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3 November 2010

Special Duties Division
Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
Level 29, One Pacific Place
88 Queensway
Admiralty
Hong Kong

By Fax: 2869 4420
& By Post

Dear Sirs,

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

Kindly find attached our comments on the Consultation Paper for your review please.
Should you require any further information or clarifications from us, please feel free
to let us know.

Yours faithfully,

Legal and Regulatory Department
Hong Kong Cable Television Limited

Encl.



**Submission by Hong Kong Cable Television Limited on the
Public Consultation Paper on Legislation to Enhance Protection for Consumers
Against Unfair Trade Practices (the "Consultation Paper")**

1. Introduction

We have, for your consideration, the following views in particular on the proposals effected through amendments to the Trade Description Ordinance ("TDO") under the Consultation Paper after our careful review of the same.

2. Self-Regulatory Regime

2.1 The telecommunications and broadcasting sectors are under a well-established regulatory regime of the Telecommunications Ordinance ("TO") and the Broadcasting Ordinance separately, their respective subsidiary legislations, and various directions, code of practices and guidelines issued by Telecommunications Authority ("TA") and the Broadcasting Authority ("BA") individually from time to time including without limitation, as for the TA's jurisdiction, section 7M of the TO which prohibits misleading or deceptive sales practices and the guidelines in relation to section 7M of the TO clearly spelt out all sorts of prohibitive unfair sales practices covering more than those described in the Consultation Paper which in comparison means greater level of protection already afforded to consumers.

2.2 In addition, we are governed and regulated by the conditions of the licences granted by the authorities whereby we are obliged to comply with certain best sales practices stipulated and pledged in the Customer Charter. In fact, our sectors have all along been mindful of, and conscientious in initiating measures to enhance consumer protection. We have recently been preparing, for example, our own Code of Practice on Communications Service Contracts ("CoP") aiming to enhance consumer protection through various proposed measures in line with the amended TDO.

2.3 Given a robust self-regulatory mechanism for our sectors is already in place, unless there is a vote of no confidence casted on TA's and BA's role and ability in regulating the industry, it shall be the main (established) mean for dealing with misleading/unfair trade practices. As such, we strongly believe that our sectors, as in the case of the other exempted industry, be excluded from the ambit of the amended TDO altogether, though with much regret that in the interim we are yet to be exempted and does it probably and ironically attributable to the belief that both TA and BA have all along been doing a lousy job?

3. Duplicating Enforcement Power & Overlapping Legislation

3.1 Apart from the Customs and Excise Department to be conferred with the enforcement power, concurrent enforcement power will be given to TA and BA under the amended TDO in respect of telecommunications and broadcasting sectors. Such duplication of enforcement power together with the overlapping of legislation (as currently we have various statutes protecting consumers' interests



including section 7M of the TO, Misrepresentations Ordinance, Supply of Services (Implied Terms) Ordinance, Unconscionable Contracts Ordinance, etc) would cause confusion to and risk double jeopardy for our industry which could open to challenge on different fronts and at the same time by different authorities.

4. Cooling-off period

4.1 Without prejudice to the foregoing views, given that we have a CoP, our industry, in any event, should not be subject to similar requirements including the cooling-off period proposed in the Consultation Paper. Otherwise, confusion and disputes are bound to proliferate.

4.2 The duration of the cooling-off period as arbitrarily proposed in the Consultation Paper coupled with the suggestion of the consumer using the services with a reasonable costs payable to the service provider during the cooling-off period will give rise to moral hazard, not to mention the far-reaching negative impact on the businesses as such proposals will not only encourage consumers to take less care before buying, but will also facilitate the abuse of such right by taking unfairly the advantage of the relatively much cheaper cost of services which are otherwise not available to those unwilling to commit a longer contractual period with the service provider.

4.3 The proposal fails to take into account the substantial resources incurred by the service provider for effectuating the service contracts. If the cooling-off period is abused by insincere consumers, the costs incurred by the service provider in, among other things, installing and uninstalling the service will be passed on to other consumers. This could not be fair to those consumers who have already exercised due diligence prior to signing up a contract and with a view to using it on a long-term basis.

5. Criminal Sanction

5.1 We do not support the proposal of creating criminal sanctions for infringement of the fair trade provisions relating to certain sales practices as described therein. We think the introduction of such criminal sanctions is inappropriate and disproportionate. In a modern fair trading framework, the main enforcement mechanism should rely instead on the civil route using injunctive relief, with serious offences left to existing criminal statutes (e.g theft and fraud). Criminal prosecutions should be reserved for the most serious breaches and other, notably civil, action may be the more appropriate response for dealing with most unfair practice given the purpose of the amended TDO is to prevent unfair practices and to protect consumers, not to introduce a punitive regime for business.

5.2 Even if criminal sanctions which we strongly oppose were to be introduced it would be essential that adequate defences are provided and these should be accompanied by the requirement to demonstrate intent or recklessness on the part of the trader (mens rea), so strict liability offence, as proposed, to prohibit use of aggressive practices which have definitional issues is not appropriate and



unfair to many traders engaging at normal commercial practices who may easily fall foul of the provisions if the aggressive practices are not well-defined or are interpreted excessively widely.

6. *Clear Guidance necessary*

6.1 As the prohibition against aggressive practices is new under the amended TDO, the guidance would need to clarify precisely where legitimate practices end and aggressive practices begin, with detailed, specific and practical examples for the businesses that are subject to the amended TDO to follow and refer to.

7. *Private Actions*

7.1 We do not agree that an express right be created under the amended TDO to allow aggrieved consumers to institute private actions on infringement of certain fair trade provisions as this might have unintended and adverse consequences, by potentially providing consumers with undesirable latitude to sue traders. Such a move carries the obvious risk of increasing the number of claims made by consumers, predominantly frivolous and vexatious cases and would also risk encouraging a "compensation culture", an undesirable side-effect, adding unnecessarily heavy financial burden on the businesses.

7.2 In fact, in many cases, it would be impossible for a consumer's loss to be evaluated in monetary terms, unless the intention is that damages should be punitive. We therefore disagree to the introduction of such a new right under the amended TDO.

8. *Conclusion*

On the basis of the aforesaid, unfortunately, most of the proposals in the amended TDO could not serve the intending purpose but on the other hand, will unduly restrict the legitimate business practices, fetter its operation and create unnecessary regulatory and financial burden on the businesses.

Hong Kong Cable Television Limited