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15 March 2012

Dear Mr YAU,

Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

To assist our scrutiny of the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 (the Bill), we should be grateful for your clarifications on the legal and drafting issues set out at **Annex I**. Our comments on the Chinese text of the Bill are set out at **Annex II**. Please send us your reply in both languages as soon as possible. Please also send an electronic copy of your reply to ftse@legco.gov.hk.

Yours sincerely,

Bonny LOO,

(Bonny LOO)
Assistant Legal Adviser

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Use of notes

1. The Bill uses various notes (e.g. under the proposed definitions of "product" and "trader" in the proposed section 2, and in the proposed sections 7A, 15(1) and 19). Is it necessary to clarify their status and legislative effect (if any) by adding a provision similar to clause 2(6) of the Companies Bill?

Proposed section 2

2. The matters listed under the two definitions of "trade description" in relation to goods and services are different. Please explain the discrepancies between the two lists. For example, why are the following matters omitted from the definition of "trade description" in relation to a service?
 - (a) "liability to pay tax under the laws of Hong Kong";
 - (b) "its being of the same kind as a service supplied to a person";
 - (c) "availability in a particular place of after-sale service assistance"; and
 - (d) "the charge or cost at which the after-sale service assistance is available"
3. As regards the new paragraph (ed) proposed to be added to the definition of "trade description" in relation to goods, should the reference to "duty" be changed to "tax" so as to cover all kinds of taxes including customs duty, sales tax, goods and services tax or value added tax which may now or in the future be imposed, bearing in mind that the proposed section 13E(4)(d)(i) refers to "taxes" rather than "duty"?
4. The proposed section 2(4) clarifies that a service supplied in relation to immovable property may be a product. However, it is noted that architects, professional surveyors, professional planners, land surveyors, estate agents, salespersons, landscape architects and professional housing

managers who provide services in relation to immovable property are exempted from the application of the Bill, so that unfair practices engaged in by these persons would not be covered by the Bill. Please therefore provide examples of the types of services supplied in relation to immovable property which are intended to be caught by the Bill.

Proposed sections 7 and 7A

5. It is noted that while a person can commit an offence under section 7(1)(a)(i) by merely applying a false trade description to any goods (even though the goods are not supplied or offered to be supplied to anyone), a trader could not be prosecuted for an offence under the proposed section 7A(a) unless the service to which he applies a false trade description is supplied or offered to be supplied to a consumer. The different formulations seem to have the following effect: for the offence of false trade description of goods, the defendant can be any person (including an exempt person) acting in the course of trade or business and the person to whom the goods are offered or supplied can be anyone, whereas the proposed offence of false trade description of services could only be committed by a trader (not being an exempt person) who supplies or offers to supply the service to a consumer.

Please explain the different scopes of application of the proposed offences of false trade description of goods and services. Why, in relation to services, is the proposed prohibition of false trade descriptions confined to the provision of service *to consumers* while there is no such restriction in relation to goods?

6. If we are correct about the limited scope of application of the offence of false trade descriptions of services, please consider whether the proposed insertion of the phrase "to prohibit false trade descriptions in respect of services supplied by traders" in the long title of Cap. 362 should be further qualified by adding the words "to consumers" after "traders".

Proposed section 4

7. It is further noted that the proposed amendments to section 4 seem to have a similar effect of creating two different offences under section 4(2):

- (a) the supply of goods by *any person in the course of any trade or business* in contravention of any order made by the Chief Executive in Council under section 4(1); and
- (b) the supply of services *by any trader to a consumer* in contravention of such an order.

Please explain the different scopes of application of the proposed offences of in relation to goods and services.

Proposed section 6A

8. Section 6 and the proposed section 6A seek to explain how a trade description is deemed to be applied to goods and services respectively. However, the two sections use slightly different language:

- (a) while section 6(1) uses the expression "A person applies a trade description... if he", the proposed section 6A(1) says "A person is to be regarded as applying a trade description... if the person"; and
- (b) while section 6(3) says "the person supplying the goods shall be deemed to have applied", the proposed section 6A(3) uses the words "the person supplying the service is to be regarded as having applied".

Is there any reason for using different formulations under these two sections?

Proposed repeal of section 7M of the Telecommunications Ordinance (Cap. 106)

9. The Bill proposes to repeal section 7M of Cap. 106 which at present prohibits a licensee from engaging in any misleading or deceptive conduct in providing, acquiring, promoting, marketing or advertising telecommunications networks, systems, installations, customer equipment or services. Section 39A(1) of Cap. 106 further provides that a person sustaining loss or damage from a breach of section 7M may bring an action for damages, injunction or relief against the person in breach:

- (a) The person sustaining loss or damage as a result of the licensee's misleading or deceptive conduct can be a consumer or a business. Since the new offences under the Bill (i.e. the proposed sections 7A and 13E to 13I of Cap. 362) could only be committed in relation to a consumer, would a business aggrieved by misleading or deceptive conduct in the telecommunications sector be left without any remedy after section 7M of Cap. 106 is repealed?
- (b) According to the Administration, section 7M is proposed to be repealed as it would be essentially covered by the new offences under the Bill. To avoid the possibility that the proposed discrete offences of false descriptions of goods or services, misleading omissions, aggressive practices, bait advertising, bait and switch and wrongly accepting payment may not be broad enough to cover all unfair trade practices hitherto prohibited under section 7M of Cap. 106, would the Administration consider retaining the section? Indeed, in similar legislation in Australia (i.e. the *Australian Consumer Law* (ACL)) and the United Kingdom (i.e. the *Consumer Protection from Unfair Trading Regulations 2008* (CPR)), a general prohibition against misleading, deceptive or unfair conduct in trade or commerce (e.g. section 18 of ACL and Regulation 3(3) of CPR) is retained although specific types of unfair practices (e.g. misleading actions or omissions, aggressive commercial practices, bait advertising, bait and switch and wrongly accepting payment) are prohibited. Should a similar approach be adopted in the Bill?

Proposed section 13D – Average consumer

10. In relation to the proposed section 13D:

- (a) The proposed subsection (3)(b)(i) deals with consumers who are particularly vulnerable because of "mental or physical infirmity, age or credulity". Why are other factors such as education level, financial disadvantage and "specific misfortune or circumstance" referred to in the proposed section 13F(3)(c) not also included as relevant factors in deciding whether a group of consumers is particularly vulnerable?

- (b) The proposed subsection (4) refers to "the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally". By whose standards is it to be judged whether the advertising practice is "common and legitimate" and whether or not the relevant exaggerated statements are meant to be taken literally? Is it the standards of the advertiser, the average consumer referred to in the proposed section 13D(1) who is "reasonably well-informed, reasonably observant and circumspect", or the consumer referred to in the proposed section 13D(3)(b)(i) who is particularly vulnerable because of mental or physical infirmity, age or credulity? Should provisions be included to cover this matter?
- (c) The proposed subsection (5) defines "materially distort" to mean "appreciably to impair" etc. The word "appreciably" appears to impose a rather high threshold. Please provide examples to illustrate in what circumstances the average consumer's ability to make an informed decision would be said to have been "appreciably" impaired. If the policy intent is to prohibit unfair practices which cause the average consumer to make a transactional decision he would not have made otherwise, would it be simpler to define "materially distort the economic behaviour" to mean "to cause an average consumer to make a transactional decision that the consumer would not have made otherwise"?

Proposed section 13E – Misleading omissions

11. Paragraph (b)(ii) of the definition of "material information" under the proposed section 13E(5) refers to "any other information required in relation to a commercial communication under any other enactment". What information is intended to be covered by this definition? Please provide examples of the relevant requirements under other enactments.
12. Under the proposed section 13E(5), in the definition of "professional diligence", reference is made to "honest market practice in the trader's field of activity" and "the general principle of good faith in that field". Are these common law concepts or based on jurisprudence of the European Court of Justice? How are "honest market practice" and "the general principle of good faith" in a particular trader's field to be

established as a matter of evidence? Would the court require upstanding and respectable representatives of the relevant field to testify on such matters, or are they matters of which the court could take judicial notice?

13. The proposed section 13E appears to have been modelled on Regulation 6 of CPR which is in turn based on the *Unfair Commercial Practices Directive (2005/29/EC)*. According to the Guidance on the CPR issued by the United Kingdom Office of Fair Trading, "professional diligence is an objective standard which will vary according to the context" (paragraph 10.5); while "honest market practice" and "good faith" are not defined in the CPR, "they are similar and overlapping principles" which "require traders to approach transactions professionally and fairly as judged by a reasonable person" (paragraph 10.6). Would these matters be addressed in the guidelines to be issued under the proposed sections 16BA and 16H of Cap. 362?

Proposed section 13F – Aggressive commercial practices

14. In defining what constitutes an "aggressive commercial practice", the proposed section 13F(2)(a) refers to the use of "harassment, coercion or undue influence". While the latter two concepts are defined in the proposed subsection (4), "harassment" is not defined. Is it also necessary to define "harassment" in the Bill?

Proposed section 13G – Bait advertising

15. The proposed section 13G appears to have been modelled on section 35 of ACL which provides that advertising at a specified price is bait advertising if "there are reasonable grounds for believing that the person will not be able to offer for supply" the relevant products at that price. The proposed section 13G(2), however, has flipped the formulation over such that the prosecution must prove that "there are no reasonable grounds for believing that the trader will be able to offer for supply those products at that price".
 - (a) Whose belief must be examined by the court? Is it the defendant's or a reasonable trader's?

- (b) Please explain the proposed departure from the formulation used in section 35 of ACL. Would the departure affect the burden or standard of proof or any matters which must be proved by the prosecution?

Proposed section 13I – Wrongly accepting payment

16. This section appears to have been modelled on section 36 of ACL which provides that a person must not accept payment for goods or services if "there are reasonable grounds for believing that the person will not be able to offer for supply" the relevant products within the period specified by him or a reasonable period. Again, the proposed section 13I(2)(c) has flipped the formulation over such that the prosecution must prove that "there are no reasonable grounds for believing that the trader will be able to supply the product" within the specified period or a reasonable period.

Please consider whether the departure from the formulation used in section 36 of ACL would affect the burden or standard of proof or any matters which must be proved by the prosecution.

Nature of offences proposed in sections 13E to 13I

17. According to the LegCo Brief, it is the Administration's intention that the *mens rea* requirement is displaced in the offences proposed in the new sections 13E to 13I. However, it is noted that in some of these new provisions, words importing intention are used. For example:

- (a) The proposed section 13E(2)(b) uses the term "hide" (隱瞞) which seems to import an element of dishonest intent. Please clarify whether the proposed offence is one of strict liability or one that requires *mens rea*.
- (b) Paragraphs 8 and 11 of the LegCo Brief state that a trader could be guilty of the proposed offences of "bait advertising" and "wrongly accepting payment" if he held an unreasonable (albeit honest) belief that he would be able to supply the products. Does it suggest that the offences under the proposed sections 13G and 13I are strict liability offences?

- (c) The proposed section 13H (bait and switch) uses the terms "intention" and "refuses", whereas the proposed section 13I(2) (wrongly accepting payment) uses the term "intends". These words suggest that *mens rea* is required. Please clarify what *mens rea*, if any, is required to establish the proposed offences.

Proposed section 20 – Liability of directors, partners, etc.

18. The proposed section 20(2) refers to various persons acting in different capacities:

- (a) While "principal officer" and "shadow director" are defined in the proposed subsection (3), is it also necessary to define "secretary" and "manager"? If "secretary" is intended to mean "company secretary", please consider making that explicit in the Bill as has been requested by both the Bills Committee on Competition Bill and the Bills Committee on Companies Bill.
- (b) The definition of "principal officer" appears to be based on that under Part 1 of Schedule 1 to the Broadcasting Ordinance (Cap. 562), but the words "or engaged" (which appear after "employed" in Cap. 562) are omitted from both paragraphs (a) and (b) of the proposed definition. What is the rationale for limiting the definition to persons employed (but not engaged) by the body corporate?
- (c) The definition of "principal officer" and the definition of "shadow director" (which appears to be based on that under the Companies Bill) both use the term "the directors" (一眾董事). Please clarify whether that expression is intended to mean "all the directors" or "any one or more director", bearing in mind that section 7(2) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that words and expressions in the plural include the singular and *vice versa*. If the Administration's intention is to refer to "all the directors", please make this clear in the English text.

Proposed section 21A – Extra-territoriality

19. While a note is proposed to be added under section 7A to refer to section 21A which seeks to give section 7A extra-territorial effect, no such note is proposed to be added under section 7 or the proposed sections 13E to 13I:
 - (a) Please clarify which proposed offences under Cap. 362 are intended to be given extra-territorial application by the proposed section 21A which applies to a trader (as opposed to any person acting in the course of trade or business).
 - (b) Is section 21A not intended to cover false trade descriptions of goods directed to consumers outside Hong Kong?
 - (c) If the unfair trade practice offences under the proposed Part IIB are intended to have extra-territorial application by virtue of section 21A, why is a note similar to that under the proposed section 7A not inserted under each of the proposed sections 13E to 13I?
20. Please also consider whether it is necessary to include a provision similar to section 7(2) of the Unconscionable Contracts Ordinance (Cap. 458) to pre-empt any attempt by traders to evade the operation of Cap. 362 (including the proposed rights of private action under section 36) or to oust the jurisdiction of the Hong Kong courts by artificially inserting a choice of law clause in the contract to apply the law of a jurisdiction other than Hong Kong.

Proposed section 36 – Actions for damages

21. Under the proposed section 30P, only an authorized officer may apply to the District Court for an injunction. The proposed section 36 seeks to allow an aggrieved person to commence action to recover damages but, unlike section 39A of Cap. 106, it does not seem to allow the person to seek injunctive or other relief in lieu of or in addition to damages:
 - (a) Please clarify whether a claimant for damages under the proposed section 36 may also seek injunctive and other relief from the court.

- (b) The proposed section 36(2) provides for a 6-year limitation period. When does the proposed statutory cause of action start to accrue? Is it the date when the defendant engages in the unfair trade practice or the date when the claimant sustains the damage? Is it necessary to provide for this matter in the proposed section 36?

New Part III - Enforcement-related matters

22. As you are aware, the Communications Authority Ordinance (Cap. 616) is due to come into operation on 1 April 2012 (L.N. 18 of 2012). As such, should all references to "Telecommunications Authority" (TA) and "Broadcasting Authority" (BA) be replaced with "Communications Authority" (CA) in the proposed sections 16E to 16H of Part III, and appropriate changes also be made to the relevant definitions in section 2?
23. Please also confirm whether a notice made under the proposed section 16E(2) is intended to be subsidiary legislation subject to scrutiny by the Legislative Council (LegCo) under section 34 of Cap. 1.
24. The proposed section 15(1)(ca) seeks to empower an authorized officer to require production of "any books or documents required to be kept under" Cap. 362. Apart from the requirement to retain invoices and receipts under section 6(2) of the Trade Descriptions (Marking) (Gold and Gold Alloy) Order (Cap. 362 sub. leg. A), please provide further examples of the books and documents that are required to be kept under Cap. 362 and its subsidiary legislation, which may be subject to production under the proposed section 15(1)(ca)? Would a person be able to resist production of such documents or books on the grounds of legal professional privilege and/or the privilege against self-incrimination? If so, is it necessary to specify these matters in the Bill?
25. The proposed sections 16BA and 16H contemplate the issuance of guidelines by the Commissioner of Customs and Excise (Commissioner), BA and/or TA. While the proposed sections make clear that such guidelines are not subsidiary legislation, the issuers must consult any persons the issuers consider appropriate before issuing or amending such guidelines, copies of which must be made available to the public for inspection at the issuers' office during ordinary business hours:

- (a) Please advise how these guidelines (including any amendments or revocation thereof) are proposed to be published in the future.
 - (b) Would they be published in the Gazette and/or uploaded onto the relevant department / Authority's website?
 - (c) Who are the persons that are likely to be consulted before any such guidelines are issued or amended?
 - (d) Would any persons be consulted at all before such guidelines are revoked?
26. How would any memorandum of understanding (MOU) to be signed between the Commissioner, TA and BA (and upon their merger, CA) under the proposed section 16G be published? Would the relevant LegCo Panel be consulted before such MOU is signed or amended?

Proposed Part IIIB

27. In relation to undertakings:

- (a) The proposed sections 30L(4) and 30P(3) contemplate that an undertaking may be published in any form and manner that an authorized officer or the District Court thinks appropriate. How are such undertakings proposed to be published?
- (b) Upon withdrawal of acceptance of an undertaking, should an authorized officer not be able under the proposed section 30N(3)(b) to resume or continue (as well as bring) proceedings in a court relating to the matter to which the undertaking related?
- (c) The proposed section 30N(3)(c) provides that upon withdrawal of acceptance of an undertaking, a statement of any fact contained in the undertaking may be admitted in evidence and, on its admission, is conclusive evidence of the fact stated. Does the Commissioner intend to specify a standard form for the undertaking and, if so, would the specified form, as a matter of procedural fairness, include a pre-printed warning drawing attention to the possible

consequences of making statements in the undertaking including those set out in the proposed section 30N(3)(c)?

28. Is it appropriate for the heading of the proposed section 30S to use the abbreviation "CFI" without the term having been defined first?

Proposed section 43 of Cap. 106

29. In relation to the proposed section 43 of Cap. 106, is it necessary to make clear in subsections (4) and (6) that in order for the transitional provisions to apply, the relevant appeal subject matter or breach (as the case may be) must relate to conduct engaged in, or in part engaged in, before the commencement date, as provided in subsection (2)(a)?

Cooling-off arrangements

30. Is there any reason for not including provisions on cooling-off arrangements as originally proposed in the public consultation report published in January 2011?

**Comments on the Chinese text of the
Trade Descriptions (Unfair Trade Practices)
(Amendment) Bill 2012 (the Bill)**

- (a) While "產品" (product) is defined to mean any goods or service, the term "商品" is not defined. With the proposed extension of the Trade Descriptions Ordinance (Cap. 362) (the Ordinance) to cover services, would the continued use of the term "商品" (including in the short title) cause any confusion as to the scope of application of the Ordinance, because "商品" may suggest that the Ordinance is concerned solely with goods (貨品) but not services?
- (b) The proposed definitions of "廣管局" (Broadcasting Authority) and "電管局局長" (Telecommunications Authority) have been omitted from section 2(1) of the marked-up copy of the Chinese text of the Ordinance at Annex B to the LegCo Brief. In the marked-up copy, the proposed section 7A(b) seems to contain a redundant "應" after "向消費者提供". In the proposed section 16E(6)(b), the word "人" is missing after "持牌". Please amend the marked-up copy of the Ordinance to correct the above errors and send us a revised version as soon as possible.
- (c) Do you also intend to prepare a similar marked-up copy of the relevant provisions of the Telecommunications Ordinance (Cap. 106) to incorporate the proposed amendments under Division 2 of Part 5 of the Bill?
- (d) Under the proposed definition of "一般消費者" (average consumer), "see section 13D" is rendered as "見第 13D 條". However, in the context of the proposed notes under the definitions of "商戶" (trader) and "產品" (product), as well as the note proposed to be added to section 19, "see" is rendered as "參看". Please adopt the same Chinese renditions for words used in similar contexts.
- (e) Under the existing sections 4(1) and 5(1), "including" is rendered as "包括有", but the proposed amendments to those sections use the expression "包含". Please explain why the latter is to be preferred.

- (f) Under the existing section 6(1)(d), the phrase "to the effect that" is rendered as "意思是指", whereas the same expression is rendered as "表示" in the proposed section 6A(1)(b). Please explain why different Chinese expressions are used.
- (g) The Bill seeks to render "supply" or "supplied" differently as "供應" and "提供" in relation to goods and services respectively (see, for example, the proposed section 8(3)). However, the proposed section 8(2)(b) uses "供應" in respect of both "貨品" and "服務". Is it necessary to further amend the proposed section 8(2)(b) to achieve consistency with other provisions of the Bill and the Ordinance.
- (h) While "the goods" are generally rendered in the plural as "該等貨品" (see, for example, section 8(3)), the term is rendered in the singular as "該貨品" in the proposed section 6(3). Please explain why the singular expression is used in that subsection.
- (i) The term "directed to" is rendered as "以 ... 為對象" under the proposed sections 13D(1), 13D(3)(a) and 21A, but is rendered as "針對" in the proposed section 36(1)(a). Please explain why different Chinese renditions are used.
- (j) In relation to the proposed section 13D(3)(b):
- (i) Is "特別易受 ... 左右" an appropriate rendition for the expression "particularly vulnerable to" in the context of legislation? Would "影響" be more appropriate and less imprecise than "左右"?
 - (ii) Please consider recasting the Chinese rendition of "in a way which the trader could reasonably be expected to foresee" in the proposed subparagraph (i) along the lines of the proposed definition of "undue influence" under the new section 13F(4) to make it more readable, i.e. "且特別易受左右(影響)的方式是按理可期望有關商戶會預見的".
 - (iii) Is "消費表現" (as opposed to "經濟表現") an appropriate rendition for "economic behaviour" in the proposed subparagraph (ii)?

- (k) In relation to the proposed section 13E(4)(f):
- (i) In the proposed subparagraph (ii), would the expression "送貨" be construed to exclude the delivery of service? If the delivery of both goods and services is intended to be covered, a better rendition may be "交付" which is used in the proposed section 13H(2)(b) to refer to "deliver".
 - (ii) In the proposed subparagraph (iii), would "供應產品" be too narrow a rendition for "performance"? Would "履行交易" or "履行合約" be a better rendition in the context of that subparagraph?
- (l) In the proposed section 13H(2), "有關產品" is a defined term to refer to "the product". No such definition, however, appears in the English text. To achieve consistency between the English and Chinese texts, and to avoid any possible confusion that the term "the product" under section 13H(2)(a) to (c) may be misconstrued as referring to "a different product", should "a product" also be defined as "the product" when it first appears in the English text of that subsection?
- (m) Similarly, "某產品" is defined in the Chinese text of the proposed section 13I(2) as "有關產品" with the result that the clause "in respect of which the payment or other consideration is accepted", which appears in the English text of subsection (2)(b), is omitted from the Chinese text. Should "a product" be similarly defined as "the product" to achieve consistency between the English and Chinese texts?
- (n) In the proposed section 16F(1), the term "執行當局" is defined, but no such definition appears in the English text. To achieve consistency between the two texts, should a definition of "enforcement agency" or "enforcement authority" be used in the English text as well?
- (o) To ensure that the Chinese text corresponds to the English text as much as possible, and to simplify the Chinese text, should "The Telecommunications Authority, or the Telecommunications Authority jointly with the Commissioner, may" in the proposed section 16H(1) be rendered as "電管局局長，或電管局局長聯同關長，可"?

Similar changes may also be made to the proposed section 16H(2) in relation to the Broadcasting Authority (廣管局).

- (p) While the English text of the proposed Schedule 4 uses "or" to connect "(Cap. 485)" and "the Securities and Futures Ordinance (Cap. 571)", the Chinese text uses "及". Is that a typographical error?