



**社區發展動力培育
就**

**《競爭條例草案》就法定團體訂明的豁免安排
作出之意見**

2012年2月28日

Comments on

Exemption Arrangements for Statutory Bodies
Under the Competition Bill

by

Community Development Initiative
February 28, 2012



社區發動力培育認為，部份政府部門及公營機構均從事經濟活動，而且當中更有與私營公司競爭的成份，嚴格來說，它們也算是從事經濟活動的「業務實體」。本智庫擔心，一旦所有政府部門及法定機構全數獲得豁免後，若它們在執行公共服務的同時從事經濟活動，並以其特殊身份作出壟斷及反競爭行為，便很可能以其優勢影響其他業界內競爭對手。

從歐洲個案，我們可以看到歐盟的做法並非對所有政府或法定機構活動全數豁免，只要該行為涉及商業活動並與市場經營相同業務的實體作出直接競爭時，一旦收到投訴，歐委會便會即時作出調查。因此，本智庫認為草案可參考歐盟的做法，無需事先強調政府及部份法定機構行為可獲豁免。而當有關行為涉及經濟活動，包括上述香港郵政的郵件速遞、國際特快郵遞、物流服務等多項收費服務及貿發局的展覽業務，由於這些商業行為與私營市場提供相同服務的企業實體直接競爭（速遞公司及物流公司），若上述政府部門或法定機構以其本身的優勢作出反競爭行為時，便應該受法例所規管。正如研究反壟斷法的內地學者所指，一個國家的反壟斷適用除外制度（即豁免機制）不是一成不變的，它會隨著科技發展和經濟形勢變化而作出調整，而反壟斷適用除外制度的總體發展趨勢是適用除外的範圍逐漸縮小。

本港的《條例草案》列明政府部門將全部獲得豁免，至於法定機構方面，政府亦擬訂了一份法定機構的名單，並向立法會提交，待立法會進行審批工作。本智庫認為，從上述例子可見，從事經濟活動的法定機構以至政府部門均確實存在，因此政府實在沒有強調豁免名單的必要。相反，本港可借鏡歐盟的做法，並不會在法例列明對政府部門作出豁免，只有在收到對政府部門的投訴後即時由競爭事務員會作出調查。至於法定機構方面，本智庫認為審批工作的權力應由現時的立法會交予競委會跟進。本智庫相信，審批法定團體是否獲得豁免的工作應透過競委會具經濟及法律角度的專業程序作出決定，而並非透過立法會的政治角力去處理。本智庫希望競委會能根據歐盟的準則及精神去批核相關的政府行為，並且根據每一個政府部門或法定機構的每一項行為逐一檢視，當中若發現法定機構所從事的商業活動並非法例所賦予的職能，或並非直接與提供主要公共服務或施行公共政策有關，就不應獲得豁免。

Community Development Initiative believes that there are some government departments and statutory bodies which are engaged in economic activities and at times compete with the private sector as well, so strictly speaking, they can be considered as an entity engaged in economic activity.

From these European Union competition law cases, we can see that not all government or statutory bodies enjoy full exemption from competition law. If the government or statutory body is involved in commercial activities and their conduct is in direct competition of other market operators, the European Commission will investigate whether this amounts to anti-competitive conduct immediately after receiving such a complaint. CDI believes the government should take reference to the approach taken in the European Union and there is no need for having to exempt all government and statutory bodies from competition legislation. Government departments and statutory bodies which are involved in the conduct of economic activities, such as Hon Kong Post and the TDC, and are in direct competition with the private sectors should be regulated by law.

Hong Kong's Competition Bill proposes to exempt all government departments and statutory bodies from this piece of legislation. The government will prepare a list of statutory bodies for the Legislative Council. Although the government has stressed there is no need for an exemption list since the activities of the public sector are almost non-economic in nature falling outside the scope of the bill, CDI believes there are government departments and statutory bodies which actually fall in the category of entities engaged in economic activity. We are of the view that perhaps Hong Kong should learn a lesson from the European Union and the government should not impose a blanket exemption on all government departments and statutory bodies. Like the EU's experience, the Competition Commission could investigate the conduct of government departments and statutory bodies after receiving a complaint. Rather than having the Legislative Council decide which statutory bodies should fall under the competition bill, it would be best to have the Competition Commission to take up this decision and to base their decisions from an economic and legal point of view. We hope the Competition Commission will adopt EU Competition law guidelines. The Commission should also view the acts of these bodies one by one in deciding whether or not they should be exempted from competition rules.