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Subject Consultation Paper on Legislation to Enhance Protection for  
Consumers Against Unfair Trade Practices
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Dear Sir/Madam,

Reference is made to the Consultation Paper released by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau on 15 July 2010.

Please find attached our submission with our views and comments on the Consultation Paper for your consideration.

Yours faithfully,

For and behalf of Wharf T&amp;T Limited

Jordan Lee  
 Legal, Regulatory & Carrier Affairs  
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2010-10-submission\_TDO\_Revised.pdf

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Direct Fax No:  
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1 November 2010

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Commerce, Industry and Tourism Branch  
Commerce and Economic Development Bureau  
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By Email (CPR@CEDB.GOV.HK)

Dear Sir/Madam,

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

Reference is made to the Consultation Paper released by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau on 15 July 2010.

Please find attached our submission with our views and comments on the Consultation Paper for your consideration.

Yours faithfully,

For and behalf of Wharf T&T Limited

Jordan Lee  
Senior Manager, Regulatory & Carrier Affairs

Encl.

## WHARF T&T LIMITED

### SUBMISSION IN RESPONSE TO THE CONSULTATION PAPER ON LEGISLATION TO ENHANCE PROTECTION FOR CONSUMERS AGAINST UNFAIR TRADE PRACTICES (THE "CONSULTATION PAPER")

31 OCTOBER 2010

#### 1. INTRODUCTION

- 1.1 Wharf T&T Limited ("WTT") welcomes the opportunity to submit its views on the Consultation Paper issued by the Commerce and Economic Development Bureau on 15 July 2010, in light of the Government's review on the existing legislations involving consumer protection.
- 1.2 According to the Consultation Paper, the Government's review was driven by the policy objectives to enhance protection for consumers against unfair trade practices and to ensure a level playing field for businesses. Under such a review, the Government has considered the consumer protection legislations and regimes of overseas jurisdictions alongside the views and comments set forth in the Consumer Council report titled "Fairness in the Marketplace for Consumers and Business" dated 25 February 2008 (the "CC Report").
- 1.3 Stating its intention to "*safeguard the legitimate rights of consumers... (but) not to create unnecessary regulatory burden on business or fetter the legitimate use of creativity in promotional activities*", the Government, with reference to the findings of its review on the consumer protection legislations, sets out in the Consultation Paper specific proposals to amend the Trade Description Ordinance ("TDO"):
  - (a) The creation of new criminal sanctions under the TDO to deter misleading omissions, aggressive practices, "bait-and-switch", and the practice of accepting payments without the intention or ability to supply the contracted goods or services;
  - (b) The extension to cover the scope of the prohibition provisions of false trade descriptions of goods in the TDO to the trade descriptions of services;
  - (c) Empowering and mandating the Customs and Excise Department ("C&ED") to enforce the proposed offences whilst introducing a compliance-based mechanism to seek an undertaking from suspects alleged of deploying unfair trade practices and/or seeking an injunction from the court for that purpose;
  - (d) The extension of the jurisdictions of the TDO to all sectors, unless specifically exempted (viz: the financial services sector, property transactions and professional practices regulated by regulatory bodies established by statute), in Hong Kong;
  - (e) Conferring concurrent enforcement powers on the Telecommunications Authority ("TA") and the Broadcasting Authority (or the Communications Authority if established upon the enactment of the Communications Bill) to enforce the fair trade provisions in the TDO;

- (f) Against persons convicted of offences under the amended TDO, allowing private parties to launch legal actions as well as empowering the court to make compensation orders in favour of consumers; and
  - (g) Imposing cooling-off periods on transactions of timeshare rights and long-term holiday products and also transactions concluded during unsolicited visits to consumers' homes and places of work.
- 1.4 In response to the Consultation Paper, which seeks views and comments from the public on the proposals reiterated above, the Communications Association of Hong Kong ("CAHK") has submitted on behalf of its members, which include most, if not all, of the broadcasting, wireline, wireless and information communications technology service providers and operators in Hong Kong, the general views that:
- (i) The amended TDO should not apply to the telecommunication sector as on par with the sectors of financial services, real estate and professional practices; and
  - (ii) The telecommunications sector should remain to be regulated by the existing regulatory regime, which comprises both government laws/regulations (viz: the Telecommunications Ordinance ("TO"), its subsidiary legislations, and various directions and codes of practices issued by OFTA) and the industry's self-regulations (inter alia, the Code of Practice for the Provision of Chargeable Mobile Content Service and the "to-be-adopted" Code of Practice on Communications Service Contracts).
- 1.5 Whilst echoing the general views submitted by CAHK as summarized above, we set out in this submission our specific views/comments on the various proposals detailed in the Consultation Paper.

## 2. SECTOR-SPECIFIC REGIMES (STATUS QUO) VS. GENERAL REGIME (NEW TDO)

- 2.1 As correctly described in CAHK's submission to the Consultation Paper, the existing consumer protection regime specific to the telecommunications sector comprises of both government regulations and the industry's self-regulations.
- 2.2 In regard to government regulations, telecommunications service providers licensed by the TA are subject to Section 7M of the TO which stipulates that:

*"A licensee shall not engage in conduct which, in the opinion of the Authority, is misleading or deceptive in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service".*

- 2.3 Pursuant to Section 6D(1) of the TO, the TA has released an enforcement guidelines titled "Misleading or Deceptive Conduct in Hong Kong Telecommunications Market" (the "7M Guidelines") to detail his enforcement policy on Section 7M of the TO. Under Section 3.30 of the 7M Guidelines, the TA considers that a licensee may have engaged in misleading or deceptive conduct where:

- a licensee did not, or will not, possess the products in question at the time of the promotion; or
- a licensee did not intend to supply the services on offer; or
- the products or services are only available to a very limited number of consumers or are only available for a very limited period in circumstances where these limitations were not highlighted in the advertisement for those products or services.

- 2.4 In terms of licence condition, all facility-based or service-based operators, be it fixed or mobile, licensed by the TA are required by their licence to prepare a customer charter which sets out the minimum standards of service to the licensee's customers and gives guidance to the employees of the licensee in their relations and dealings with customers. Further, all telecommunications licensees are also required to comply with any other regulatory instruments, inter alia, directions, guidelines and codes of practices, issued by the TA. To deter misleading/aggressive trade practices such as misselling, the TA has established nine best practice benchmarks for the industry and encouraged compliance to the benchmarks by means of publishing yearly reports on the compliance status of the industry since 2005.
- 2.5 On the self-regulatory side, the industry has voluntarily adopted the Code of Practice for the Provision of Chargeable Mobile Content Service and is working to develop the Code of Practice on Communications Service Contracts for the purpose of enhancing consumer protection by means of setting minimum industry standards and improving information clarity to consumers. In the Code of Practice on Communications Service Contracts in particular, a 7-day cooling-off period would be imposed on consumer transactions concluded during unsolicited visits to consumers' residence. Further back in 2005, four fixed operators contributed a funding of HK\$2.3 million towards a consumer education and awareness program that targets on minimizing aggressive/misleading trade practices.
- 2.6 In the Consultation Paper, the Government asserts that it "generally share(s) the Consumer Council's thinking" that:

*"(T)rade practices provisions in existing statutes regulating specific sectors (e.g. Section 7M of the Telecommunications Ordinance) should remain unaffected by the enactment of the proposed Statute, provided that a significant degree of professional and specialized knowledge is required for enforcement of such provisions or statutes, and a similar level of protection has already been provided by such statutory frameworks, parallel to and compatible with the proposed Statute"*  
(Section 21 of the CC Report).

- 2.7 Considering the existing consumer protection regime specific to the telecommunications sector, the Consumer Council has stated in the CC Report that:

*"Much of the existing statutes that cover consumer protection, such as provisions in the ... the Telecommunications Ordinance, address important sector-specific issues, and the relevant agencies have the expertise and resources to administer the law. Accordingly, the Council is of the view that trade practices provisions in existing*

*statutes regulating specific sectors should remain unaffected by the enactment of the proposed Statute, provided that a significant degree of professional and specialized knowledge is required for enforcement of such provisions or statutes, and a similar level of protection has already been provided by such statutory frameworks, parallel to and compatible with the proposed Statute. If necessary, amendments should be introduced to these existing statutes to ensure that they will cover the range of unfair trade practices that the proposed Statute will regulate". (Sections 20 and 21 of the CC Report)*

- 2.8 Despite the currently functioning consumer protection regime for the telecommunications sector outlined above (which, alike the new TDO proposed by the Government, provides for a cooling off period for consumer transactions concluded during unsolicited visits to consumers' homes and prohibits false trade descriptions, misleading omissions, bait-and-switch, aggressive practices, and accepting payment without the intention or ability to supply) and the view of the Consumer Council that Section 7M of the TO as one of the trade practices provisions in existing statutes regulating specific sectors should remain unaffected by the enactment of the new TDO, the Consultation Paper proposes to extend the scope of the TDO to telecommunications services as well as to give the TA and the BA the concurrent jurisdiction to enforce the relevant provisions of the new TDO.
- 2.9 The Consultation Paper has not elaborated or explained the rationale for extending the scope of the TDO to telecommunications services. We opine that such proposal to extend the scope of the TDO to telecommunications services is unnecessary, unjustified, and unfair, and is at odd with the Government's policy intention "*to enhance protection for consumers against unfair trade practices... (but) not to create unnecessary regulatory burden on business or fetter the legitimate use of creativity in promotional activities*".
- 2.10 The existing consumer protection regime specified for the telecommunications sector has been in place for years and in general has been viewed as effective in deterring unfair trade practices. Over the years, precedents detailing how Section 7M of the TO should be applied have been gradually built up and have been extensively studied and applied by OFTA's enforcement officers, legal practitioner, industry members and other stakeholders (e.g. Consumer Council). In turn, these parties' working knowledge and reliance on the existing enforcement system have reinforced the predictability and transparency of the system itself and thereby helped to enhance the overall effectiveness of the sector's consumer protection regime. By contrast, the proposal to establish a new enforcement system by extending the TDO to telecommunications services has no historical basis. As historical basis is a vital element sustaining the predictability and transparency of our legal system, forgoing such basis in exchange for a new criminally based system is clearly against public interest.
- 2.11 On the issue of using criminal remedies as a deterrent to unfair trade practices, at present parties proven to be in contravention to the Section 7M of the TO and/or other conditions of their licences granted by the TA are already faced with very serious legal and financial consequences, inter alia, detrimental publicity, financial penalty or revocation of licence. In light of the above, it is difficult to see how by

subrogating the currently functioning system by a new criminally based system would necessarily lead to any additional benefits in safeguarding consumers rights without overburdening the OFTA officers, who would be expected to prove beyond reasonable doubt for establishing any offences under the new TDO, and the industry, which is already striking hard to comply to the relevant consumer protection provisions of the statutes and to its own codes of practice.

- 2.12 As identified in OFTA's consultation paper titled "Customer Complaint Settlement Scheme" dated 8 June 2010, "*many disputes between the customers and the (telecommunications) service providers however concern the contractual terms or pricing and do not necessarily involve such misconduct of the service providers*". Against such factual observation of OFTA, the criminal law enforcement/litigation approach advocated by the Consultation Paper is an inappropriate solution for addressing consumer complaints arising from contractual disputes and is inconsistent with the Government's policy (as stated in the Civil Justice Reform in 2009) to encourage dispute resolution outside courtrooms.
- 2.13 On the basis of the above, we submit that the treatment of the highly technical and specialized telecommunications sector ought to be on par with the financial services sector, property transactions and professional practices regulated by regulatory bodies established by statute, and therefore, the status quo should be maintained (i.e. to maintain the sector-specific regulatory regime for the telecommunications sector and to exempt telecommunications services from the new TDO).

### 3.0 AMBIGUOUS LEGISLATIVE FRAMEWORK

#### TERMINOLOGIES

- 3.1 The proposed TDO amendments have been drafted with vague and untested languages with fundamental questions such as what a "*consumer*" is and what constitutes a "*consumer transaction*" remain unanswered. Without further clarification, the proposed legislative measures will inevitably open to the subjective assessments of enforcement officers.
- 3.2 Aside from unwanted subjective judgments from law enforcement officers, the lack of clarity of obligations such as "*material information*" and "*misleading omission*" under the proposed amendments to the TDO will cause ambiguities to suppliers of goods and services in relation to scope of information disclosure.
- 3.3 With such ambiguities, honest suppliers may unwittingly fall foul of the law and incur criminal liability inadvertently. Against all fairness, this cannot be said to be consistent with the Government's objectives to enhance protection for consumers against unfair trade practices and to ensure a level playing field for businesses.
- 3.4 In view of the above, we submit that whilst it is understandable that absolute clarity in defining the scope of material terms to be adopted in the amended TDO might be difficult, the Government should try to define such terms as clear as possible so as to facilitate compliance by suppliers and to provide clarity to consumers.



#### **4.0 BUSINESS-TO-BUSINESS ("B2B") TRANSACTIONS VS CONSUMER TRANSACTIONS**

- 4.1 B2B transaction can be broadly defined to mean transactions entered into by parties of comparable knowledge and economic position following negotiations at arm's length. Further, parties are usually either represented or have been advised by legal, or other suitably qualified, advisers.
- 4.2 Contrasting to B2B transactions, a consumer transaction refers to parties of unequal economic position, whereby the party with the greater knowledge and economic position dictates the terms of the contract. Consumer sales are entered into between the seller, who is selling as part of its business activities, and the buyer who buys in a non-trading capacity for consumption rather than for profit. There is a fine distinction between dealings in business and consumer context.
- 4.3 There is no reason why parties to B2B should receive the same level of protection comparing to general consumers. Applying the proposed TDO to B2B transaction indicates that the Government ignores the existence of commercial reality within which transactions ceaselessly occur. As such, we submit that the proposed TDO should only be applicable to consumer transactions, (i.e. a contract concluded between a seller/supplier and a consumer who is contracting for a non-business purpose) and that any B2B transactions should not fall within the ambit of the new TDO.

#### **5.0 EXISTING CRIMINAL REGULATIONS**

- 5.1 The main legislation of general application across different industries is TDO. Section 7 of the TDO prohibits a person in the course of any trade or business from applying a false trade description to any goods, or supplying or offering to supply any goods, to which a false trade description is applied.
- 5.2 Section 7 catches general advertising of goods, which contains false trade descriptions, as well as both oral and written trade descriptions given at the point of sale. One of the guiding principles is that there is a legal presumption of *mens rea*. Merely the *actus reus* of the offence is sufficient for a conviction. This strict liability gives rise to the concern of injustice as it is inconsistent with the general criminal principles that *mens rea* or knowledge of the wrongfulness of the act is an essential ingredient of every offence.
- 5.3 No doubt Section 7 of the TDO is a serious offence, and intention is clearly central to establishing criminality. In such case, greater weight on standard of proof should be attached to element of *mens rea*. It is submitted that the Government should make clear that TDO section 7 offences will require *mens rea* of intention, recklessness, knowledge or negligence.

#### **6.0 UNEVEN COMPLIANCE OBLIGATIONS BETWEEN BUSINESSES AND THE CONSUMERS**

- 6.1 Consumer's knowledge to a product and a service directly contributes to the extent of information disclosure required by a supplier. Notwithstanding that rights of consumers ought to be observed and duly protected, the Government appears to adopt a protective approach to consumers, who are not subject to any compliance obligations. Against this, it is amongst the utmost concern of the business community that the proposed TDO imposes an imbalance compliance burden on business operators and suppliers vis-à-vis consumers.
- 6.2 As the Consultation Paper asserts that the Government would be "*mindful not to create unnecessary regulatory burden on business or fetter the legitimate use of creativity in promotional activities*" while trying to enhance consumer protection by means of introducing amendments to the TDO, we caution the Government to ensure that a right balance be struck between the interests of businesses and consumers.

## 7.0 CONCLUSION

- 7.1 Whilst we appreciate the Government's intention to enhance consumer protection in Hong Kong, such intention should not be achieved at the expense of the legitimate interests of the business community as a whole. A right balance must be struck between the interests of businesses and consumers.
- 7.2 Just as we, as a member of the business community, see the need to deter the unfair trade practices adopted by the few "bad apples" for the interest of ensuring a level playing field for those law-abiding businesses, we, as a telecommunications operator, also see that the treatment of our highly technical and specialized sector ought to be on par with the financial services sector, property transactions and professional practices regulated by regulatory bodies established by statute. Accordingly we submit that the Government should maintain the sector-specific regulatory regime for the telecommunications sector and to exempt telecommunications services from the new TDO.
- 7.3 The extension of criminal sanctions of the TDO to services constitute a major change to how trade practices are regulated in Hong Kong as the output of our service sector accounts for over 90% of our GDP. To ensure normal B2B transactions, which constitute a very significant portion of that 90% figure stated above, could be continued effectively as they are, they should not fall within the new TDO. Furthermore, prudent steps and careful contemplations ought to be duly taken by the Government after conducting extensive consultation with the general public and the various stakeholders.

Submitted by Wharf T&T