

## Opinions from New Forum

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### The Competition Law and Unfair Trading Law should be put under the same jurisdiction

1. We suggest that the Competition law and unfair trading practices law should be administered under the same enforcement agency.

#### The reasons:

- 1.1. Putting the administration of the law under one umbrella promotes **economy, efficiency, and effectiveness** which are important values in public administration;
  - 1.2. **Such framework is in line with international practices.** For example, UK is put under *the OFT, Office of Fair Trade*; Australia under *the ACCC*; and New Zealand under the *Commerce Commission*;
  - 1.3. the combined office can be called "*Competition & Fair Trade Commission*";
2. The Custom Department lacks the experience and knowledge to strike a good balance between the need of protecting legitimate business interests and the need of preventing harm to consumers. It may not be experienced in handling the compliance-based mechanism recommended in the consultation paper. This should be the job of a specialised agency, such as the new Competition Commission.

### The Financial, Property and Professional Sectors shall not be excluded from the new law

3. We do not share the government's suggestion that the ambit of the law should not cover **financial, professional, and property sectors**. We also do not agree with the argument of the government that the present codes of practice in these three sectors are sufficient for preventing **unfair, deceptive, misleading and aggressive** practices in these sectors. The Lehman Brother incident, the misleading advertisement and marketing materials commonly used in the property sector, and the malpractice seen in the professional sector have all proved that the present law and codes in these sectors are inadequate to deter the bad guys from harming the consumers.
4. The professional disciplinary bodies and the business associations in these three sectors have **no power to impose criminal sanction** against unfair trade practices by their members while the **enforcement agency** in the unfair trade law does have.

5. It is against the principle of rule of law to exclude these sectors. The principle requires 'equal subjection of all classes [of people] to the ordinary law'<sup>1</sup>; Financiers, real estate tycoons, and professionals shall not be given **more rights** than other classes of people.
6. Applying the new law to these three sectors will not render the codes of practice in these sectors useless. Instead, it reinforces the codes. Experience in the UK suggests that the success of the codes of practice depends on four factors:
  - 6.1. the availability of a strong sanction;
  - 6.2. a plausible threat of statutory regulation;
  - 6.3. a clear wish by the good players in the industry to distinguish themselves from others; and
  - 6.4. the existence of obvious benefits to consumers<sup>2</sup>
7. The Lehman Brother incident has proven that the present regulatory regime in the financial services sector is inadequate in protecting the consumers. After the Lehman collapse, the **American Federal Government** has enacted a new law called the *Consumer Financial Protection Agency Act 2010* with an objective to protect consumers in financial sector from **unfair, deceptive and abusive practice**. Hong Kong has done nothing of similar magnitude in the financial sector regardless of tenth of thousand of its small investors are hurt by the misconduct of the financial institutions.

### **Unfair Consumer Contract Terms shall be regulated**

8. We propose that unfair consumer contract terms should be regulated in the new law<sup>3</sup> with an objective to sanction unfair and misleading terms hidden under the small prints in standard contracts which are not negotiable by the consumers. If these unfair terms are not regulated, the consumer protection law will be incomplete.

Reference can be made to the *Unfair Terms in Consumer Contract Regulations 1999, UK*. Section 5 of the regulation provides that

A contract term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer<sup>4</sup>.

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<sup>1</sup> Dicey, 1885, *the Law of the Constitution*, pp 202-3

<sup>2</sup> OFT, UK, 1996, *Voluntary Codes of Practice*, paras 2.3, 2.5

<sup>3</sup> Refer to our Internet submission made on Oct 21, 2010.

<sup>4</sup> This UK provision is a modified version from the EU Directive 93/13/EEC

## **A Codified General Prohibition is needed**

9. In addition to the government's proposed list of offence, we suggest that a codified general prohibition is needed to capture the ever-changing form of malpractice in trade. Reference can be made to the UK law, titled, *Consumer Protection from Unfair Trading Regulations 2008*<sup>5</sup>. Section 3 of the regulation provides:

A commercial practice is unfair if (a) it contravenes the requirements of professional diligence; and (b) it materially distorts or is unlikely to materially distort the economic behaviour of the average consumer with regard to the product.

## **Representative Action and Conditional fees should be allowed to improve accessibility to justice**

10. In UK and US, representative action is allowed. In the US, even class action is allowed. The UK also allows solicitors sometimes to charge what is called a *conditional fee* or the so-called "no-win-no-fee" under the *Access to Justice Act 1999*, ss27-8. But it restricts the solicitor to charge only on (a) his normal fee plus a success uplift, or (b) only his normal fee, but never on (c) any of his client's winnings. The UK government believes that this flexible arrangement will increase the accessibility to justice.

## **The Enforcement Agency should be given power to issue guidelines on the offences and to make a list of unfair practices**

11. The Enforcement Agency should be given power to issue guidelines on the offences and to make a list of commercial practices which are in all circumstances considered unfair and to amend the list. The EU and UK has endorsed such list<sup>6</sup>. The guideline should be subject to legislative negative resolution ("negative vetting") procedure. The list of unfair practices and its amendment should be subject to legislative affirmative resolution procedure or super-affirmative resolution procedure<sup>7</sup>. This power is needed to face the ever-changing form of malpractice in trade.

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<sup>5</sup> This UK provision is a modified version of the EU Directive 2005/29/EC, Article 5.

<sup>6</sup> *Ibid*

<sup>7</sup> Taking reference from the UK Act: *Legislative and Regulatory Reform Act 2006 (c. 51), s12*