10 November 2010

Mrs Rita Lau, JP
Secretary for Commerce and Economic Development
Commerce and Economic Development Bureau
2/F, Murray Building
Garden Road, Central
Hong Kong

Dear Rita,

Legislation to Enhance Consumer Protection Against Unfair Trade Practices

The Hong Kong General Chamber of Commerce ("HKGCC") would like to present its views on several key issues in the Government's proposals to regulate trade practices in services as discussed in the Consultation Paper 'Legislation to Enhance Protection for Consumers against Unfair Trade Practices'.

HKGCC supports the idea of extending the Trade Description Ordinance (TDO) to services, but it seems to us that the Consultation Paper ("CP") does not have enough detail to build confidence that the government's proposals would achieve a fair balance of protecting the legitimate rights of consumers and avoiding an unnecessary regulatory burden on businesses. The new offences proposed also appear to be not proportional to the problems identified as requiring new criminal legislations. In particular, the government has failed to convince business stakeholders that the existing law is insufficient to address the problems.

Strict Liability

Our biggest concern is about the proposed creation of strict liability offence.

The Consultation Paper proposes the creation of strict liability offences to prohibit the use of "aggressive practices" and "bait advertising", "accepting payment without the intention or ability to supply", etc.

As a matter of principle, we generally consider it not proportionate to impose absolute legal responsibility on business. A trader should only be liable if it acted "knowingly or recklessly".

For instance, in the case of the proposed prohibition of "aggressive practices", commercial practice will be considered aggressive if, "in the factual context, taking into account all relevant circumstances, it significantly impairs the consumer's freedom of choice through the use of harassment, coercion or undue influence and it thereby causes him to take a transactional decision that he would not have taken otherwise."

The Consultation Paper does not give the reason for making "aggressive practices" a strict liability. Is "aggressive practices" a widespread and pressing problem that warrants a new strict liability? The Consultation Paper is silent on this important point. Perhaps the Government has assumed it to be a serious problem. But we do not think a case has been made at all for strict liability.

Whether a consumer perceives certain sales practices aggressive or over enthusiastic is determined to a large extent by the individual's subjective views and preferences. Imposing a strict liability on businesses for loosely defined "aggressive practices" which hinge on subjective elements would be onerous and disproportionate.

It is not entirely clear whether all the proposed new offences in the Consultation Paper are strict liability, apart from those expressly stated to be so. It would help if the government could provide clarifications to allay concerns.

Misleading Statements

The problem associated with relying on subjective notions in creating new offences is also evident in the proposal about making "misleading statements" criminal.

In Annex D (Proposed definition of "trade description in respect of services"), item (a) states that misleading statements as to standard, quality, benefits, effectiveness, etc. would be criminal. Irrespective of whether one takes a legal point of view or common sense approach, these matters are too subjective to be classified as criminal. It seems that all statements – verbal and written – will be caught by the government proposal. And the Consultation Paper does not seem to contemplate setting an allowable period of claim. The likely result of creating such a criminal offence according to the Consultation Paper's ideas would likely be undue inhibition on business activities and creativity, and many nuisance or frivolous claims.

Misleading Omissions

The retail trade is very concerned that the proposal of creating an offence of "misleading omissions" may provide an incentive to customers to renege on transactions.

Every consumer has a different level of knowledge and expectation on the products that they seek to buy, in particular on complex products such as electronic devices. It will therefore be extremely difficult in practice for traders to anticipate what information an "average consumer" will consider to be material to his "transactional decision". There are inevitable risks in a proposal of this kind as matters may well be contemplated by consumers with the benefit of hindsight, and some may likely take advantage of the potential benefits afforded to them if certain information can be conveniently considered to be "omitted" in the descriptions provided to them.

The government apparently anticipates that confusion will arise. In paragraph 2.9, the government concedes that it will require the issuance of enforcement guidelines and building up of case law to enable the business sector and consumers to understand the protection afforded by the proposed legislative provisions and what would constitute a breach. It is definitely not a good policy-making practice to legislate without sufficient

clarity in the first place, and rely on some hoped-for clarifications to emerge in the future. This is effectively policy-making or offence creation as we go along.

It is of fundamental importance to highlight that paragraph 2.10 significantly weakens the government's own case for creating a new offence of "misleading omissions". The paragraphs states that:

- customers are responsible for seeking relevant information and should not enter into the transaction if insufficient information is available; and

- if information provided by the supplier in response to customers' enquiry amounts to a false trade description, it would be caught by the TDO, as to be amended, relating to false trade description.

It is clearly recognized here that consumers have their own responsibilities to enquire and they can always decide not to enter into transactions; and that, perhaps more importantly, false trade descriptions will be caught anyway. Following the Consultation Paper's own logic, the only conclusion that could be reached is that no new offence is warranted.

Average Consumers

The issue of clarity also manifests in the Consultation Paper's concept of "average consumer", as alluded to in the discussion above on "misleading omission". To retailers, each customer is different. What may affect one customer's decision may not have the same effect in the case of another. The retail trade will find it extremely hard to comply the law if their front-line employees are required to second-guess what an "average consumer" may perceive when it comes to description of services.

Bait Advertising

We are of the view that with the proposed expanded definition of "trade description" for goods and services, there is no need for a new offence of "bait advertising". The expanded definition of "trade description" will cover false and misleading representations as to availability, which would also cover bait advertising.

The proposed offence prohibits a person from advertising for the supply of products at a specified price if there are no reasonable grounds for believing that he will be able to offer those products for sale at that price for a "reasonable period" and in "reasonable quantities", having regard to the "nature of the market" and "nature of the advertisement".

The Consultation Paper rightly highlights the need to consider the "nature of the market". For example, in the fast-moving-consumer-goods sector, which operates high-complex international supply chains, and in today's "just-in-time manufacturing", there are inherent uncertainties in the supply of goods. The notion of "reasonable period" and "reasonable period" can take on very different meanings from what may be commonly perceived. Defining an offence with such notions will run the risk of having to rely on subjective judgments in determining whether a criminal offence has been committed.

Cooling-Off Arrangements

The government proposes in the Consultation Paper that cooling-off periods should be imposed on time-share/holiday products and contracts made during unsolicited visits to a customer's home or place of work.

There have been suggestions that the cooling-off period requirement be applied across the board to pre-payment mode of transactions, such as club memberships, beauty care, fitness and slimming services. We agree with the government's view that cooling-off period may not help in respect of misrepresentations, omissions and accepting payments without the intention or ability to supply. As a cooling-off period is usually of a limited duration and misrepresentations or omissions may not come to light until the consumer starts using the products after the end of the cooling period.

Compliance and Consumer Redress

The Consultation Paper's proposals of instituting a "compliance-based mechanism" (discussed in Chapter Three) and a new consumer redress regime (Chapter Five) actually reinforce the argument that no new criminal offences are necessary.

Under the proposed compliance-based mechanism, the enforcement agency can enter into consultations with a trader suspected of contravening the fair trade legislation and seek an undertaking from him to stop and not to repeat the offending acts. The enforcement agency can apply for an injunction from the court if the trader refuses to cooperate. We are of the view that the enforcement agency should as a matter of default make use of the compliance-based mechanism when dealing with businesses committing unfair practices. Criminal prosecution, where applicable, should only be contemplated as a last resort.

The Consultation Paper mentions that the civil enforcement approach, which entails the creation of an express right for aggrieved consumers to institute private actions, would give "more avenues to promote compliance" and have "the potential of achieving a quicker and better outcome" for consumers.

The Consultation Paper envisages and seems to harbour an implicit expectation that most of the disputes about alleged unfair trade practices could be resolved by civil means, which underpins the argument that there is no pressing need to create new criminal offences, at least not at this stage when the focus should rather be on working with businesses and consumers on promoting awareness and compliance.

Enforcement Powers

As regards the powers proposed to be given to Customs and Excise Department (C&ED) to inspect books and documents during proactive and preemptive spot checks of stocks, we strongly feel that such powers should only be invoked if there is reasonable cause to suspect an infringement and only if a magistrate is satisfied with the relevant application for a warrant, otherwise it will constitute a gross invasion of the legitimate civil rights of law-abiding traders. C&ED officers should not be given powers to spot check the stocks of a business only for the purpose of ascertaining whether the business has sufficient stock or has in place suitable arrangements for the supply of products. There is a legal opinion expressed in some discussions that such powers could potentially infringe the Hong Kong Bill of Rights.

Sector-Specific Regimes

We agree that the financial services sector, property transactions and professional practices regulated by regulatory authorities established by statute need not be brought under the ambit of the expanded TDO. We also support the rationale behind this exclusion proposal: requirement of a significant degree of professional and specialized knowledge for enforcement; and a similar level of protection already provided in existing statutory framework (as enunciated in Paragraph 4.2 of the Consultation Paper).

We are surprised to see that the telecommunications and broadcasting services are caught by the Consultation Paper's proposals even though these two sectors satisfy both criteria for exclusion. The government proposes concurrent enforcement powers for the Telecommunications Authority (TA) and the Broadcasting Authority (BA) under the TDO in respect of the sectors they regulate. But the Consultation Paper does not explain why concurrent jurisdictions would be needed for these two sectors, which may give rise to duplicity in regulation and law enforcement.

Though the Consultation Paper mentions that the government would request that memoranda of understanding be entered into between the CE&D and the two authorities, we do not see why concurrent jurisdictions should be recommended in the first place. The government should not spend time on cumbersome bureaucratic arrangements to solve problems that should not have been allowed to emerge. The telecommunications and broadcasting services should, in our views, simply be excluded alongside financial services, property and professional practices.

We hope that the government would seriously consider our views and continue to discuss with us on the way forward. We look forward to receiving your response.

Thank you very much.

Sincerely yours,

Alex Fong
CEO