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Legislative Council
By email: mchiu@legco.gov.hk

Dear Ms So

United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003

Thank you for your fax of 17 October inviting comments on the above Bill.

We would like to make the following comments on the Bill:-

1. Clause 2 (Section 2(1), Definition of “authorised officer”) - To be consistent with Section 3A(1), this should refer to a “relevant” public officer.
2. Clause 2 (Section 2(1), Definition of “public body”) - In paragraph (b), to avoid circularity, the word “public” should be deleted.
3. Clause 2 (Section 2(8)) - This empowers the Chief Executive to specify any body to be a public body for the purposes of the Ordinance. In theory, this could apply to a private organisation. It should be clarified so that the Chief Executive may not specify, for example, a private company or any other organisation not having any of the characteristics of a public body.
4. Clause 7 (Section 11B) - This is a provision which creates offences in respect of bombing prescribed objects. A prescribed object would include a bank (see the definition of “place of public use” in Section 11A(1)). The substantive bombing offences arise if the bombing is with the intention to cause death or serious bodily injury (Section 11B(1)) or with the intention to cause the destruction of all or part of the prescribed object and where it could be reasonably concluded that the destruction would be likely to result in major economic loss (Section 11B(2)). In respect of the offence in Section 11B(2), it should be sufficient if there was an intention to cause the destruction of all or part of the prescribed object or where it could be reasonably concluded that the destruction would be likely to result in major economic loss. We therefore suggest that in Section 11B(2), the conjunction between paragraphs (a) and (b) be changed from “and” to “or”.
5. Clause 8 (Section 12(6)(a)) - A new provision is proposed to be added to Section 12. Section 12 is the provision which is substantially similar to Sections 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance and which requires disclosures to be made of knowledge or suspicion of any property being terrorist property. The new provision states that once a disclosure has been made to an authorised

officer, the information contained in the disclosure may be disclosed to the Department of Justice, the Hong Kong Police Force, the Customs and Excise Department, the Immigration Department and the ICAC. It is not so stated that the information should only be used for the purpose of investigation of terrorist property or terrorist offences. This should be made clear in that this section and the like provisions of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance are particularly draconian pieces of legislation. It is significant to note that the proposed Section 12(6)(b) which allows disclosure of information to authorities outside of Hong Kong is specifically limited to disclosure for the purpose of promoting multi-lateral cooperation in preventing and suppressing the financing of terrorist acts.

6. Clause 8 (Section 12(7)) - This effectively states that without prejudice to Section 12(6), disclosure may be made other than as provided in Section 12(6). This sub-section should be deleted as it seems to have the effect of allowing general disclosure to any party without any restriction.
7. Clause 9 (Sections 12A(3)(c)(i) and (ii)) - These paragraphs set out the authority of an authorised officer to require persons to answer questions, provide information or supply material and the questions, information or material is that which the authorised officer subjectively believes to be relevant to the investigation. We consider that an objective test is appropriate rather than a subjective one. See by way of comparison, the provisions of Section 12A(4) which set out the conditions required before the Court makes an order enabling an authorised officer to require persons to answer questions, provide information or supply material and here the conditions are strictly objective.
8. Clause 9 (Section 12A(5) and (6)) - Again, a subjective test is used in relation to the ability of an authorised officer to require persons to answer questions or furnish information or produce material (see point 7 above). For similar reasons, we consider that an objective test is appropriate rather than a subjective one.
9. Clause 9 (Sections 12A(11) and 12B(13)) - These sections state that a person is not excused from furnishing information or producing material on the ground that to do so would breach an obligation as to secrecy or another restriction on the disclosure of information or material imposed by statute or otherwise. These sections should be amended to provide that the furnishing of information or material will not breach such a restriction or render any person liable in damages arising out of disclosure. This point was already covered in Section 12(3) (and in the parallel provisions of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance) in relation to disclosures made under that section but it ought to be repeated in these sections also for reasons of consistency.

10. Clause 9 (Section 12D(2)(a)) - This is another provision which allows disclosure of information to the Department of Justice, the Hong Kong Police, the Customs and Excise Department, the Immigration Department and the ICAC (see point 5 above).
11. Clause 9 (Section 12D(2)(b)) - This allows disclosure by the Secretary of Justice to any “corresponding person or body”. This is defined widely under Section 12D(5) to include a body which has similar functions to the Department of Justice, the Hong Kong Police, the Customs and Excise Department, the Immigration Department and the ICAC. No reference is made to the purpose of such a disclosure. This is to be contrasted with Section 12D(4) which allows disclosure of information to any organisation or person in the service of the United Nations but only for the purpose of assisting the United Nations in securing compliance with or detecting evasion of measures in relation to a terrorist or terrorist associate. It seems incongruous that in relation to disclosure to the United Nations, the specific purpose is provided whereas this is not the case in relation to domestic disclosure under Section 12D(2)(a) or disclosure to other bodies under Section 12D(2)(b). (Compare also Section 12(6)(b) relating to disclosure of information to authorities outside Hong Kong which also requires it to be for the specific purpose of promoting multi-lateral cooperation in preventing and suppressing the financing of terrorist acts.) As previously mentioned, in view of the draconian nature of this legislation, it would be appropriate for there to be some purpose mentioned for the disclosure (see point 5 above).
12. Clause 9 (Section 12D(3)) - This is another provision which states that the section allowing disclosure is without prejudice to any other right to disclose information. This should be deleted if the previous provision is to have any effect (see point 6 above).
13. Clause 19 (Schedule 2) - Paragraphs 4 and 5 of this Schedule use the subjective test in relation to the answering of questions, production of material or furnishing information (see point 7 above).
14. Schedule (Consequential Amendments) - The Consequential Amendments amend Sections 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organised and Serious Crimes Ordinance in the same way as Section 12 of the United Nations (Anti-Terrorism Measures) Ordinance is amended and the same points as are made under points 5 and 6 above apply also to these amendments.

Taking this opportunity, we wish to make a supplementary point for the consideration of the Bills Committee on United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003:

In order for AIs to comply with the prohibitions under Sections 7 and 8 of the Ordinance, they are required to screen receipts and payments before such receipts can be credited to their clients' accounts or such payments can be made to the payee to ensure that these receipts are not received nor payments made to persons who are on the list of terrorists or suspected terrorists provided to AIs by their regulators. However, such lists do not usually contain details other than the names or aliases of

the terrorists or suspected terrorists, i.e. they do not have ID numbers, date of birth or other identity details of the individuals. Where there is a positive match on a name only, the AI would have to conduct further checks to ascertain if the payor or payee is in fact the same person as the name on the lists provided by its regulators. Such checks could cause delays in processing the receipts or payments and could render AIs particularly exposed to potential claims by the clients in remittance transactions. If an AI refuses to act in accordance with a client's remittance instruction to receive or remit funds for reasons under Sections 7 or 8, the AI's action will be a breach of client mandate, thus exposing the AI to legal claims for damages by the client. As our members are concerned that there could be delays in collection and payment as a result of checking up on positive name matches, which may or may not be false positives, it would be helpful if the Ordinance could be amended to provide that where a receipt or payment has been delayed as a result of an AI complying with the legislation by conducting pre-collection and pre-payment filtering, that such delays shall not render the AI liable for damages.

Yours sincerely

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The Hong Kong Association of Banks