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15 October 2018

Ms Shirley Chan
Clerk to Bills Committee on Travel Industry Bill
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms Chan,

**Bills Committee on Travel Industry Bill
Letter dated 29 January 2018 from Hon Luk Chung-hung**

I refer to your letter dated 31 January 2018 enclosing a letter dated 29 January 2018 from Hon Luk Chung-hung to the Chairperson of the Bills Committee on his proposed Committee Stage Amendments (CSAs) to the Travel Industry Bill (the Bill). After our detailed examination of Hon Luk's proposed CSAs, our reply is as follows.

Proposed CSAs to Clauses 37 and 164 (Paragraph (l) Added)

Hon Luk proposed amending clauses 37 and 164 in the Bill such that if a licensed travel agent has not arranged a tour escort to accompany an outbound tour group, it must display, in the prescribed way, the prescribed information to the participants of the tour group.

We agree in principle with the regulatory requirement proposed by Hon Luk, but consider that it should be formulated by the Travel Industry Authority (TIA) by administrative measure instead of being stated in the primary and subsidiary legislation. Clause 153(2)(k) explicitly empowers TIA to issue guidelines, directives and codes of conduct (collectively called "administrative measures") to regulate licensees, and clause 55 requires that a

licensee must observe the administrative measures issued under clause 153(2)(k). The disciplinary procedures in Part 7 of the Bill also provide that a licensee contravening any of the administrative measures will be subject to disciplinary action. In future, TIA can require, by way of administrative measure, that a licensed travel agent must clearly state in promotional materials about any outbound tour (e.g. brochures) whether a tour escort is arranged to accompany the outbound tour, such that consumers can make informed decisions upon tour enrollment. There is therefore no need for the CSAs as proposed by Hon Luk.

Proposed CSAs to Clauses 38 and 39

Hon Luk proposed amending clauses 38 and 39 to mandate the collaboration between travel agents and tourist guides as well as tour escorts to be an employer-employee one across the board.

As we pointed out in LC Paper No. CB(4)1101/16-17(01), Hong Kong is a free market, and there is no legislation thus far that mandates, for any individual sector, all frontline practitioners to be employees. The collaboration relationship between individual firms and persons working for them should be decided as appropriate through liaison having regard to the circumstances of the sector and business concerned. At present, tourist guides and tour escorts can work as employees or self-employed persons for travel agents. Mandating all frontline practitioners to be employees will violate the free market principles all along adopted by Hong Kong. The Government considers that there are insufficient justifications for mandating the collaboration between travel agents and tourist guides as well as tour escorts to be an employer-employee one.

Nevertheless, we must emphasise that the Government accords great importance to safeguarding the rights and benefits of tourist guides and tour escorts as frontline practitioners. We have earlier clearly stated that TIA will require, through administrative measures, that a travel agent must sign a service agreement with its tourist guide or tour escort before entering into collaboration, whereby the travel agent must pay service remuneration to the tourist guide or tour escort; must not require its tourist guide or tour escort to bear or unreasonably advance any payment for a tour group received; and must not delay the reimbursement for any advance payment made by its tourist guide or tour escort. A travel agent contravening any of the administrative measures will be subject to disciplinary action.

As in the case of other sectors, to avoid any misunderstanding or dispute, before entering into collaboration, a travel agent and a tourist guide or tour escort should understand clearly their mode of collaboration according to

their intention, and the tourist guide or tour escort should clearly identify his/her identity as an employee or a self-employed person, to safeguard mutual rights and benefits. In differentiating the two identities, all relevant factors of the case should be taken into account. The court has already set out different factors for distinguishing an employee from a self-employed person in past cases¹. Even though a tourist guide or tour escort is called a self-employed person or has been labelled as a self-employed person in the contract, if in essence there exists an employer-employee relationship between the travel agent and tourist guide or tour escort, the travel agent is still required to fulfil its responsibilities under the relevant legislation, including the Employment Ordinance (Cap. 57), Employees' Compensation Ordinance (Cap. 282), etc., by paying statutory benefits retroactively to the tourist guide or tour escort concerned. Furthermore, the travel agent may be liable to criminal sanctions under the relevant legislation.

The Labour Department has been educating the public and employers on the differences, pros and cons as well as legal rights and obligations of the two contractual relationships of employment and self-employment. It has also adopted different measures to deter the malpractices of evading liabilities by purposely and falsely labelling an employee as a self-employed person. Such measures include providing consultation and conciliation service to those involved in disputes over false self-employment, referring them to the Labour Tribunal, or Minor Employment Claims Adjudication Board, as necessary to seek adjudication or institute civil claims, and taking enforcement actions against any employers who fail to fulfil their responsibilities under labour legislation.

On the basis of the foregoing, the Government does not support the CSAs proposed by Hon Luk.

CSAs Proposed to Clause 164 (New Paragraphs (m) and (n))

Hon Luk proposed amending clause 164 such that TIA may make regulations to prescribe the insurance policy that a licensed travel agent must take out for a person who is working as a tourist guide providing guiding service, or a person who is working as a tour escort, in accordance with its directions.

¹ The common important factors include: control over work procedures, working time and method; ownership and provision of work equipment, tools and materials; whether the person is carrying on business on his own account with investment and management responsibilities; whether the person is properly regarded as part of the employer's organisation; whether the person is free to hire helpers to assist in the work; bearing of financial risk over business (e.g. any prospect of profit or risk of loss); responsibilities in insurance and tax; traditional structure and practices of the trade or profession concerned; and other factors that the court considers as relevant. Since the actual circumstances in each case are different, the final interpretation will rest with the court in case of a dispute.

In case where tourist guides and tour escorts work for travel agents in the capacity of employees, the travel agents concerned are currently required to cover the liabilities under the law related to employees' compensation (including common law) and take out employees' compensation insurance policies for the tourist guides and tour escorts concerned under the Employees' Compensation Ordinance. We thus consider the repetition of such requirement in the Bill unnecessary, and likewise the CSAs proposed by Hon Luk.

In case where tourist guides and tour escorts provide service for travel agents in the capacity of self-employed persons, as mentioned in paragraph 3 above, we consider that such regulatory requirements should be formulated by TIA by administrative measure, instead of being stated in the primary and subsidiary legislation as suggested by Hon Luk's proposed CSAs. To ensure frontline practitioners are offered appropriate protection during their service period, TIA can in the future require, through administrative measures, that any self-employed person providing tourist guide or tour escort service for a travel agent must have a work insurance policy that meets TIA's prescribed basic requirements, and that the travel agent must ensure the tourist guide or tour escort concerned has taken out the aforementioned work insurance before entering into collaboration with them. Furthermore, the relevant premium for the aforementioned work insurance, which is to be taken out by the tourist guide or tour escort on his/her own, would be borne by the travel agent. We have consulted the trade on this proposed arrangement, and in particular the Outbound Committee, Inbound Committee and Mainland China Inbound Tour Affairs Committee of the Travel Industry Council of Hong Kong ("TIC") have held separate meetings recently and reached a consensus on supporting the formulation of the aforementioned administrative measures by TIA, such that the trade's service level and relevant protection can be enhanced.

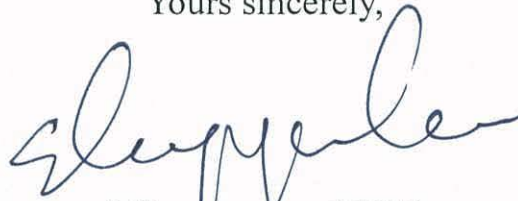
To ensure the timely implementation of the aforementioned arrangements, TIC will discuss with relevant parties as soon as practicable, to formulate the basic requirements of the aforementioned work insurance and the reference amount of the relevant premium, such that the arrangement, taking the form of an industry best practice, can be used by the trade voluntarily as a pilot as soon as practicable before the formulation of the aforementioned administrative measures by TIA.

CSAs Proposed to Section 1 in Schedule 9 to the Bill

Hon Luk proposed amending section 1 in Schedule 9 to the Bill such that appointed trade members of TIA must consist of not less than six representatives of travel agents and not less than six representatives of tourist guides and tour escorts.

As we pointed out in LC Paper No. CB(4)346/17-18(02), the Government will move CSAs on the composition of TIA's members. As regards the composition of trade members, the Government will appoint not more than three individuals who are engaged in carrying on outbound travel agent business, not more than three individuals who are engaged in carrying on inbound travel agent business, not more than three representatives of the TIC, and not more than four tourist guides or tour escorts. The Government considers that the arrangements above can already ensure balanced representation in the composition of TIA's trade members, covering travel agents of different businesses and sizes as well as frontline practitioners, such that TIA can have a comprehensive understanding of the trade's overall operations. Therefore, the Government does not support the CSAs proposed by Hon Luk.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sheung-yuen LEE', written in a cursive style.

(Sheung-yuen LEE)
for Commissioner for Tourism

Encl.

c.c. DoJ (Attn.: Mr Michael Lam & Mr Jonathan Luk) (By E-mail)