17th February 2012

Mr Gregory So, JP
Secretary for Commerce and Economic Development
22nd Floor West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Mr So,

Proposed Legislation on Unfair Trading Practices: The need for further consultation

We understand that the Government is aiming to present a Bill to Legco, incorporating its proposals on the above subject, by the end of the current Legco session, i.e. by July 2012. We are concerned that there has been no further public consultation on the Government's proposals since the Government published its conclusions from the first consultation as long ago as January 2011. We would urge the Government to hold a further consultation as soon as possible, before the Bill is published, for the following reasons:

1. Several respondents to the Government's first consultation, including this Chamber, pointed out that the need for the proposed new criminal offences had not been demonstrated. This leaves the impression that the mere existence of such offences in other jurisdictions, such as the EU and Australia, was viewed by the Government as sufficient justification in itself for the creation of these new offences in Hong Kong. We are sure that the Government would wish to dispel this impression: a further consultation would give it the opportunity to do so, and to provide an explanation of why it believes the benefits of creating such new offences exceed the costs.

   The proposal, which includes not just criminalisation of conduct previously governed by commercial law, but also a move to strict liability, is not seeking to codify existing Common Law principles. Instead, it effects fundamental changes to the legal framework. This underscores the need to ensure careful and full attention is given to whether jurisdictions that have gone down this road have maintained the necessary balance of fairness and justice and whether such legislation could, in any event, achieve that result in the Hong Kong setting. If there is to be consideration of a move to wholesale legislation in this area, any proposal should be carefully reconciled with the existing (tried and tested) Common Law legal principles that have been developed in

Hong Kong to ensure fairness and justice (both to claimants and defendants) is maintained.

2. Even assuming that the creation of such offences was justified on a cost-benefit analysis, many respondents have expressed concerns about the vague and subjective terms in which the proposed offences have been framed. The Government has acknowledged the lack of clarity, and sought to provide re-assurance by saying that it will *"put in every effort to refine the terms and definitions of the proposed offences and related terms when preparing the legislative amendments"*. The Government has also indicated that clarity will be provided in "implementation guidelines" which will be issued by the Customs and Excise Department (C & ED) once the amendments have entered into force. We do not believe it is appropriate for criminal law offences to be clarified in "guidelines". Criminal offences should be clearly and precisely codified so that it there is legal certainty as to precisely what conduct is and is not putting people at risk of criminal prosecution. Ideally, this should be done in the primary legislation, although some aspects could be left to subsidiary legislation. In any event, we believe strongly that it is in the interests of both the public and the Government for public consultation to take place on both the Government's proposed amended wording, and the C & ED's guidelines in draft form, before, and not after, the Bill is passed. In this way, any material issues can be resolved before the Bill is presented to Legco, thereby avoiding unnecessary disruption to the progress of the Bill through the legislative process.

3. In this respect, it is interesting to compare the Government's approach to its proposals in this case with two recent pieces of proposed legislation which have been presented to Legco, namely the Securities and Futures (Amendment) Bill and the Competition Bill. With the former, the relevant Government department and Security and Futures Commission have consulted not only on the terms of the draft legislation, but also on the draft SFC implementation guidelines, and it is intended that the latter will be finalized at the same time as the Bill is passed, not after it has entered into force. Similarly, as regards the Competition Bill, Bills Committee members have not been content to await the guidelines to be issued by the future Commission after the Bill is passed, particularly given the experience with the minimum wage legislation, and the Government has as a result been forced to issue indicative guidelines and receive public feedback on them before the Bill is passed. Consultation should also take place on the terms of the proposed legislation and the draft guidelines in this case, before the Bill is passed.

4. As well as clarity on the drafting of the proposed new statutory offences, respondents to the consultation raised a number of other fundamental issues on the Government's proposals, such as who will bear responsibility if the proposed new offences are breached – i.e. the company, management and/or frontline staff – and the circumstances in which civil or criminal enforcement respectively will be pursued. The Government has said that the former issue will be addressed at the legislative drafting stage, while the latter will be explained in the C & ED guidelines. We believe that neither of these responses is satisfactory. The question of who is liable for breach of a new statutory

offence is a fundamental one on which public consultation should take place before, not after, the Bill is presented to Legco. Similarly, the circumstances in which civil as opposed to criminal enforcement should be pursued should be addressed now, in the draft legislation; it should not be left to the C & ED for decide in future guidelines which it may issue. At the very least, if the matter is to be addressed in guidelines, those guidelines should be issued in draft form for public consultation at this stage or at the latest when the Bill is presented to Legco and any guidelines should have statutory force.

5. One of the Government's proposals is that there should be a private right of action for parties who have suffered loss as a result of a breach of any of the new proposed statutory offences. Presumably, this is intended to include "stand alone" actions (which do not require a prior finding of infringement by the court) as well as "follow-on" actions (i.e. actions following a finding of infringement by the court). By contrast, under the Competition Bill, as a result of pressure from small and medium-sized enterprises and concerns about promoting excessive litigation, the Government has withdrawn its proposals for stand alone actions, so that only follow-on actions would be permitted. Logically, one assumes that the same will apply under the proposed legislation in this case. Again, this is a matter which should be subject to public consultation.

The Government has said that *"with the introduction of the Bill, the community will have the opportunity to comment on the detailed key provisions"*. For the reasons mentioned above, we believe that, without further public consultation on several fundamental outstanding issues, discussions in the future Bills Committee will not be restricted to the drafting of the key provisions, but will inevitably have to address these fundamental issues which should have been addressed at the prior consultation stage. This will in turn disrupt and delay the legislative process. The experience with the Competition Bill provides a graphic illustration of these risks. We would therefore urge the Government to have a further consultation on the outstanding issues as soon as possible.

Yours sincerely,

Shirley Yuen
CEO