

# Are Your Sales Practices Too Aggressive?

## 你的营商行为太具威吓性吗？

The Trade Descriptions Ordinance (TDO) prohibits traders from engaging in aggressive commercial practices, including harassment, coercion, or exerting undue influence on customers. DLA Piper explores what employers and their employees, managers and directors need to be aware of to avoid being held criminally liable for aggressive commercial practices.

《商品说明条例》禁止商户作出具威吓性的营业行为，包括使用骚扰、威迫手段或对消费者施加不当影响。欧华律师事务所（DLA Piper）将于本文探讨雇主及其员工、经理和董事避免为作出具威吓性的营业行为承担刑事责任必须要注意的事项。





Complaints regarding unscrupulous sales practice have increased markedly in recent years. Engaging in outrageously lengthy sales pitch to exert pressure on customers, making misleading representations as to the product/ service to increase customers' appetite for purchase etc. are tactics adopted by some unscrupulous salespersons which raise eyebrows.

Under the Trade Descriptions Ordinance (Cap 362) (the "TDO"), "aggressive commercial practice" is a criminal offence. In light of recent enforcement actions taken by the Customs and Excise Department (the "CED"), sales employees as well as management staff should pause to examine the legal position and liabilities in relation to aggressive commercial practices.



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近年来针对不良营商手法的投诉显著增加。通过进行“疲劳式轰炸”的推销以对消费者施加压力, 或对于产品/服务作出带有误导性的陈述来提高消费者的购买欲望等, 都是一些不良的销售人员所采取的令人侧目的销售伎俩。

《商品说明条例》(第362章)规定,“具威吓性的营业行为”属于犯罪行为。鉴于近期香港海关针对不良营销手法所采取的执法行动,销售人员以及管理人员都应认真审视有关具威吓性的营业行为的法规以及作出该等行为所需要承担的法律风险。

## AGGRESSIVE COMMERCIAL PRACTICE

### What is aggressive commercial practice?

Under section 13F of the TDO, a commercial practice is aggressive if it would significantly impair the average consumer's freedom of choice or conduct in relation to the product through the use of "harassment, coercion or undue influence", which in turn causes the consumer to make a transactional decision that s/he would not have made otherwise.

There are a number of factors which the court will take into account when determining whether the commercial practice is unlawful:-

- its timing, location, nature or persistence;
- the use of threatening or abusive language or behaviour;
- the exploitation of any specific misfortune or circumstance, of which the trader is aware and which is of such gravity as to impair the consumer's judgment, to influence the consumer's decision with regard to the product;
- any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or to switch to another product or another trader; and
- any threat to take any action which cannot legally be taken.

## 具威吓性的营业行为

### 什么是具威吓性的营业行为?

《商品说明条例》第13F条规定,如果某营业行为通过使用骚扰、威迫手段或施加不当影响,在相当程度上损害一般消费者就有关产品在选择及行为方面的自由,因而导致消费者做出本来不会做出的交易决定,那么,该营业行为即属于具威吓性的营业行为。

法院在断定某营业行为是否违法时,会考虑以下因素:

- 进行该营业行为的时间、地点、性质或持续情况;
- 是否使用威胁性或侮辱性的言语或行为;
- 有关商户是否利用该商户所知悉的任何特定的不幸情况或状况,以影响有关消费者就产品做出的决定,而该情况或状况的严重程度,足以损害有关消费者就有关产品



## Penalties

A person who is found guilty of engaging in aggressive commercial practices may be liable to a maximum fine of HK\$ 500,000 and imprisonment of five years.

## First conviction of engaging in aggressive commercial practice

In April 2015, three beauticians of a beauty parlour were convicted of engaging in aggressive commercial practices in selling body care therapy service to a customer, which breached the TDO. This was the first conviction under this section of the TDO.

The CED conducted the investigation after receiving a complaint in November 2013. It was found that the three beauticians told the customer that she had lumps in her chest which could mutate into cancer, and then persuaded her to purchase a body treatment package of HK\$140,000. Although the customer had indicated her reluctance in purchasing such an expensive package, the three beauticians persisted for over 1.5 hours in talking her into buying it. The customer finally made the purchase and paid a deposit of HK\$70,000.

The Kowloon City Magistrates' Court ruled that the sale practice used by the three beauticians was aggressive commercial practice. One of the beauticians was sentenced to 200 hours of community service and the

的判断；

- 有关商户在某消费者意欲行使合约下的权利（包括终止合约、转购其他产品或改向其他商户购买产品）时，是否施加任何严苛或不相称的非合约障碍；及
- 是否威胁采取任何非法行动。

## 刑罚

任何人作出具威吓性的营业行为，一经定罪，可被判处最高罚款500,000元港币及监禁五年。

## 首宗针对具威吓性的营业行为定罪的案件

2015年4月，一间美容公司的三名职员因向消费者推销身体护理疗程服务时作出了违反《商品说明条例》的具威吓性的营业行为，而被法院定罪。这是首宗就违反该《商品说明条例》条文而定罪的案件。

香港海关于2013年11月接获一名消费者的投诉后展开调查。调查发现，三名美容师藉词该事主的胸部有肿块，可能会引致癌症，然后游说她购买价值140,000元港币的身体护理疗程服务。尽管事主已表示她不愿意购买这么昂贵的疗程，但是该三名美容师仍对她持续游说长达一个半小时。事主最终支付了70,000元港币定金购买该疗程。

九龙城裁判法院裁定，该三名美容师的销售手法属于具威吓性的营业行为。一名被告被判处200小时社区服务，其他两名被告被判监禁3个月。他们还须向事主偿还70,000元港币。

## 董事和经理能否逃脱责任？

一般情况下，销售人员作出具威吓性的营业行为的动机是为了获取更多的交易佣金。为提高业绩，企业管理人员常常对这种行为视而不见，并纵容下属作出具威吓性的营业



other two were sentenced to 3 months' imprisonment. They also had to repay the sum of HK\$70,000 to the customer.

### CAN DIRECTORS AND MANAGERS ESCAPE LIABILITIES?

Generally, the motivation for sales employees to engage in aggressive sales tactics is the reward of commission earned from transactions. To improve the business' performance, it is common for management staff to turn a blind eye and condone their subordinates' procurement of sales through the use of aggressive commercial practices. Are management staff free from any liability as they are not directly engaged in such aggressive commercial practices? Section 20 of the TDO provides an answer, which is "NO".

#### Liabilities for directors and managers

Under section 20 of the TDO, if a company or any of its members (e.g. sales employees) is found to have committed an offence of engaging in aggressive commercial practices, its directors and managers may also be held personally liable if such an offence has been

行为。未有直接作出具威吓性的营业行为的管理人员是否免于承担任何责任呢？根据《商品说明条例》第20条的规定，答案是“否”。

### 董事和经理的责任

根据《商品说明条例》第20条的规定，如果公司或者其任何成员（如销售人员）被裁定作出了违法的具威吓性的营业行为，并且该营业行为征得了其董事或经理同意或者可归因于他们的疏忽大意，那么，该董事或经理也可能要承担个人责任。

### 最近某健身中心的管理人员因涉嫌做出具威吓性的营业行为而被捕

今年七月，香港海关对某健身中心采取执法行动，逮捕了四名涉嫌做出具威吓性的营业行为的人员。据报道，被逮捕的人其中一人是销售人员，其他三人是该健身中心的管理人员，其中包括两名董事和一名经理。

事主在该健身中心被销售人员持续游说购买价值38,000元

港币的10年健身俱乐部会籍。事主因已经拥有10年的会籍而拒绝购买。然而，销售人员要求其出示身份证和信用卡，以便查询事主是否可以享有任何折扣。销售人员涉嫌在未经事主的授权下，用其信用卡购买会籍。在被告知不可能退款后，事主被迫接受该次购买。该案件还在进一步调查中。

### 雇主实用提示

为避免自身及其员工承担违反《商品说明条例》的责任，雇主应考虑：

- 就《商品说明条例》的相关规定对销售人员和管理人员提供培训。确保他们了解作出具威吓性的营业行为或允许该行为发生将导致的法律后果；
- 建立检查销售行为是否符合《商品说明条例》规定的监控系统。雇主应确保监控是必须而不超乎适度的，避免违反《个人资料（私隐）条例》（第486章）；
- 审核员工工作指南和销售手册，以确保其符合《商品说明条例》中有关禁止作出具威吓性的营业行为的规定。✍

committed with their consent or is attributable to their neglect.

### Recent arrest of a fitness centre's management staff for suspected aggressive commercial practices

In July this year, the CED took enforcement action against a fitness centre and arrested four people for engaging in suspected aggressive commercial practices. According to the report, one of the people arrested is the salesperson and the other three people arrested are the management staff of the company, including two directors and a manager.

The complainant was approached by a salesperson in the fitness centre who persistently persuaded her to buy a 10-year fitness club membership valued at HK\$38,000. The complainant declined the offer as she already had a 10-year membership. However, the salesperson asked the complainant to produce her identity card and credit card such that she could check if there were any discounts. Without the authorisation of the complainant, the salesperson charged the credit

card to purchase the membership. The complainant was forced to accept the purchase after being told that it was impossible to get a refund. This case is still under investigation.

### PRACTICAL TIPS FOR EMPLOYER

To avoid exposing themselves as well as their employees to liabilities under the TDO, employers should consider the following:

- provide training to their salespersons and management staff and educate them on the requirements of the TDO. Ensure they understand the legal consequences of engaging in aggressive commercial practices or allowing such practices to take place;
- put in place a system to check that sales practices are compliant with the TDO. Employers should ensure that such monitoring is necessary and not excessive and is in compliance with the Personal Data (Privacy) Ordinance (Cap 486); and
- review employees' guidelines and sales manual to ensure they are in compliance with the TDO in relation to prohibition of aggressive commercial practices. ✍