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Consultation Paper on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices (the "CP")

Hutchison Telecommunications (Hong Kong) Limited ("HTHK") is pleased to submit the joint comments of Hutchison Global Communications Limited and Hutchison Telephone Company Limited on the CP issued in July 2010 as set out below.

A. Communications sector should be exempted

1. A major flaw in the CP is that it incorrectly omits to include telecommunications and broadcasting amongst the sectors which are proposed to be excluded from the new legislation. These two sectors (now increasingly converging, and referred to as the "communications sector") meet fully the two criteria put forward by the Consumer Council - and endorsed by the CP itself - to justify the exclusion of a sector from the ambit of the new legislation, namely that
 - (i) a significant degree of professional and specialized knowledge is required for enforcement of sector-specific regulation; and
 - (ii) a similar level of protection has already been provided by such statutory frameworks parallel to, and compatible with, the new legislative proposals to tackle unfair practices.
2. Regarding the first criterion, it is undeniable that a significant degree of professional and specialized knowledge is required for enforcement in telecommunications and broadcasting. This is one of the reasons why sector-specific authorities were set-up with the specialist knowledge necessary to regulate the sectors. Convergence of these two sectors through increasingly sophisticated products and services has led to the proposal currently before the Legislative Council to create a Communications Authority with the necessary experience and expertise across the communications sector.

Since HTHK's focus is on telecommunications rather than the creation of channels or content, we will focus on telecommunications in the remainder of this submission.



3. As regards the statutory framework, the Telecommunications Ordinance (the "TO") itself includes a statutory prohibition against conduct which is misleading or deceptive (section 7M). The Telecommunications Authority (the "TA") has also issued guidelines in relation to "Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets" (the "Guidelines") as early as in 2003.

The TO, the Guidelines and various other guidelines, codes of practices and directions issued by the TA are broad enough in scope to cover the proposed new offences, and have been extensively enforced in practice, with increasingly severe financial penalties imposed for contravention. The maximum penalties in the TO are HK\$200,000 for the first breach, HK\$500,000 for the second, and HK\$1 million for the third and subsequent breaches. However, if the TA can show the Court of First Instance (the "CFI") that these sanctions are insufficient in a particular case, the CFI can impose penalties of up to HK\$10 million or 10% of turnover in the market concerned, whichever is higher.

4. In addition to the statutory framework, the TA has been active, and continues to be active, in taking initiatives, alone or with the cooperation of the telecommunications operators, to enhance consumer protection across all areas of the telecommunications sector. In 2010 alone, the consumer protection measures have included the following:
- (i) an industry Code of Practice For the Provision of Chargeable Mobile Content Services (to ensure that consumers are better informed of the charges of mobile content services);
 - (ii) an industry Code of Practice for Communications Service Contracts (includes cooling-off periods, meeting consumer requests for termination of services, and many other consumer protection clauses);
 - (iii) Best Practice Indicators on Representations on Mobile Broadband Services (to prevent misleading or deceptive conduct in the promotion of mobile broadband services);
 - (iv) publication of measures to prevent consumers from incurring unexpected charges for data supplied via SMS messages;
 - (v) publication of the measures adopted by mobile operators to prevent unintentional incurring of mobile charges;
 - (vi) publication of performance pledges by mobile operators in respect of mobile broadband services (to increase the transparency of the service performance);
 - (vii) a proposed scheme for the adjudication of consumer complaints;
 - (viii) tips on dealing with unsolicited sales calls;



- (ix) tips on roaming mobile data service charges; and
- (x) tips on security of wifi data transmission.

In summary, with robust legislation already in place, and with the regulators and industry operators actively enhancing consumer protection in all areas of the sector, there is no reason to apply new legislation to the sector which largely overlaps with the existing statutory provisions. To do so would be disproportionate and unfair, and would create confusion and uncertainty.

5. By way of comparison, it is instructive to note the CP's justification for excluding the financial services sector from the new legislation. This includes the following considerations:
- (i) well-established existing regimes;
 - (ii) regulators with specialist knowledge and expertise;
 - (iii) dealings with consumers covered by relevant legislation and codes of conduct;
 - (iv) ongoing review of how consumer protection of the investing public can be further enhanced; and
 - (v) consumer education, and a proposal forum for dispute resolution

All of these considerations apply equally to the communications sector.

6. Because of the highly technical nature of the industry, even if a decision were taken to apply the new legislation to the communications sector (which it should not, as explained above), the proposed new offences as currently envisaged would not accommodate the special features of the industry.

For example, regarding the proposed extension of the prohibition of false and misleading trade descriptions to services, the following difficulties would arise. It is the inherent nature of mobile broadband service that its performance will be affected by various external factors that are outside the control of a telecommunications operator. A consumer would not be able to enjoy mobile broadband service at a constant speed at all times as the performance speed is susceptible to the influence of various external factors, such as the relative position between the consumer and the base station, download server source, Internet traffic conditions, number of users, the device used. It is the inherent nature of the service that makes it impossible for an operator to indicate the exact performance speed that a consumer would be able to enjoy at all times.

Extending the prohibition of false and misleading trade descriptions to telecommunications services would in effect mean prohibiting variation between the indicated performance speed of mobile broadband service and the actual speed that a customer may experience



when, variation is inevitable due to in the inherent nature of the service and is completely outside the control of the operators.

The appropriate protection to the consumers in the circumstances should also take into account the technicality and the nature of the telecommunications service. Those protections are already in place in the current regulatory regime and have been enforced for a long time. Applying the regulation and the offences as proposed to the telecommunications services would be inappropriate and disproportionate. This is yet another reason why the communications sector should be excluded from the scope of the proposed legislation.

7. The telecommunications industry should be, as in the case of the other exempted industries, excluded from the ambit of the new legislation and should remain to be regulated by the existing regulatory regime as:
- (i) the telecommunications sector is under a well-established regulatory regime which has in place measures to offer protection to consumers similar to that proposed under the new legislation;
 - (ii) those measures are specific and appropriate to the telecommunications industry, having taken into account the inherent nature of the telecommunications services; and
 - (iii) telecommunications is a highly specialised industry that requires technical knowledge and expertise for enforcement and is already being regulated by the TA.

B. Scope of the new legislation should be limited and well defined

Given that specific ordinances and regulations are in place to protect different aspects of consumer interests, any new legislation should only address areas that are clearly insufficiently covered by the current regulations.

Accordingly, even if the proposed new legislation was to extend to telecommunications services (which it should not, for the reasons set out above), in light of the substantial degree of overlapping between the areas that are already covered by the current telecommunications specific regulatory regime and the proposed new legislation, the areas which are not adequately covered by the current regulations (if any) should be identified and the new legislation should only extend to the telecommunications sector in respect of those areas.

C. New legislation lacks clarity and certainty

In any event, the proposed new legislation lacks the clarity and certainty in the following areas that is required in order to prevent the imposing of unnecessary regulatory burden on businesses.

- (i) Material omission



The proposed offence is subject to the judgement of an "average consumer" but what is an "average consumer" is very difficult, if not impossible, to define.

Besides, what information is considered as "material" is subjective. What is material to one person might not be so to another. Every consumer based his/her purchasing decision on different criteria and it is not possible to define a set of considerations which are "material" to all or a majority of consumers. It is not practical to expect an operator to be able to anticipate what information is material to every single consumer.

An operator should not be subject to a criminal offence purely on the basis of a subjective opinion of an individual which, an operator has no means to anticipate.

It should only amount to a misleading sales practice if the information omitted is what a reasonable consumer can reasonably expect to be provided with when making a purchasing decision.

(ii) Aggressive practices

The CP does not define what is an "aggressive practice". While it proposed to set out a list of factors (e.g. location, timing, persistent of the practice) that one should take into account in determining if a practice is aggressive, it does not define the degree and magnitude required for a practice to be considered as "aggressive". A practice can be persistent without being aggressive; it can be aggressive and yet not coercive. The magnitude that is required to distinguish a practice that justify criminal penalty from the other practices should be clearly defined.

Besides, whether a practice is considered as "aggressive" is subjective and is open for disputes. It depends on a state of mind of a particular consumer and all the surrounding circumstances.

While the CP proposed this offence to be a strict liability, it did not state the reason behind that proposal that can justify treating this offence differently from the other new offences.

Besides, strict liability often applies to offences where it is easy and straightforward, as a matter of fact, to prove that an event prohibited by law has occurred (e.g. speeding in traffic offence). Whereas, determining whether a practice is aggressive is not so clear cut and straightforward.

(iii) Bait advertising and Bait-and-Switch

Similarly, the CP does not state the reasons that justify making bait advertising a strict liability.

Each of bait advertising and bait-and-switch shall only be an offence if the operator has the intention of using one product/service as a bait to attract consumers when it knows, at the time of the promotion, that it does not and will not have the "bait product/service" to supply. An operator should not be made subject to criminal sanction simply because the advertised product/service is out of stock, whether or not because the operator has misjudged the market response to the product/service.

(iv) Criminal prosecution

The CP does not make it clear that whether it is the company, the directors, or the persons who committed the proposed offences would be subject to the criminal sanctions proposed.

In light of the uncertainties as highlighted above, further clarification, elaboration and consultation would be required before any new legislation was contemplated.

D. Conclusion

As the telecommunications sector is subject to regulation that provides consumers with protection at least as robust as the proposed new legislation, and that requires a significant degree of industry-specific knowledge for enforcement, the telecommunications sector should be exempted from the proposed new legislation, similar to the other exempted industries. Not to do so would unnecessarily hamper operators' efficiency and cause confusion amongst all stakeholders due to excessive, overlapping, and conflicting regulations.

In any event, while the aim of the new legislation is enhance information flows to ensure that consumers can make an informed decision, the CP rightly states that it is also important to keep the regulatory requirements on businesses to the minimum so as not to affect business efficiency. Accordingly, any new legislation should only address areas that are not being covered by the current regulations. Further study and consultation would be required in order to identify those areas and to clarify the uncertainties in the current proposal before the introduction of any new legislation was considered.

Should you have any queries, please do not hesitate to contact Winnie Ma on 2128 2202.

Yours sincerely
For and on behalf of
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