012
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- (1) Without prejudice to any other Ordinance, any person who-
- (a) wilfully obstructs an authorized officer in the exercise of his powers or the performance of his duties under this Ordinance;
 - (b) wilfully fails to comply with any requirement properly made to him by any such authorized officer; or
 - (c) without reasonable excuse fails to give such authorized officer any other assistance or information which the authorized officer may reasonably require of him for the purpose of the performance of the officer's functions under this Ordinance, (Amended L.N. 65 of 1986)
- commits an offence. (Amended L.N. 272 of 1990)
- (2) Subject to subsection (2A), any person who discloses to any other person- (Amended 2 of 1987 s. 3)
- (a) any information with respect to any manufacturing process or trade secret obtained by him in premises which he has entered by virtue of this Ordinance; or
 - (b) any information obtained by him in pursuance of this Ordinance, commits an offence unless the disclosure was made-
 - (i) in or for the purpose of the performance by him or any other person of functions under this Ordinance; or
 - (ii) in the case of paragraph (b) under the direction or order of a court.
- (2A) A person does not commit an offence under subsection (2) by-
- (a) disclosing information under section 16C(1) or (2) or under an order of the Court of First Instance made under section 16C(3);
 - (b) disclosing information under section 16D; or
 - (c) disclosing information under section 30F(1) or under an order of the Court of First Instance made under section 30F(2). (Replaced 11 of 1996 s. 15. Amended 25 of 1998 s. 2)

- (3) Any person who, in giving any such information as is referred to in subsection (1)(c), makes any statement which he knows to be false commits an offence.
- (4) Subject to subsection (5), nothing in this section shall be taken to—
- require a person to answer any question or give any information if to do so might incriminate that person or the wife or husband of that person; or
 - compel the production by a solicitor of a document containing a privileged communication made by or to him in that capacity or authorize the seizure of any such document in his possession.
- (5) A person shall not be excused, by reason that to do so may incriminate that person or the wife or husband of that person of an offence under this Ordinance—
- from answering any question put to that person in any civil proceedings;
 - from complying with any order made in any such proceedings,
- but no statement or admission made by a person in answering a question put or complying with an order made shall, in proceedings for an offence under this Ordinance, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the wife or husband of that person. (Amended L.N. 123 of 1982)

[cf. 1968 c. 29 s. 29 U.K.]

Section:	18	Penalties	L.N. 72 of 2013	19/07/2013
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- (1) Any person who commits an offence under section 4, 5, 7, 7A, 9, 12, 13E, 13F, 13G, 13H or 13I shall be liable— (Amended 65 of 2000 s. 3; 19 of 2008 s. 8; 25 of 2012 s. 14)
- on conviction on indictment, to a fine of \$500000 and to imprisonment for 5 years; and
 - on summary conviction, to a fine at level 6 and to imprisonment for 2 years.
- (1A) Any person who commits an offence under section 16A(3) shall be liable to a fine at level 2 and to imprisonment for 3 months. (Added 2 of 1987 s. 4)
- (2) Any person who commits an offence under section 17 shall be liable to a fine at level 3 and to imprisonment for 1 year.
- (Amended 19 of 2008 s. 8)

Section:	18A	Power to award compensation	L.N. 72 of 2013	19/07/2013
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- (1) If a person is convicted of an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I, the court may, in addition to passing any sentence that may otherwise be passed by law, order the person to pay an amount of compensation that it thinks reasonable to any person who has suffered financial loss resulting from that offence.
- (2) An amount of compensation ordered to be paid to a person under subsection (1) is recoverable as a civil debt.

(Added 25 of 2012 s. 30)

Section:	19	Time limit for prosecutions	L.N. 72 of 2013	19/07/2013
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- No prosecution for an offence under this 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.

Note—

See section 30O. (Added 25 of 2012 s. 28)

Section:	20	Liability of directors, partners, etc.	L.N. 72 of 2013	19/07/2013
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- (1) If an offence under this Ordinance is committed by a body corporate or by a person as a member of an unincorporated body, and it is proved that the offence has been committed with the consent or connivance or is attributable to the neglect of a person specified in subsection (2), that person also commits the offence and is liable to be proceeded against and punished accordingly.
- (2) The person referred to in subsection (1) is a person who, at the time of the offence, was—
- (in the case of a body corporate) a director, shadow director, company secretary, principal officer or manager of the body corporate;
 - (in the case of a member of an unincorporated body) a partner or office holder in or a member or manager of the unincorporated body; or
 - (in either case mentioned in paragraph (a) or (b)) purporting to act in the capacity of a person referred to in that paragraph.
- (3) In this section—

company secretary (公司秘書) includes any person occupying the position of company secretary, by whatever name called;

principal officer (主要人員), in relation to a body corporate, means—

- a person employed or engaged by the body corporate who, either alone or jointly with one or more other persons, is responsible under the immediate authority of the directors of the body corporate for the conduct of the business of the body corporate; or
- a person employed or engaged by the body corporate who, under the immediate authority of a director of the body corporate or a person to whom paragraph (a) applies, exercises managerial functions in respect of the body corporate;

shadow director (幕後董事), in relation to a body corporate, means a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act.

(Replaced 25 of 2012 s. 15)

- (b) 拒絕接受有關產品的訂單或在合理時間內交付有關產品；或
- (c) 展示或示範使用有關產品的欠妥樣本，
- 則該商戶作出該購買邀請，即屬先誘後轉銷售行為。

條:	131	不當地接受付款	L.N. 72 of 2013	19/07/2013
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- (1) 任何商戶如就任何消費者作出構成不當地就產品接受付款的營業行為，即屬犯罪。
- (2) 如任何商戶就某產品(有關產品)接受付款或其他代價，而在接受時—
- (a) 該商戶意圖不供應有關產品；
- (b) 該商戶意圖供應與有關產品有重大分別的產品；或
- (c) 沒有合理理由相信該商戶將能—
- (i) 在其接受該付款或代價之時或之前所指明的期間內，供應有關產品；或
- (ii) (如在接受該付款或代價之時或之前沒有指明期間)在合理時間內，供應有關產品，

則該商戶即屬不當地就有關產品接受付款。

部:	3	強制執行	E.R. 2 of 2012	02/08/2012
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條:	14	獲授權人員的委任	E.R. 2 of 2012	02/08/2012
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- (1) 關長可為施行本條例而委任任何公職人員為獲授權人員。
- (2) 關長可行使根據本條例賦予獲授權人員的任何權力。

(由1982年第294號法律公告修訂；由2000年第65號第3條修訂)

條:	15	進入處所、檢查與檢取貨品及文件的權力	L.N. 72 of 2013	19/07/2013
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- (1) 獲授權人員於出示其委任證據(如被要求這樣做的話)後，可—
- (a) 作出為決定本條例的條文是否獲遵從而看似是適宜作出的貨品的購買；
- (b) 為確定是否有人已犯或正在犯本條例所訂任何罪行，檢查任何貨品和進入任何非住用處所的處所；
- (c) 在他有合理理由懷疑有人已犯本條例所訂任何罪行的情況下，為確定(藉測試或其他方式)是否有人已犯該罪行而檢取或扣留任何貨品；
- (ca) 為確定是否有人已犯或正在犯本條例所訂任何罪行，規定任何進行某商業或業務的人，或規定在與某商業或業務有關連的情況下受僱的人，出示根據本條例須備存的任何簿冊或文件，並可抄印該等簿冊或文件，或抄印其中任何記項；(由2012年第25號第25條增補)

- (d) 在他有合理理由懷疑有人已犯本條例所訂任何罪行的情況下，為確定是否有人已犯該罪行而規定任何進行商業或業務的人或與商業或業務相關而受僱的人，出示與該商業或業務有關的任何簿冊或文件，並可抄印該等簿冊或文件或其中任何記項；
- (e) 在他有合理理由懷疑於任何處所、車輛、船隻(軍用船舶除外)或航空(軍用航空器除外)內有以下貨品：即有人已犯或正在犯本條例所訂罪行所關乎的貨品的情況下—
- (i) 在符合第16條的規定下，進入和搜查該等處所；
- (ii) 截停和搜查該等車輛；或
- (iii) 截停、登上和搜查該等船隻或航空器；
- (f) 檢取、移走或扣留—
- (i) 他有合理理由懷疑有人已犯或正在犯本條例所訂罪行所關乎的貨品；及
- (ii) 任何他有理由相信在本條例所訂罪行而進行的法律程序中可能需用作證據的東西。

附註一

憑藉《釋義及通則條例》(第1章)第3條，除非出現相反用意，否則對條例的提述，包括根據該條例訂立的附屬法例。(由2012年第25號第25條增補)

- (2) 獲授權人員可—
- (a) 為行使他根據第(1)(f)款具有的檢取貨品的權力，破啟任何容器或開啟任何售貨機；
- (b) 破啟他獲本條例賦權或授權或根據本條例獲賦權或授權進入和搜查的地方的內門或外門；
- (c) 強行登上他獲本條例賦權截停、登上或搜查的任何船隻或航空器；
- (d) 強行移走妨礙他行使本條例授予他的權力的人或東西；
- (e) 扣留在他獲本條例賦權或授權或根據本條例獲賦權或授權搜查的任何處所內所發現的任何一人，直至該地方已如此搜查完畢為止；
- (f) 扣留他獲本條例賦權截停、登上和搜查的任何船隻或航空器，並防止任何人接近或登上該船隻或航空器，直至該船隻或航空器已如此搜查完畢為止；
- (g) 扣留他獲本條例賦權或根據本條例獲賦權截停和搜查的任何車輛，直至該車輛已如此搜查完畢為止。

[比照1968 c. 29 ss. 27 & 28 U.K.]

條:	16	進入和搜查住用處所的限制	E.R. 2 of 2012	02/08/2012
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- (2) 在第(1)款所指明的情況下，關長可向商標的擁有人或其授權代理人披露以下資料—(由2000年第35號第98條修訂)
- 檢取或扣留貨品的時間和地址；
 - 如貨品是自某人處檢取或扣留的，該人的姓名或名稱及地址；
 - 檢取或扣留的貨品的性質及數量；
 - 任何人向關長所作出的與該項檢取或扣留相關的任何陳述，但須事先得到該人的書面同意，如該人已去世或關長在合理地查詢該人的所在後仍未能找到該人，則不須事先得到該人的書面同意；
 - 與所檢取或扣留的貨品有關，並且是關長認為適合披露的任何其他資料或文件。
- (3) 凡—
- 商標的擁有人或其授權代理人尋求披露沒有在第(2)款中提述的任何資料或文件；或(由2000年第35號第98條修訂)
 - 關長並沒有披露在第(2)款中提述的資料或文件，
- 該商標的擁有人或其授權代理人即可向原訟法庭申請一項命令，規定關長披露該等資料或文件，而原訟法庭則可應該申請而作出其認為適合的披露命令。(由1998年第25號第2條修訂；由2000年第35號第98條修訂)
- (4) 根據第(3)款提出的申請，可在事先給予關長通知的情況下藉動議而開始進行。

(由1987年第2號第2條增補。由2000年第65號第3條修訂)

條:	16D	國際合作	E.R. 2 of 2012	02/08/2012
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關長可為促進國際間在保護知識產權權利方面的合作，將依據本條例所取得的資料，向任何公約國家的海關當局披露。

(由1996年第11號第14條增補。由2000年第65號第3條修訂)

條:	16E	關於電訊及廣播事務的強制執行	L.N. 72 of 2013	19/07/2013
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- 除第(2)款另有規定外，通訊事務管理局可行使根據本條例(第IIIA部除外)賦予獲授權人員的任何權力。
- 行政長官會同行政會議可藉於憲報刊登的公告，指明通訊事務管理局不可行使的第(1)款所涵蓋的權力。
- 通訊事務管理局或該局就此以書面授權的任何公職人員，可行使憑藉本條而可由該局行使的任何權力，但只有在有關營業行為是由屬《電訊條例》(第106章)或《廣播條例》(第562章)所指的持牌人作出，且該營業行為是直接與該持牌人根據相關條例提供電訊服務或廣播服務有關連的情況下，該局或該人員方可就該營業行為行使該等權力。
- 本條並不使任何人可就第9或12條涵蓋的行為行使權力。

- 除第16F條另有規定外，通訊事務管理局或該局以書面授權的任何公職人員可就某營業行為行使某權力一事，並不妨礙關長或獲授權人員就該營業行為行使該權力。
- 為免生疑問，通訊事務管理局或該局以書面授權的任何公職人員，在根據本條例行使權力時，並不是作為關長的代理人或獲關長轉授職能或權力的人行使權力。

(由2012年第25號第27條增補)

條:	16F	在執行當局之間移交事宜	L.N. 72 of 2013	19/07/2013
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- 如關長或通訊事務管理局正在根據本條例就某事宜執行職能，而另一方同時就該事宜具有管轄權，則他們可協議將該事宜移交其中一方，並由該方處理。
- 除非有第(1)款所述的協議，否則如關長或通訊事務管理局正在或已經根據本條例就某事宜執行職能，則另一方即使同時就該事宜具有管轄權，亦不得就該事宜執行任何職能。

(由2012年第25號第27條增補)

條:	16G	諒解備忘錄	L.N. 72 of 2013	19/07/2013
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- 關長與通訊事務管理局須擬備及簽署一份諒解備忘錄，以協調他們在本條例下的職能的執行。
- 在不局限第(1)款的原則下，諒解備忘錄可就以下任何或所有事宜作出規定—
 - 雙方將會採用何種方式，執行他們根據本條例同時具有管轄權執行的職能；
 - 雙方將會採用何種方式，解決他們之間的爭議；
 - 一方向另一方提供協助；
 - 關於特定事宜或特定類別的事宜的責任如何在雙方之間分配；
 - 由一方向另一方提供關乎他們同時具有管轄權的事宜的資料的安排；
 - 當一方正執行職能，而根據本條例該職能是可由另一方同時執行的，有何安排使該另一方得知事情進展；
 - 共同撰寫關於雙方同時具有管轄權的事宜的教材或指引。
- 諒解備忘錄的雙方，可修訂任何根據本條擬備及簽署的諒解備忘錄，亦可更換任何該等備忘錄。
- 諒解備忘錄的雙方，須在備忘錄或對備忘錄的修訂經雙方簽署後6個星期內，以雙方認為適當的方式，發布該備忘錄或該修訂。
- 關長與通訊事務管理局須在《2012年商品說明(不良營商手法)(修訂)條例》(2012年第25號)第27條實施後，在合理切實可行範圍內盡快根據本條擬備及簽署雙方的首份諒解備忘錄。

(由2012年第25號第27條增補)

PART A

COMPLIANCE AND ENFORCEMENT POLICY STATEMENT

IMPLEMENTING THE FAIR TRADING SECTIONS OF
THE TRADE DESCRIPTIONS ORDINANCE

ISSUED BY
THE COMMISSIONER OF CUSTOMS AND EXCISE
AND
THE COMMUNICATIONS AUTHORITY

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Appendix

An opportunity will be given to the trader to give a reasonable account for the conduct or commercial practice in question in response to the Enforcement Agency's concern. Depending on the circumstances of the case, the Enforcement Agency may also explain to the trader the operation of the civil compliance-based mechanism under the TDO for addressing the conduct of concern, and his rights and obligations thereunder (please refer to paragraph 18 below).

Civil Enforcement – Undertakings

14. As an alternative to initiating prosecution, under section 30L, the Enforcement Agency may, with the consent of the Secretary for Justice ("SJ"), accept an undertaking from a trader whom the Enforcement Agency believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the fair trading sections.
15. An undertaking given by a trader under section 30L is a commitment by him not to continue or repeat the conduct or commercial practice of concern. It may also be a commitment by a trader not to engage in conduct or commercial practice of the kind or of a substantially similar kind of concern. Section 30M provides that where an undertaking given by a trader is accepted by the Enforcement Agency, an investigation may not be commenced or continued and criminal proceedings in a court of law may not be brought or continued relating to the matter to which an undertaking relates.² Section 30L(5) empowers the Enforcement Agency to cause an accepted undertaking to be published. Section 30N provides for the Enforcement Agency's withdrawal of acceptance of an undertaking. The following paragraphs set out the circumstances under which an undertaking may be accepted, published and the acceptance withdrawn by the Enforcement Agency.

Acceptance of an undertaking

16. Acceptance of an undertaking by the Enforcement Agency under section 30L is a means to encourage compliance by a trader and to resolve the matter more expeditiously. The Enforcement Agency will consider accepting an undertaking having regard to the circumstances of the case and a non-exhaustive list of factors, including:
 - (a) the nature³ of the conduct of concern and the regulatory impact of the undertaking compared to that of criminal prosecution;
 - (b) the extent of cooperation that the trader has given in the investigation, including the provision of complete information about the conduct of concern and any timely and appropriate remedial efforts taken;
 - (c) whether the undertaking contains an admission/acknowledgement by the trader that the conduct of concern has occurred;

² This is subject to the Enforcement Agency's power to withdraw the acceptance of an undertaking under section 30N, and the details of the withdrawal mechanism may be found in paragraphs 24 and 25.

³ For example, the seriousness of the conduct of concern and the history of the trader.

- (d) whether the trader is likely to comply with the undertaking – the history of complaints against or contraventions by and the general compliance record of the trader, including any relevant previous court proceedings, will be relevant;
 - (e) whether the trader is prepared to include in the undertaking a commitment to put in place a compliance programme (with details) for his staff, where appropriate;
 - (f) whether and what enforcement measures have been taken against other parties with similar degree of culpability in the same incident.
17. The Enforcement Agency and the trader concerned may, depending on the nature and actual circumstances of the case, discuss and explore the option of invoking the civil compliance-based mechanism. The Enforcement Agency will not mandate a trader to give an undertaking. Likewise, a trader cannot compel the Enforcement Agency to accept an undertaking. When a trader proposes to give an undertaking⁴, the Enforcement Agency will assess the merits of the trader's proposal, with due regard to the factors set out at paragraph 16 above. However, this does not imply that an undertaking given by a trader will necessarily be accepted as an alternative to criminal prosecution in addressing the conduct of concern. Ultimately, whether to accept an undertaking from a trader is subject to the written consent of SJ. Given the different background and nature of every case, the acceptance of an undertaking in the particular circumstances may not be regarded as a precedent for consideration of an undertaking in other circumstances, whether or not the same trader is involved.
 18. To enable a trader to determine whether proposing an undertaking is the most appropriate path for him to take, the Enforcement Agency may, in appropriate circumstances, provide relevant information to the trader regarding all the rights and obligations under the proposed undertaking, including the situation where the Enforcement Agency may withdraw the acceptance of an undertaking under section 30N in the circumstances set out at paragraph 24 below, and also the legal consequences of such withdrawal which is further explained in paragraph 25 below.

Elements of an undertaking

19. While contents may vary, undertakings should be of substance and directly address the conduct in question and its consequences.
20. An undertaking usually includes the following elements (a sample is at the Appendix):
 - ❖ 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 has engaged, is engaging or is likely to engage, in conduct which constitutes an offence (or offences) under the fair trading sections;
 - ❖ 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;
 - ❖ 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;

⁴ The negotiations concerned will be conducted on a without prejudice basis.