

## **Consumer Council Submission to Bills Committee on Electronic Transactions Bill**

The Consumer Council is pleased to provide the following submission to facilitate deliberation of the Bills Committee on the subject of electronic commerce.

### **Introduction**

1. At the outset, the Council wishes to express its general support for the proposed Electronic Transactions Bill (the Bill). This important piece of legislation will play an important role for Hong Kong when its consumers and businesses engage in electronic commerce domestically and across international borders.

2. The objective of the proposed legislation is to address the basic issues of clarity of contract by providing some certainty to parties engaged in an electronic transaction, thereby engendering some confidence in the transaction.

3. Nevertheless, there are other issues that go to the heart of building consumer and business confidence in electronic commerce, that the Council would like to take the opportunity to raise for consideration by Members. Some of the issues relate specifically to the provisions in the Bill, while others are of a more general nature.

### **Basic consumer safeguards**

4. The Consumers International (CI)<sup>1</sup>, has been assisting in the development of guidelines to provide basic consumer safeguards for electronic commerce (The Consumer Council is a member of CI task force on e-commerce). The task of developing the guidelines has been a project taken up by a Working Group of the Organisation for Economic Cooperation and Development (OECD) on the subject. The matters in the guidelines go beyond clarifying the basic elements of a contract and address and cover issues such as:

- the provision of adequate information on goods and services on offer;
- security of financial transactions;
- the protection of privacy;

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<sup>1</sup> Consumers International is a confederation of 250 consumer organizations in over 110 countries.

- returns policies for unsatisfactory goods; and
- dispute resolution and consumer redress mechanisms.

5. While the legislation under current scrutiny is probably not be the best platform to cover these issues, they are of concern to the Council and are matters that legislators should have in mind when debating regulatory oversight of electronic commerce. For its part, the Council considers that current measures to address these issues, at least in the short term, might be found through self regulatory schemes that use accreditation mechanisms to ensure that businesses comply with appropriate guidelines, and enable consumers to recognize reputable traders.

6. The Council is offering its services to assist in this regard, and has had discussions with some Hong Kong industry associations to discuss the means by which this form of regulation might be achieved. However, there may be a need for legislative intervention in the future with regard to some matters, if industry is unable to generate the necessary momentum to cover the range of concerns that will arise as this new form of marketing evolves.

7. The Bill proposes the Director of Information Technology Services (the Director) will oversee recognition of certification authorities. While the Bill does not canvass a wider role for the Director in electronic commerce that would cover issues such as those described above, the position could serve as a basis for facilitating the development of wider consumer safeguards in this emerging industry.

### **Competition oversight**

8. Another issue concerns regulatory oversight of competition issues that may arise through the development of the new market for demand and supply of authentication services in Hong Kong to facilitate electronic commerce. There are no general competition laws in Hong Kong governing the abuse of dominance by a firm or firms, or prohibiting other anti-competitive conduct between market participants. The contestability of the Hong Kong market for authentication services may be impeded because of the absence of any oversight, particularly in the early stages of development in this immature market. For example, a certification authority with first mover advantage, and other factors which give rise to market power, could be in a position to deter new entry or deter smaller participants from engaging in competitive behavior.

9. The exemption that Hong Kong Post (HKP) has with regard to the provisions of Part VII of the Bill is a case in point. It seems clear that HKP will enjoy substantial first mover advantage through its statutory recognition as a certification authority, and that it will have an advantage compared to other market participants because its recognition as a certification authority under the legislative scheme cannot be revoked. As a government agency the HKP would no doubt operate on a clear objective of protecting public interest. However, the possibility that HKP's authentication services, at the least, might be privatized in the future, would suggest that there is a need for competitive safeguards to be put in place.

10. If Members feel this is a concern, they could consider expanding the role of the Director of Information Technology Services (the Director) to act as a competition authority for overseeing the development of this market. A problem would seem to arise however, because there is no licensing function envisaged under the Bill for the Director that would enable him to exert some form of regulatory control. For example, similar to that exercised by the Telecommunications Authority, in his role of overseeing competition in the telecommunications sector.

#### **Liability against frauds**

11. The absence of any regulatory oversight achieved through a licensing mechanism also means that specific consumer safeguards could not be achieved through administrative means. For example, achieving a remedy in circumstances where a CA is liable due to negligence would require consumers to take civil action through the courts for a case of negligence against the CA. This would be costly and most likely not an option for many consumers. If CAs were subject to a licensing scheme, a condition of the license could be that the liability of CAs for matters such as negligence would be subject to a determination by the Director rather than subject to a determination by a court on a matter of law. This would also require a provision that enabled the Director to enforce the payment of compensation to consumers for loss as a result of the CA's failure to observe the required standard of conduct. This scheme would seem to provide a more affordable and informal means of achieving redress for consumers.

#### **Choice of Laws**

12. As with paper based contractual disputes, a major question that often needs

to be resolved is that concerning territorial jurisdiction. This will be an issue in regard to some e-commerce disputes that arise in the future, given the global nature of many of the transactions. Consumers International has taken the general position that e-commerce transactions should be made subject to the laws governing the jurisdiction of the consumer in the transaction.

13. The Council can appreciate that this is a matter that is not easily resolved, and is a matter that is subject to issues that go beyond the control of legislation. Moreover, even if a contract is made subject to Hong Kong laws, the ability for a Hong Kong party to seek redress could be limited because of the difficulty in dealing with a trader in another jurisdiction. By the same token, if an e-commerce trader specifies that a particular jurisdiction's laws should apply, the choice is open for a consumer not to trade, or to trade and take the risks.

14. Nevertheless, the Council suggests that an option for Members to consider is whether a default provision could be inserted in the legislation, that provides for the application of Hong Kong laws, where there is no specific mention in the provisions of an electronic transaction.

Consumer Council  
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