Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

The Administration's Replies to Questions raised by the Assistant Legal Advisor in his letter of 15 March 2012

Questions in Annex I

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?

1.1 As we have verbally advised at the meeting held on 12 April, the notes used in the Bill are merely signposts to relevant provisions. They could not possibly affect the interpretation of the legislation. Having regard to their nature, a clause explaining their status is unnecessary.

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".

2.1 As we have verbally advised at the meeting held on 12 April, the two definitions are framed in an all-inclusive fashion, that is to say, any indication, direct or indirect, and by whatever means given, with respect to the goods or service or any part of it, will fall within the

definitions. The matters mentioned in the paragraphs under the definitions are in our view the most relevant examples. They may be framed differently because of differences in nature between goods and services. This would not affect the all-inclusive nature of the definitions. We do not see a strong need to add the four matters referred to under the proposed definition of trade description in relation to a service.

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"?

3.1 Because of the all-inclusive nature of the proposed definitions, the use of "liability to pay duty" does not mean that the liability to pay tax is not a trade description.

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.

4.1 As we have verbally advised at the meeting held on 26 April, an example is decoration and interior design services supplied by a general furniture shop to a consumer.

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?

5.1 As we have verbally advised at the meeting held on 26 April, the current offence of false trade descriptions of goods indeed does not only apply in a trader-consumer context. On the other hand, the policy objective of the Bill, pursuant to the public consultation we conducted in late 2010, is to enhance consumer protection through tackling common types of unfair trade practices which may be deployed against consumers. The proposed offences (including false trade descriptions of services) therefore are meant to apply in a trader-consumer context only. In this light, expanding the scope of application of the proposed offence of false trade description of services would not be in line with the policy objectives of the current legislative exercise.

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".

6.1 As we have verbally advised at the meeting held on 26 April, we do not consider it necessary to add the reference "to consumers" after "traders" in the Long Title, because as defined, a "trader" must be acting in relation to a consumer, by operation of "commercial practice" in the definition.

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.

7.1 Please refer to paragraph 5.1 above.

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?

8.1 The different formulations arise from the use of gender-neutral language in new provisions and the contemporary preference for terms such as "is to be regarded as" instead of "deemed" when creating a legal fiction.

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?

9.1 As explained in paragraph 5.1 above, the policy objective of

the Bill, pursuant to the public consultation we conducted in late 2010, is to enhance consumer protection through tackling common types of unfair trade practices which may be deployed against consumers. The proposed offences (including false trade descriptions of services) therefore are meant to apply in a trader-consumer context only. It is neither fair nor appropriate to subject traders from a single specific sector to additional prohibitions not applicable to other traders to which the Bill applies. In any event, the majority of the cases in relation to section 7M of the Telecommunications Ordinance (Cap. 106) concern aggrieved consumers.

9.2 Major categories of misleading or deceptive conduct that are covered by section 7M will be covered by the proposed unfair trade practices provisions. In fact, the proposed unfair trade practices provisions would offer wider protection in that "aggressive practices", which currently does not fall within the scope of section 7M, will be created as an offence under the proposed section 13F. Furthermore, the amended TDO is a control regime which includes criminal enforcement, where the Customs and Excise Department (C&ED) and the Communications Authority (CA) are responsible for investigation and it is for the court to decide whether an offence has been committed, while section 7M of the Telecommunications Ordinance is merely a civil enforcement regime, where the CA assumes both the roles of investigator and adjudicator in respect of whether an alleged conduct is in breach of section 7M. The co-existence of two entirely different regimes against broadly the same conduct is not practicable and cannot be justified. It would be discriminatory and objectionable for the telecommunications sector to be singled out for regulation under two different regimes. There would also be operational difficulties in enforcing two separate regimes over the selling conduct of telecommunications operators.

9.3 The issue of introducing a general prohibition as in the case of Australia and the United Kingdom was addressed in the report we issued in January 2011 pursuant to the public consultation. The relevant extract is appended below. Our position remains the same –

> " 3.5 ….On the issue of introducing a general prohibition, we recognize the flexibility it can provide. However, the specific offences that we proposed would already be able to combat and deter the more commonly seen unfair trade practices in Hong Kong and our proposals as a whole amount to significant improvements over the current legislative regime. Also taking also into account the importance attached by some quarters about specificity in crafting

the prohibited unfair trade practices and the likely enforcement difficulties arising from such a general prohibition, we have no plan at present to introduce a general prohibition in the TDO."

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"?

10.1 On item 10(a), first of all, if a commercial practice is held to be directed to a group of consumers with a common attribute, for instance, low education attainment or financial position, by operation of new section 13D(3)(a), the average consumer will be taken to be the average consumer of that group, and that attribute of the average consumer of that group will be taken into account in the determination of the effect (or likely effect) of the practice. "Vulnerability" in new section 13D(3)(b) refers to circumstances which may render the relevant persons susceptible to the practice in question. The attributes referred in item 10(a) above could come into play via the concept of "credulity", if the group of consumers is clearly identifiable.

10.2 On item 10(b), "the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally" is similar to "puff" in the law of contract. It is the standard of the group of consumers to which the practice is directed by which the effect of the practice is to be judged.

10.3 On item 10(c), the use of "appreciably" means that the impairment of the average consumer's ability to make an informed decision must be significant enough to be noticed. The threshold is not unduly high. The definition is modelled on that provided by regulation 2(1) of the Consumer Protection from Unfair Trading Regulations 2008 (UK). On the other hand, the effect of the alternative formulation suggested in item 10(c) should be the same. We will propose committee stage amendments (CSAs) to amend the proposed section 13D(3)(b)(ii) as "the practice is likely to cause the average member of only that group to make a transactional decision that the consumer would not have made otherwise." (subject to fine tuning) and remove the proposed section 13D(5).

10.4 In relation to the word "only" in proposed section 13D(3)(b)(ii), one of the deputations has expressed the view that the provision cannot kick in if it can be established that the practice in question is likely to materially distort the economic behaviour of the average member of another group (or the general public) as well. If the practice is likely to materially distort the economic behaviour of the average member of the group (e.g. old aged) and (for example) the general public, even if the standard of the average member of the general public is to be applied, the practice would also be in breach of the law. We therefore consider that the word "only" can be retained.

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.

11.1 As verbally advised at the meeting held on 26 April, various enactments require specific pieces of information to be included in advertisements (being a form of commercial practice). Examples are section 21 of the Gas Safety (Registration of Gas Installers and Gas Contractors) Regulations (Cap. 51, sub. leg.), section 18 of the Accreditation of Academic and Vocational Qualifications Ordinance (Cap. 592) and section 15 of the Residential Care Homes (Persons with Disabilities) Regulation (Cap. 613, sub. leg.).

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?

12.1 Professional diligence is broadly equivalent to the common law concept of duty of care. It is an objective standard which measures the diligence that a good businessman can reasonably be expected to exercise and must be commensurate with the duty to be performed and the individual circumstances of each case. The court may need to examine the relevant facts such as the general practice of the market concerned and certain objective tests will be imposed to examine whether honest market practice and the general principle of good faith have been applied in the context of the case concerned as judged by a reasonable person. These are questions of fact upon which expert evidence might

be required. The proposed provision is based on the United Kingdom's Consumer Protection from Unfair Trading Regulations (S.I. 1277/2008) which in turn seeks to implement the Directive of the European Parliament and the European Council 2005/29/EC on Unfair Commercial Practices. Jurisprudence in the European Court of Justice and the courts in the United Kingdom will be of reference.

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?

13.1 We are prepared to address the notion "professional diligence" in guidelines to be issued pursuant to new section 16BA.

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?

14.1 As we have verbally advised at the meeting held on 26 April, in general, a definition is only required when a meaning which differs from its ordinary common usage meaning (as per any standard dictionary) is intended. We do not consider it necessary to define "harassment" in the Bill as we consider that the word should take the ordinary dictionary meaning. In its Report on Stalking, the Law Reform Commission held the view that "harassment" is "an ordinary word that can easily be understood by the courts and the ordinary public" (paragraph 6.37).

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?

15.1 On item 15(a), the prosecution is required to prove beyond reasonable doubt, among other elements of the offence, that the circumstances were such that a common sense, right thinking member of the community would consider that there were no reasonable grounds to lead a person in the position as the trader to believe that he would be able to offer for supply those products at that price.

15.2 On item 15(b), it is not our intention to enable the prosecution of a trader on the basis of only *one* reasonable ground for believing that he will not be able to supply (even when reasonable grounds for believing that he will be able to supply also exist), as the Australian formulation would appear to permit. Our current formulation, that is, "there are no reasonable grounds for believing that the trader will be able to offer for supply", better reflects our policy intent. A defendant should be acquitted where the court entertains the existence of any reasonable grounds to vindicate him. It should be noted that the burden of proving a defendant's guilt beyond reasonable doubt remains at all times on the prosecution.

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.

16.1 Please refer to paragraphs 15.1 and 15.2. Furthermore, we wish to add that new sections 13G (bait advertising) and 13I (wrongly accepting payment) are respectively modelled on sections 157 and 158 of the ACL. Sections 35 and 36 are the equivalent civil provisions.

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.

17.1 As we have verbally advised at the meeting held on 26 April, in response to item 17(a), although proposed new section 13E(2)(b) refers to hiding material information, it is not necessary for the prosecution to prove dishonesty on the part of the defendant. In construing the meaning of "隱瞞", the ordinary and natural meaning of the word should be adopted, unless the context or purpose points to a different meaning. We consider that the proposed term "隱瞞" does not imply any element of dishonest intent. That said, we intend to propose a CSA to replace "隱瞞" with "隱藏" to avoid any possibility of mistaken understanding.

17.2 In response to items 17(b) and (c), as we set out in paragraph 15.1 above, the tests of "no reasonable grounds for believing" in respect of the proposed offences of "bait advertising" (section 13G) and "wrongly accepting payment" on grounds of "inability to supply" (section 13I(2)(c)) are objective.

17.3 On the other hand, the reference to "displacing the *mens rea* presumption" in the LegCo Brief does not pertain to the proposed offences "bait-and-switch" (section 13H) and "wrongly accepting payment" on grounds of "no intention to supply" (section 13I(2)(a) and (b)). The prosecution has to prove the intention as described in the proposed sections.

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.

18.1 On item 18(a), we understand that CSAs will be introduced to the Competition Bill to replace "secretary" with "company secretary". We will propose similar CSAs. The term "manager" is intended to bear its ordinary meaning and should not therefore require definition.

18.2 Regarding item 18(b), we will propose CSAs to include "or engaged".

18.3 As regards item 18(c), in the context it is very clear that the term "the directors" in the definition of "principal officer" and "shadow director" refers to all the directors.

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?

19.1 New section 21A applies when a trader engages in a commercial practice that is directed at consumers. In other words, it will apply, in relation to false trade descriptions of goods, when a trader applies, in an advertisement (being a form of commercial practice), a false trade description to goods for supply to consumers. It will also apply to all proposed offences.

19.2 While the note was inserted in section 7A to draw specific attention to section 21A in the context of that section its omission from other sections has no effect on the general application of section 21A to other offences relating to commercial practices.

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.

20.1 We will provide a response separately.

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?

21.1 In relation to item 21(a), proposed section 36 does not provide for the seeking of injunctive relief. Nevertheless, this does not prejudice a claimant's right under common law to seek other relief as appropriate.

21.2 In relation to item 21(b), the running of limitation periods is subject to normal common law rules. A cause of action for damages cannot accrue unless and until loss is incurred. Proposed new section 36(2) reflects the language of section 4(1) of the Limitation Ordinance (Cap. 347). We see no strong need for amendments.

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?

22.1 The Communications Authority Ordinance (Cap. 616) was brought into operation on 1 April 2012. We will propose CSAs to the Bill to reflect changes brought about by the commencement of that Ordinance.

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.

23.1 The notice to be made under new section 16E(2) is subsidiary legislation subject to LegCo's negative vetting.

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?

24.1 Five pieces of subsidiary legislation under the Ordinance require that invoices or receipts be kept. The relevant sections are section 6(2) of the Trade Descriptions (Marking) (Gold and Gold Alloy) Order, section 6(2) of Trade Descriptions (Marking) (Platinum) Order, section 4 of the Trade Descriptions (Provision of Information on Natural Fei Cui) Order, section 4 of the Trade Descriptions (Provision of Information on Diamond) Order and section 4 of the Trade Descriptions (Provision of Information on Regulated Electronic Products) Order.

24.2 As regards the point about possible safeguards for legal professional knowledge and that against self-incrimination, we will provide a response separately.

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?

25.1 The present intention is to have the guidelines published on the websites of C&ED and CA. The guidelines will also be made available for inspection by the public at the Headquarters of the two agencies. These guidelines will not be published in the Gazette as they are not subsidiary legislation.

25.2 The persons to be consulted will depend very much on the issues in question. We envisage that stakeholders including consumer advocates and relevant industry and trade organizations will be consulted. Similarly, pursuant to the principle enshrined in section 16BA(6), we will consult relevant stakeholders where there are material changes to the guidelines, including amendments and, in the very unlikely event, revocation.

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?

26.1 The MOU is similar to other co-operative arrangements that are signed between departments from time to time under the established legal framework. Being a document about internal operational arrangement, it is not required under the Bill that consultation be made in preparing the MOU or that the MOU be published. However, to enhance transparency, we propose the MOU be published in the websites of the respective enforcement agencies.

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)?

27.1 On item 27(a), as far as undertakings caused to be published by authorized officers are concerned, it is the intention of C&ED and CA that accepted undertakings will be published on their departmental websites.

27.2 Regarding item 27(b), proposed section 30N(1) sets out the circumstances in which an authorized officer may withdraw the acceptance of an undertaking. Simply put, the circumstances are such that the undertaking would not have been accepted if the circumstances were known before it was accepted or that the person who gave the undertaking has breached any of the terms. It is only appropriate that power be given for an authorized officer to commence or resume an investigation, or bring proceedings in a court, relating to a matter to which the undertaking relates, the same power that the officer had if the undertaking were not accepted in the first place.

27.3 As regards item 27(c), the Commissioner is prepared to see to it that any persons who are to give undertakings are adequately informed of the possible consequences of statements made in undertakings that may eventually be accepted. A pre-printed warning could be a suitable vehicle for the purpose.

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

28.1 There is no need to define "CFI" as used in the heading. When read with the text below its meaning is clear. Headings should be kept as short as possible.

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)?

29.1 For an appeal right under section 32N(1) or a right to bring an action under section 39A(1) of the Telecommunications Ordinance to have arisen before the commencement date, the conduct must have been engaged in before that date.

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?

30.1 We consulted the public on a package of legislative proposals against unfair trade practices in 2010. Generally speaking, our proposals received public support. The proposals can be broadly divided into two groups. The first group seeks to create offences against various types of unfair trade practices and enhance effectiveness in enforcement. The second group relates to the mandatory imposition of a cooling-off period. In the public consultation report published in January 2011, we proposed that the scope of the cooling-off arrangements should be expanded to cover two types of consumer contracts, namely those involving goods or services (or both) with a contract duration of not less than six months and those concluded during unsolicited visits to consumers' homes and places of work.

30.2 With the expansion in scope, the proposal would affect a

wide range of traders dealing in different goods and services. It would also affect business operation and the process in which consumers enter into contracts. We have met with different stakeholders and discussed detailed arrangements for implementing the proposals. Trade associations and others have expressed concerns about practical arrangements including the arrangements for consumers to exercise the right of cancellation, the refund arrangements and small-value transactions. We need more time to study how to address these concerns properly by legislation.

30.3 To ensure that consumer protection could be enhanced as soon as possible, we have proposed to tackle unfair trade practices as our top priority. Hence the Bill contains this group of legislative proposals. We briefed the Panel on Economic Development on this at its meeting held on 14 October 2011.

Questions in Annex II

31. Our response to the questions in Annex II to the ALA's letter is in the Enclosure.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
May 2012

Enclosure

The Administration's Replies to Questions raised by the Assistant Legal Advisor in Annex II of his letter of 15 March 2012

(a) The term "商品" is only used in the phrase "商品說明" (trade description) in the Ordinance. Trade description is proposed to be defined under section 2 of the Ordinance, in relation to goods and services respectively. The short title is intended to serve as a label of an ordinance only. Having examined the long title and provisions of the Ordinance, we consider that the scope of application of the Ordinance as amended by the Bill is clear that it will cover both goods and services.

(b)&(c) The latest marked-up version showing the proposed amendments under the Bill to the Trade Descriptions Ordinance (Cap. 362) and Telecommunications Ordinance (Cap. 106) was issued via our letter dated 5 April 2012.

(d) The proposed definition of "average consumer" is a signpost definition which refers readers to another substantive provision. The proposed notes under the definition of "trader" and "product" are to draw readers' attention to other relevant provisions in the Ordinance. We consider that the term "見" and "參看" are appropriate in the context of the provision. The two terms are also used in similar context in other legislation, for example in section 2 of the Legislation Publication Ordinance (Cap. 614) (definition of "verified copy") and section 2 of the Food Safety Ordinance (Cap. 612) (definition of "food distribution business").

(e) "包括有" may imply that a trade description itself has to be mentioned in the information, whereas the meaning of "包含" is wider and may cover information which is not itself a trade description. We consider that the latter term better reflects the meaning of sections 4(1) and 5(1).

(f) We consider that both "意思是指" and "表示" are appropriate for the purpose of bringing out the policy, while the latter is more common in recent legislation.

(g) We suggest to further amend section 8(2)(b) to read "如該類別的貨品或服務，是由發布或展示宣傳品的人供應或要約供應的，或提供或要約提供的，……".

(h) "The goods" is rendered as "該貨品" in the Bill where the term refers to one kind of goods. In section 6(3), "the goods" refers to "goods … supplied in pursuance of a request in which a trade description or trade mark or mark is used" ("貨品是依據某項使用任何商品說明、商標或標記的要求而供應的") mentioned earlier in the provision. Thus we consider that it is appropriate to render "the goods" as "該貨品" in section 6(3). In section 8(3) (as proposed to be amended by clause 9(6)), "the goods or services" is proposed to be rendered as "該等貨品或服務" because there are two objects, i.e. goods and services.

(i) Under the proposed section 36, the conduct concerned has caused loss or damage to the claimant. We consider that "針對", which has a negative connotation, is an appropriate rendition for "directed to" under the provision. Furthermore, the term makes the provision easier to read compared to "以……為對象".

(j) (i) According to dictionary, "左右" means "支配、操縱" (《現代漢語詞典》) or "影響、支配"(《國語活用辭典》). Therefore we consider the expression "特別易受…左右" is appropriate in bringing out the policy reflected by the equivalent English expression "particularly vulnerable to…" under the proposed section 13D(3)(b)(i).

(ii) We have considered the suggested formulation and are of the view that the formulation adopted in the current version of the proposed section 13D(3)(b)(i) is easier to read.

(iii) "Materially distort the economic behaviour" is defined under the proposed section 13D(5). The phrase is defined in relation to an average consumer. We consider that in the context of the definition, "消費表現" is an appropriate label.

(k) The intention is that section 13E(4)(f)(ii) and (iii) should cover (a) arrangements for delivery of goods and (b) arrangement for delivery of services. With a view to making this policy intention clear, we propose to amend section 13E(4)(f)(ii) to "arrangements for delivery of goods" ("送貨安排") and section 13E(4)(f)(iii) to "arrangements for supply of service" ("提供服務的安排").

(l)&(m) We consider that putting in place a tag “有關產品” referring to the subject “product” in the Chinese text of the proposed section 13H(2) will enhance the comprehensibility of the provision. As for the English text, we consider that the current version is clear thus it is not necessary to have a same tag.

(n) We consider that putting in place a tag “執行當局” for “the Commissioner, the Telecommunications Authority or the Broadcasting Authority” in the Chinese text of the proposed section 16F(1) will enhance the comprehensibility of the provision. As for the English text, we consider that the current version is clear thus it is not necessary to have a similar tag.

(o) We consider that the current Chinese version of the proposed section 16H(1) and (2) is clear and more readable when compared to the suggested version which follows the sentence structure of the English text strictly. We consider that the current Chinese version delivers the same meaning as that by the English text and do not see the need for the Chinese text to strictly follow the structure of the English text. The suggested version is more anglicized in linguistic terms.

(p) We will propose CSAs to substitute “及” by “或” in the Chinese text of item 1 of Schedule 4.