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**中環立法會道一號**
**立法會綜合大樓**
**競爭條例草案委員會**

尊敬的主席及副主席：

**釐清認為貿發局不應受《競爭條例草案》規管的誤解**

環球資源支持公平競爭的精神，反對《競爭條例草案》豁除法定團體(例如：香港貿易發展局「貿發局」)的建議。

我們過往已多次指出，參與經濟活動者不論公營私營，均應公平競爭，競爭法應一視同仁，不應設雙重標準，在同一市場內只規管商界而不管從事商業活動的法定團體。

貿發局65%收入(近16億元)來自貿易展覽會及訪問團業務，在本港展覽業的市場佔有率排行第一，高達45%[1]，並集三重角色於一身，不但代表官方推廣本港貿易，又擁有會展場地，同時舉辦展覽與私營展覽主辦商直接競爭，現時私營機構已難與其公平競爭。如競爭法豁除貿發局，等於將它凌駕於法律之上，損害本港公平競爭環境。

綜觀全球絕大多數司法權區，包括中國、歐盟、法國、日本及南韓等地的法定團體均受競爭法規管，如本港反其道而行，實有違國際慣例。附上過去曾提交的意見書[2]，解釋為何豁除法定團體的建議全無道理，亦不適合香港。

近日委員會在短時間內接獲多份意見書，認為貿發局不應受《競爭條例草案》規管，但各意見書均無正面回應我們過往多次提出的理據，並有多項誤解，我們將於下文一一釐清。

[1] 根據張惠民教授(中文大學決策科學與企業經濟學系主任)發表之《香港商貿展覽業概況》
[2] 請參考我們分別於2010年11月17日、2011年7月11日及2011年12月1日提交的意見書

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1. 貿發局展覽業務屬商業行為

(i) 有部份意見認為，貿發局是非牟利機構，經營活動並非與民爭利的商業行為，不應被視作「業務」看待，因此不需受競爭法規管。

(ii) 但貿發局過往提交立法會工商事務委員會的文件，已明確指出其**展覽會「以商業原則營運」**，以及「**是在平等的基礎上與同行良性競爭**」[3]，**因此貿發局早已承認從事經濟活動，與私營展覽主辦商直接競爭。**

(iii) 貿發局如由衷重視公平競爭精神，理應順應各方訴求，支持與其他展覽主辦商一視同仁，否則重視公平競爭之說僅屬空談。

2. 私營展覽會價格合理，質素高

(i) 有部份意見認為，貿發局主辦的貿易展覽會質素勝過私營主辦商、費用較便宜，亦只有貿發局願意舉辦高風險及投資回報不明朗的展覽會，但這些意見均值得相榷。

(ii) 論展覽會質素，張惠民教授的**研究訪問 180 個參展商，了解他們對私營與公營機構主辦貿易展覽會的評價，結果兩者評分相若**[4]；本地或海外參展商，一般都認為私營展覽主辦商的表現和貿發局不相伯仲，可見近期不少針對私營展覽主辦商的批評有欠公允。

(iii) 價格方面，我們與貿發局分別主辦多個題材相似的貿易展覽會，相比之下，**我們多個展覽會的價格都低於貿發局，例如電子產品展**。貿發局副總裁周啟良先生以往接受傳媒訪問時，亦曾談及貿發局的貿易展覽會收費問題。

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[3] 貿發局於 2004 年 4 月向立法會工商事務委員會提交之「香港貿易發展局舉辦展覽會推動香港貿易的工作及角色簡介」(http://www.legco.gov.hk/yr03-04/chinese/panels/ci/papers/ci0423cb1-1533-1c.pdf)

[4] 《香港商貿展覽業概況(第二階段)》，私營主辦商評分約為 3.24，公營主辦商為 3.33

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(iv) 周啟良先生曾表示：「**坦白說，好的展會價格不會便宜。價格就是門檻，如果價格高的話，太差的公司根本參不了展。如果參展公司的東西很差，是不會有買家的。**所以，在自由經濟下，不需要調控得太厲害，你只需要制定一個標準的價格即可。**有些價格太便宜，誰都能參展，這不能說就是好的。**」[5]

(v) 周啟良先生的言論，與認為貿發局主辦的展覽會費用「超值」或「低廉」的說法有異。亦說明展覽價格由市場決定之外，亦受品質品牌服務等因素影響。

(vi) 另外，並非只有貿發局才願意舉辦高風險及新題材展覽。正如香港會議展覽中心（管理）有限公司董事總經理王禮仕在報章撰文指出，2010 年 7 月至 2011 年 6 月，「**於會展中心舉行的展覽會多達 116 個，當中 10 個是新展覽。這 10 個新展覽由 9 個不同的私營展覽主辦機構舉辦。**」[6]

(vii) 可見近日連番被指責為「唯利是圖」、「賺錢掛帥」的私營展覽主辦商，其實是努力在貿發局的壟斷下爭取生存空間，願意舉辦不同題材的新展覽。

## 3. 貿發局受競爭法規管，仍可如常舉辦展覽，不影響支援中小企服務

(i) 有部份支持貿發局的意見擔心競爭法規管下，貿發局的服務會被指控為「掠奪性定價」或「綑綁式銷售」，令推廣本港貿易工作受阻，向中小企提供的服務及參展費用亦可能加價，導致貿發局服務範圍縮減，甚至要退出展覽業，最終令本港展覽業被外國公司壟斷。這些言論危言聳聽，但並不符合事實。

[5]「周啟良直擊香港會展業繁榮之源」中國會議產業網 http://www.meetingschina.com/news2494.aspx
[6]「保自由競爭 穩港展覽業龍頭」經濟日報 2011 年 12 月 10 日

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(ii) 貿發局展覽會及服務收費不會因競爭法的規管而受影響，中小企利益亦不會受損。正如我們之前提交的意見書已一再指出，**《競爭條例草案》附表一第三條已明確指出，令整體經濟受益的服務可作為豁除理據，保障貿發局繼續履行其法定職務，以支援、推廣中小企業務及如常舉辦貿易展覽會**。政府亦可繼續向貿發局或其他貿易展覽主辦商提供補貼，確保中小企可繼續受惠於相同甚至更低的參展費用。

(iii) 同時，日後成立的競爭事務委員會亦設有機制，拒絕調查因錯誤理解而提出的投訴。故此實無必要將貿發局完全豁除於競爭法之外。

4. <u>私營展覽主辦商支援中小企業務</u>

(i) 競爭法如規管貿發局，促進展覽業公平競爭環境，將有助吸引更多展覽主辦商來港，帶來更多展覽題材及海外買家，令本港展覽業發展更蓬勃。

(ii) 事實上，這有助貿發局支援中小企，因為**私營展覽主辦商在灣仔香港會議展覽中心舉辦展覽，需向會展管理公司支付場地租金，而據資料顯示，會展中心整體運作的毛利收入約 8.6%由貿發局收取，換言之，私營展覽主辦商正資助貿發局的貿易推廣工作** 。

(iii) 如《競爭條例草案》不規管貿發局，損害公平競爭環境，無助吸引展覽主辦商來港營運，有礙展覽業健康發展。

5. <u>貿發局展覽業務具市場支配力量</u>

(i) 商務及經濟發展局常任秘書長黃灝玄早前向傳媒表示，貿發局在市場並無支配地位，並無理由要將貿發局納入競爭法規管。

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(ii) 但無論是張惠民教授或是其他顧問機構的研究，均指出貿發局在本港展覽業的市場佔有率約 45%，是全港最高，比第二位的 16%高出接近 30%，根據歐盟定義，已具市場支配力量。

(iii) 其實所有從事經濟活動的機構只要參與市場競爭，即使無市場支配力量亦應要受競爭法規管。具支配力量的貿發局更無不受規管之理，否則公平競爭環境將進一步被扭曲。

6. 多個界別反對豁除法定團體　政府需正視

(i) 競爭條例草案推出前，**政府早於 2005 年成立競爭政策檢討委員會，負責研究競爭政策，委員會成員包括貿發局總裁林天福**。其後競爭法詳細報告書的公眾諮詢，提出要豁除所有法定團體，但各界回應諮詢均壓倒性反對或對此建議有保留，包括歐盟、法律界、政界、商會、企業、學者以至消費者委員會等。

(ii) **政府在諮詢文件總結亦承認，「很多回應者認為當政府或法定團體參與經濟活動時，競爭法應適用，以維護公平競爭的原則」、「公眾的意見均提供了有用的見解。我們在草擬競爭法時將會參考這些見解」**[7]。

(iii) 然而，之後競爭條例草案推出，卻繼續建議豁除所有法定團體，並無回應諮詢期間收到的各項反對者訴求，只表示多數法定團體並無從事經濟活動。政府公然漠視各種反對聲音，更指看不到貿發局有理由要受競爭法規管，令人費解。

[7]「競爭法詳細報告書公眾諮詢報告」商務及經濟發展局 (http://www.cedb.gov.hk/citb/doc/tc/publication/Consultation_Report_30_9.pdf)

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有政府官員表示，如競爭條例草案不豁除貿發局，中小企業務會受打擊。但上文已將各項反對豁除貿發局的誤解釐清，我們希望法案委員會支持不豁除貿發局，以促進本港公平競爭環境及展覽業健康發展。如委員會希望作進一步討論，我們十分樂意再作安排。順祝
鈞安

區乃光
環球資源行政總裁

二零一二年二月十三日

副本抄送：
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商務及經濟發展局局長蘇錦樑先生

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CB(1)516/10-11(04)

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Our ref
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Date
17 November 2010

**By email hysiu@legco.gov.hk and by hand**

Dear Sir,

We act for Global Sources Ltd. (NASDAQ: GSOL) and its subsidiaries (collectively, "**Global Sources**") and write to you on their behalf with the attached submission regarding the Competition Bill.

As will be evident from the attached submission, our client has considerable concerns regarding the proposed exclusion mechanisms applying to statutory bodies. The submission identifies the areas of concern and proposed measures that our client would respectfully submit need to be taken to rectify these deficiencies in the Bill.

We look forward to presenting further on the issues raised in these submissions at the upcoming deputations hearing.

Please do not hesitate to contact us if you have any queries or require any further information.

We look forward to hearing from you.

Yours faithfully,

Herbert Smith

Encl.



04/3190602_11

# Global Sources
# Submission to
# the Legislative Council
# Bills Committee
# On Competition Bill

## Addressing Concerns as to
## the Exclusion and Exemption Mechanism
## for Statutory Bodies
## Engaged in Economic Activity

17 November 2010

## 1. EXECUTIVE SUMMARY

Global Sources Ltd. (NASDAQ: GSOL) and its subsidiaries (collectively, "**Global Sources**") is a leading business-to-business media organisation and a primary facilitator of trade with Greater China. Amongst other services, Global Sources is one of the major private trade fair organizers in Hong Kong.

Global Sources has very considerable concerns over the drafting of the exclusion and exemption provisions in the Competition Bill ("**Bill**"). These include that:

- Statutory bodies, even those engaging in economic activity in competition with the private sector, are not subject to the law[1] unless the Chief Executive in Council ("**CE in C**") chooses to issue regulations subjecting any particular statutory body or parts of its operations to the law.[2]
- The CE in C has an apparent discretion as to whether to issue such regulations and which statutory bodies to subject to the discipline of competition law.[3]
- Legco will have limited, if any, practical ability to review the process where a statutory body has not been included in the regulations (if any)[4] promulgated to subject statutory bodies to the law.
- Affected parties will, it appears, have
  - practically no say in whether statutory bodies that compete with them or impede their commercial activities are to be subject to the competition law; and
  - no apparent way to review the process where a statutory body has not been included in the regulations (if any) promulgated to subject statutory bodies to the law.
- It is not clear whether there will be sunset clauses on any exclusions for statutory bodies, requiring review of the need or justification for exclusions as market conditions and (potentially) the scope of particular statutory body activities change.
- There are various other exclusion and exemption provisions in the Bill which have not been adequately defined and there is no clarity as to whether statutory bodies engaging in economic activity might use these exclusions and exemptions even if they were *prima facie* included in regulations promulgated by the CE in C under clause 5(1)(a) of the Bill.

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[1] See section 3 of the Bill.
[2] See section 5 of the Bill.
[3] Note the use of the word "may" in the first line of section 5(1) of the Bill.
[4] Note that Singapore has a similar mechanism in its competition law and 6 years down the track such regulations have still not been issued.

## 2. IMPLICATIONS

This could have serious ramifications for businesses in Hong Kong that are in competition with such statutory bodies and for the Hong Kong economy generally. Those statutory bodies (some of which already receive government subsidies and other privileges that necessarily distort market competition) would have the advantage of not incurring the compliance costs of the law that will be shouldered by private sector undertakings. This tilts the competitive and legal playing field in their favour. They will also not have to be concerned as to whether their conduct might be adversely impacting competition, while at the same time they will be able to use the law against those with whom they compete!

A *prima facie* across-the-board statutory body exemption is a particular concern, given that Government intervention in the economy remains the single biggest inhibitor of competitiveness and efficiency the world over.

Although some statutory bodies such as the Urban Renewal Authority ("**URA**"), Hong Kong Trade Development Council ("**HKTDC**") and Ocean Park are clearly engaging in economic activities and, therefore, fulfil the criteria for being subjected to the competition law, the Government has not yet confirmed that it will be applied to them or otherwise indentified a list of any bodies that it says will be. Nor is there a timetable for doing so, although the Under Secretary for Commerce and Economic Development stated on 8 October 2010[5] that the list would be made available to the Bills Committee at the time the Bill was being scrutinised. It is apparent the Government is reluctant to commit to a position.

## 3. WHAT WE ASK THE BILLS COMMITTEE TO DO

The purpose of this letter is not to ask the Bills Committee to step into the shoes of COMPAG or the future Competition Commission to investigate into and/or adjudicate on statutory bodies that are or might be engaging in anticompetitive conduct. Its purpose is more modest but important: to respectfully request that the Bills Committee:

(a) closely scrutinises the exclusion and exemption provisions in the Bill; and

(b) ensures that appropriate amendments are made to ensure that statutory bodies engaging in economic activities will be subject to the competition law and that affected parties will have a reasonable opportunity to be heard in this process.

We set out in more detail in section 6 what we submit is required in this regard.

Hong Kong has long maintained that Government intervention in the markets should be minimal and, where there is intervention, to ensure that there is a demonstrated justification for it and that it is the minimum necessary in all the circumstances. Where statutory bodies are competing in the markets, there needs to be a level playing field.

Global Sources believes that the key to a thriving economy is market competition. An essential first step in this direction is for the Government to keep faith with its minimal and efficient government policy, by committing to subject statutory bodies that are engaging in economic activity, including the URA, HKTDC, Ocean Park, etc., to the competition law, without further delay.

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[5] At the Hong Kong General Chamber of Commerce seminar on competition law on 8 October 2010.

## 4. ISSUES WITH THE BILL

### (a) Framework of the Bill

The Bill provides for both exclusions and exemptions.[6]

Exclusions apply automatically by operation of the Bill to:

(i) all statutory bodies (cl.3), subject to the CE in C having the power to apply the law to them per cl.5(1)(a);

(ii) specified persons / activities (cl.4), although we do not know what persons / activities will be specified until the CE in C issues regulations under cl.5(1)(b));

(iii) agreements enhancing overall economic efficiency (cl. 30 and Schedule 1, s.1);

(iv) conduct engaged in for the purpose of complying with a legal requirement, i.e. those imposed under any enactment in force in Hong Kong or imposed by any national law applying in Hong Kong (cl.30 and Schedule 1, s.2); and

(v) undertakings entrusted by the Government with the operation of services of general economic interest, insofar as the first or second conduct rule would obstruct the performance of the particular task assigned to it (cl.30 and Schedule 1, s.3).

Exemptions may be granted by:

(i) the Competition Commission to provide block exemption of agreements that enhance economic efficiency (cls.15-20); and

(ii) the CE in C on public policy grounds (cl.31) or to avoid conflict with international obligations (cl.32).

We will discuss potential issues with each of these provisions, after the following general comments on Hong Kong's existing policy and competition law international best practice in relation to statutory body exclusions.

### (b) Hong Kong's existing economic policy

Hong Kong has a long established policy of placing faith in markets and maintaining both minimal government and minimal intervention in the markets. Where there is a case for intervention, the policy has been to ensure that the intervention is the minimum required.

Consistent with this policy, the Government has also sought, where possible, to wind back its involvement in the economy. A classic example of this is found in the telecoms sector. Until 1995, that sector was subject to a monopoly Government franchise. From 1995, the sector was liberalised and exposed to competition to increase competitiveness and, thereby, the benefits that flow to Hong Kong society. The benefits of reduced Government intervention speak for themselves. Hong Kong now has one of the most competitive telecoms markets in the world.

[6] This submission does not address merger related exclusions/exemptions.

COMPAG policy since its establishment in 1997 also had an important role. Consistent with the Government's then policy of minimal intervention, there was a clearly recognised role for COMPAG in identifying Government imposed sectoral restraints and initiating pro-competitive policies in Government and public sector bodies.[7]

Government intervention in the economy remains the single biggest inhibitor of competitiveness and efficiency the world over. If statutory bodies engaging in economic activities are granted an exclusion from the competition law in Hong Kong, this has the potential to seriously undermine existing policy and Hong Kong's competitiveness, running entirely contrary to the purported object of the Bill.

**(c) International best practice**

A concise statement of competition law international best practice is found in the United Nations Conference on Trade and Development paper on exemptions and exceptions in competition law ("**UN Paper**"):[8]

> "'Best practice' advice recommends that competition (antitrust or antimonopoly) law should be a *general law of general application*; that is, the law should apply to *all sectors and to all economic agents* in an economy engaged in the *commercial* production and supply of goods and services. In this regard, *both private and public (i.e. State) owned and operated enterprises should be subject to the same treatment.*"

The UN Paper reviews the laws of various developed and developing economies (including the United States, Canada, the EU, the UK, Australia, New Zealand, Japan, Algeria, Morocco, Bulgaria, Croatia, Chile, Columbia, Venezuela, etc) and observes that "in almost all of the economies reviewed, the competition laws apply to both public and private sector enterprises" and only exempt areas that are "covered by other government legislation and regulations."[9]

The UN Paper observes that "... there are some notable differences as well ...in some of the more established competition law regimes, especially the United States, there is a patchwork of exemptions that have evolved through court proceedings and legislative actions responding to special interest groups." However, it states in relation to these exemptions that "[i]n many cases, there is a recognized need to re-evaluate these exemptions."[10] It is worth noting that the research paper more recently prepared by the Research and Library Services Division Legislative Council Secretariat observes in relation to the United States that "Government entities are exempted from the competition law" but, in any event, that "...federal government departments and agencies seldom engage in commercial activities".[11]

Importantly, the very clear conclusion reached in the UN Paper is that although "[i]n a number of jurisdictions, exemptions are granted for "special" sectors such as ... government enterprises ... [i]n most of these cases there are no credible economic bases for exempting these sectors or types of activities from competitive pressures."[12]

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[7] See paragraph 10 of COMPAG: "Statement on Competition Policy", May 1998.
[8] UNCTAD, "Application of Competition law: Exemptions and Exclusions", Document UNTRAD/DITC/CLP/Misc.25
[9] UN Paper at p 35.
[10] UN Paper at p 35.
[11] Jacky Wu of Research and Library Services Division Legislative Council Secretariat, *Competition polices in selected jurisdictions*, 25 June 2010, page 110.
[12] UN Paper at p 32.

The UN Paper also lays down recommendations as to the basic procedures and principles for granting any proposed exemptions for statutory bodies, including that:

(i) exemptions should be granted on a limited-time basis with a "sunset" clause and provisions for periodic review;

(ii) the review of exemptions should include analysis of their impact on economic efficiency and consumer welfare, and in a cost-benefit framework identify the "winners" and "losers", and whether indeed there are overriding benefits that serve the consumer or broader economic interests;

(iii) exemptions should be granted after public hearings with the participation of interested and affected parties;

(iv) exemptions should be as "least restrictive of competition" as possible; and

(v) exemptions should be generic in nature, relating to types of economic activities or arrangements.

The UN Paper highlights the importance of these procedures in promoting due process, transparency and economic policy coherence:

> "There are fundamental legal and economic policy reasons for advancing the recommendation that competition law policy should be generally applicable. Entities engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality and non-discriminatory treatment under the law. ... It would foster "due process" under the law."[13]
>
> And
>
> "[w]ith such principles, the number nature and scope of these exemptions and exceptions will tend to be more limited, and the procedures more accountable and transparent. There will also tend to be greater policy and economic coherence."[14]

Surprisingly, as will be seen from the analysis below, Hong Kong, the economy ranked to date as the freest in the world, is proposing to take quite the contrary approach, giving a *prima facie* exemption to all statutory bodies even if they are engaged in economic activities (per cls.3 and 5(1)(a)).

The controversial question whether statutory bodies should be subject to competition law is to be left to the discretion of the CE in C, with no public input and with limited oversight from Legco through the negative vetting process.

There is also no timeframe in the Bill for the CE in C to issue the regulations, leaving the prospect of an open-ended process that could see statutory bodies that should be subject to the law enjoying a *de facto* exclusion for months or years and there has been no mention of appropriate sunset clauses.

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[13] UN Paper at p 5.
[14] UN Paper at p 36.

**(d) The Statutory body exclusion (cl.3)**

All statutory bodies are *prima facie* excluded by operation of cl.3.

Clause 5(1)(a) provides that the CE in C may make regulations to apply the conduct rules, etc respectively to (i) any statutory body or (ii) various of its activities.

Clause 5(2) provides that the CE in C may only exercise this power if he is satisfied that:

(a) the statutory body is engaging in an economic activity in direct competition with another undertaking;

(b) the economic activity of the statutory body is affecting the economic activity of the specified market;

(c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and

(d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

We have a number of concerns with the drafting of this exclusion.

First, in the Government's Legco Brief on the Competition Bill, the Government explained the reason for excluding statutory bodies from competition law was that "*the activities of the public sector are almost invariably non-economic* in nature falling outside the scope of the Bill".[15] However, statutory bodies whose activities are non-economic are already effectively excluded from the competition law. The law only applies to "undertakings" which are defined as entities that are "engaged in economic activities" under cl.2. Thus the need for this further up-front and absolute statutory body exclusion is highly questionable.

Secondly, the use of the word "may" in the first line of cl.5(1) implies that the CE in C has a discretion whether to invoke cl.5(1)(a), even when statutory bodies meet the criteria specified in cl.5(2)(a)-(d) ("Criteria"). However, there is no apparent justification for excluding statutory bodies from the competition law upfront, where they already fulfil the Criteria in the first place. Indeed, to do so would be contrary to the most fundamental object of existing COMPAG policy and the competition law, because it would give such bodies effective *carte blanche* to commit the most egregious anti-competitive acts without fear of censure from any quarter.

Thirdly, the use of the word "and" at the end of cl.5(2)(c) (Criteria (c)) is concerning, as it suggests that in order for a statutory body to be potentially subjected to the competition law, it must fulfil each and every one of the Criteria. There are a number of significant problems with this, including the following:

(i) That a statutory body engages in economic activity in a market (the first limb of Criteria (a)) should in itself already be sufficient justification for the competition law to apply to it. Adding a requirement that it be in direct competition with another undertaking (the second limb of Criteria (a)) will frustrate the object of the competition law. There will clearly be instances in which statutory bodies have crowded out private competition or prevented any effective competition with them, but the competition law should not act to protect statutory monopolies in such circumstances. If statutory bodies are engaging in economic activity in

[15] Para.14 of the Legco Brief dated 2 July 2010.

a market with the threat of potential entry by private undertakings, it is essential for the statutory body to be subject to competition law to ensure that it does not act to foreclose entry to maintain its monopoly position. The simplest test is one which simply asks whether the statutory body is engaged in economic activities. If it is, then prima facie it should be subject to competition law. The onus should then be on the statutory body to make the case, if it considers there are, nevertheless, some grounds for an exclusion.

(ii) As to Criteria (b), the CE in C is not going to be in a position to form a view on this without undertaking an expansive and comprehensive competition investigation into the relevant competition law markets in which the statutory body operates. The recent grocery market industry investigation by the United Kingdom Competition Commission [16] demonstrates the magnitude and complexity of such a task. It is difficult to see how the CE in C could be in a position to undertake such investigations and analysis at present and, indeed, one of the very reasons for proposing the competition law was to give an independent commission the powers necessary to undertake such work because it was considered that COMPAG was, with its present powers, unable to effectively carry out such tasks.

(iii) Even if the CE in C was *prima facie* able to undertake such analysis, it would require input from affected parties operating in or seeking entry to the relevant markets and there is no suggestion that the CE in C will be seeking such input – quite the converse, as this issue is presently being considered behind closed doors, with the Government refusing to allow affected parties to be involved.

(iv) The term "directly related to" in Criteria (c) is also too broad. In line with the object of the competition law, exclusions from the competition regime should be drafted and construed as narrowly as possible. It should only be if application of the competition law to the statutory body would frustrate or impede the carrying out by that statutory body of its public service or public policy function that an exclusion should be considered. Even then, the onus should be on the statutory body to demonstrate that this is so.

(v) Criteria (c) and (d) are not defined and could potentially be applied very broadly by the CE in C to support any decision to maintain the exclusion for particular statutory bodies, even if those statutory bodies should, on any independent view, be subject to the discipline of competition.

Fourthly, no time limit is specified for the CE in C to consider whether these statutory bodies should be subjected to the competition law and there is no express provision allowing concerned parties to require the CE in C to actively do so. Given that the CE in C has an apparent discretion as to whether any given statutory body falling within the cl.5(2) criteria will be subjected to the law, it appears that it will be difficult to challenge the CE in C on any failure or refusal to subject statutory bodies to the competition law.

It should be noted in this regard that Singapore has a similar blanket exclusion under s.33(4) of its Competition Act. According to the Legco Secretariat's Report, "Competition polices in selected jurisdictions" in June 2010, there were concerns in Singapore society that such exclusion would create an unlevel playing field. The Singapore Government said that the exclusion was based on public interest considerations and not intended to be permanent, committing to review the need for

[16] http://www.competition-commission.org.uk/inquiries/ref2006/grocery/

exclusions after the law has been in force for some time. Six years on, the Singapore Government has still not conducted that review.[17]

Fifthly, the use of the process of regulations promulgated by the CE in C restricts public and Legco scrutiny. The negative vetting process will give Legco limited ability to consider the decisions being made by the CE in C in this regard, including in particular decisions not to put various statutory bodies in the regulations that apply the law to statutory bodies. It is submitted that something which is so integral to the scope and effectiveness of the competition law, and the future competitiveness of Hong Kong, should not be addressed in such a closed manner.

In all the circumstances, there is no apparent reason why issues such as this are being dealt with by the CE in C. These issues should, it is submitted, be considered by the independent Competition Commission, with the starting point being that all statutory bodies engaging in economic activity are subject to the competition law with the onus on them to make the case for exclusion. Affected parties should be given the right to be heard on this issue, which will potentially have enormous implications for them in their ability to survive and compete in Hong Kong.

Finally, and importantly, any statutory body exclusions should be subject to appropriate sunset clauses requiring review at established points in the future to consider whether it is appropriate to maintain the exclusion. Markets change and statutory bodies may engage in economic activities in the future or expand the scope of their operations. In the same way that undertakings that get the benefit of Commission decision are subject to conditions or limitations (and then only if they comply with those conditions or limitations), such processes are necessary in relation to statutory body exclusions, with appropriate mandatory sunset clauses. As noted above, this is in keeping with international competition law best practice.

**(e) Other exclusions and exemptions**

The Bill does not make it clear whether, even if they are subjected to the competition law under cl.5, statutory bodies could avail themselves of other exclusions and/or exemptions. This should be clarified in the drafting.

There might be a case for statutory bodies to have the ability to seek block exemptions for agreements (cl.15) or for compliance with international obligations (cl.32). There might also be a case for arguing for exclusions in appropriate circumstances for agreements enhancing economic efficiency and conduct engaged in to comply with legal requirements (ss.1 and 2 of Sched. 1).

However, the wording of the rest of the exclusions and exemptions provisions is very broad. What should be avoided is the use of these broad exclusions and exemptions as a convenient backdoor to exclude from competition law statutory bodies which are *prima facie* subjected to the law by the CE in C under cl.5(1)(a).

***Services of general economic interest (cl.30 and s.3 of Sched.1)***

Under cl.30 and s.3 of Schedule 1, undertakings entrusted by the Government with the operation of services of general economic interest are excluded, in so far as the conduct rules would obstruct the performance of the tasks assigned to them. This exclusion applies automatically.

[17] Para.6.2.15.12, Jacky Wu of Research and Library Services Division Legislative Council Secretariat, *Competition polices in selected jurisdictions*, 25 June 2010.

The Bill contains no guidance as to how this exclusion is intended to operate. However, it is noted that the Government has clarified in its Overview of Major Components of the Competition Bill[18] that this exclusion is directed at "... services that the authorities consider should be provided in all cases, whether or not there is incentive for the private sector to do so" and that "[s]uch services must be widely available and not restricted to a class, or classes of customers, e.g., public transport, water supply, power supply or postal services".

It should be made clear that statutory bodies carrying out other functions should not be able to use this as a backdoor to get an exclusion.

***Specified persons/activities (cl.4)***

Specified persons or activities are excluded by operation of cl.4. The class of persons or activities to be exempted is not "populated" until the CE in C promulgates a regulation under cl.5(1)(b) to do so. It is worrying that the operation of this provision will not be transparent, as it does not contain any apparent criteria as to how this power should be exercised or any apparent grounds for challenging any regulation under this clause. It is not clear if this provision can be applied to statutory bodies or, if so, what the grounds would be. There is also, presently, no apparent reason why such decisions should be made by the CE in C instead of the Commission.

***Public policy (cl.31)***

There is no express power to challenge orders gazetted by the CE in C to grant exemptions on public policy grounds under cl.31. Under cl.33, such orders made by the CE in C would be placed before Legco under a negative vetting procedure and there is no *prima facie* provision for public submissions to be made. It is submitted that this process is not satisfactory. It should be made clear whether and in what circumstances statutory bodies might avail themselves of this exemption. Again, it is also not clear why the CE in C, rather than the Commission, needs to be tasked with the consideration of such exclusions.

## 5. THE HONG KONG TRADE EXHIBITION INDUSTRY – A CASE STUDY

### (a) Introduction to HKTDC

The Hong Kong Trade Development Council Ordinance (Cap. 1114) stipulates that HKTDC is a statutory body which exercises two main functions:

- to promote, assist and develop Hong Kong's overseas trade, with particular reference to exports; and
- to make such recommendations to the Government as it sees fit in relation to any measures which it considers would achieve an increase in Hong Kong's trade.

The HKTDC's work as a trade fair organizer (arguably falling outside the above scope) makes it a keen and key competitor in organising trade fairs and exhibitions in competition with the private sector. According to HKTDC's most recent financial report (2009/10), organizing exhibitions and missions was its greatest source (65%) of income.

Revenue from market operations

[18] CB(1)320/10-11(02) dated November 2010, at paragraph 20.

For the year ended 31 March 2010, the Income Generated from the Group's Operational Activities is HK$1,791,922,000 (as compared to HK$1,554,691,000 for 2008/2009). Out of this:

- Exhibitions and Missions constitute: $1,450,463,000 (or 65% of its total income including income other than that generated from the Group's Operational Activities)
- Product Magazines and Online Marketplace constitute: $185,595,000 (or 8.3%)
- HKCEC Operation revenue amounts to: $129,602,000 (or 5.8%).

Government Subvention

TDC's total Government Subvention from Trade Declaration Charge is: HK$370,800,000 (which represents 16.6% of TDC's total income) for 2009/2010 (as compared to HK$360 million for 2008/2009) (These figures can be found in the attached TDC financial information for 2009-2010).

There is no doubt that trade exhibitions and the other trade industry activities, such as trade magazine publication and the Online Marketplace, are "economic activity". The very existence of active private players proves this. These economic activities comprise a very significant part of the HKTDC's operations. There is also no apparent or convincing public policy or other reason why these aspects of HKTDC's operations should be excluded from the competition law.

**(b) Economic importance of the exhibition industry**

The exhibition industry is increasingly important to the Hong Kong economy.

KPMG Transactions Advisory Services Limited estimated in their "Economic impact of the Hong Kong exhibition industry"[19] report that the industry contributed HKD$26.4 billion to Hong Kong's economy in 2006 (1.8% of Hong Kong's GDP).

For comparison, the expenditure effect of the industry was 1.5% of GDP in 2004, as against 1% in Germany and 0.8% in the UK. The industry generated (directly and indirectly) opportunities for 58,500 Full Time Equivalent employees in 2006.[20]

**(c) Regional leader**

Hong Kong's exhibition industry is a leader in the Asia Pacific region.

In terms of average revenue per fair, according to Business Strategies Group Limited's "The Trade Fair Industry in Asia" report in 2009, Hong Kong is the regional leader

| Location | Average revenue per fair in 2008 (US$'m) |
|---|---|
| Hong Kong | 4.08 |
| Mainland China | 2.71 |
| Japan | 2.07 |
| Thailand | 2.05 |

[19] published in August 2007 as quoted in paragraph 3.3 of Chinese University of Hong Kong and BMT Asia Pacific , *Hong Kong Trade Exhibition – An Industry Review* dated 31 October 2010 (the "CUHK-BMT Report")

[20] Paragraph 3.3 of the CUHK-BMT Report.

In terms of net exhibition space sold, the CUHK-BMT Report which compares the exhibition industry in Hong Kong with that in countries which are considered as sufficiently similar to Hong Kong's position (Tokyo, Singapore and Sydney) lists Hong Kong as the second largest in the Asia-Pacific region (after Tokyo).

In 2009, Hong Kong remained the regional leader with the highest average revenue per fair and the third largest space sold (behind Japan and China) in Asia according to Business Strategies Group Limited's "Asian Business Media Tracker – South China Exhibitions Market " report in September 2010.

**(d) Key players (supply side) in exhibition industry**

According to the CUHK-BMT Report, key players on the supply side in the exhibition industry are:

(a) Government agencies in charge of trade policies;

(b) venue suppliers;

(c) exhibition organisers;

(d) exhibitors; and

(e) industry associations.

***Venue suppliers***

There are currently 3 major exhibitions centres in Hong Kong capable of holding trade exhibitions: Hong Kong Convention and Exhibition Centre (HKCEC), AsiaWorld-Expo (AWE) and Hong Kong Exhibition Centre (HKEC).

HKCEC, AWE, HKEC currently provide an available saleable exhibition space of 88,563 sq m, 70,000 sq m and 2,100 sq m respectively.[21] According to the CUHK-BMT Report, HKEC is not capable of holding "mega shows" due to its very limited floor space and therefore most competition in venue supply in the Hong Kong exhibition industry presently takes place between HKCEC and AWE.

HKCEC is owned by the HKTDC and the Government. Hong Kong IEC Limited (a joint venture between the Government and a private partner) owns AWE.

***Exhibition organisers***

The number of key trade exhibition organisers was 30 in 2008.[22] These consisted of one public organiser (i.e., HKTDC) and 29 private organisers such as Global Sources, UBM Asia Ltd etc.

**(e) Market structure**

***Market share***

[21] Paragraph 2.1 of Chinese University of Hong Kong and BMT Asia Pacific , Hong Kong Trade Exhibition – An Industry Review (Phase 1 supplement) dated 19 April 2010 (the " CUHK–BMT Report Supplement")
[22] Paragraph 1 of the CUHK – BMT Report.

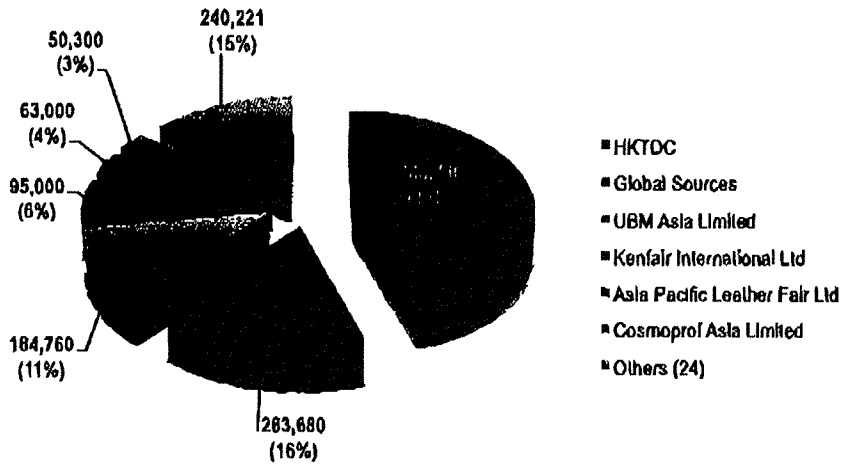
The CUHK-BMT Report studied the exhibition market and concluded, using a number of different measures, that HKTDC/HKCEC has a high percentage of market share in terms of gross exhibition space, number of trade fairs organised, gross revenue generated, etc.

This is particularly clear when one looks at the proportion of exhibition space sold to the private and public sectors. The private sector in the other three cities covered by the CUHK-RMT Report accounts for the majority of the space sold. However, somewhat surprisingly, given Hong Kong's supposed market-driven policy, a large proportion of the space in Hong Kong was sold to the public sector (which comprises only one entity, the HKTDC):[23]

| | Public | Private |
|---|---|---|
| Tokyo | 1% | 99% |
| Sydney | 2% | 98% |
| Singapore | 5% | 95% |
| Hong Kong | 45% | 55% |

The market share of Hong Kong's private organisers is more disparate and fragmented, as demonstrated by the considerable gap between HKTDC's market share (45%) and the market share of the next largest player, Global Sources (16%). The following chart sets out these shares:

**2008 Organiser Market Share (Gross Exhibition Space Sold sq m)**




Source: Figure 3.4 of the CUHK – BMT Report

The position remained the same in 2009 if one looks at trade fair revenues. According to Business Strategies Group's estimates in 2010, HKTDC had a market share of 46% with UBM Asia, Global

[23] Figure 5.2 of the CUHK–BMT Report.

Sources and Kenfair having 17%, 13% and 6% respectively. The remaining 18% was divided amongst smaller competitors.[24]

Amongst the four selected cities in the CUHK-BMT Report, Hong Kong has (i) the highest exhibition to organiser ratio (i.e. the number of events organised per organiser); and (ii) the smallest number of organisers:[25]

| | Average no. of exhibitions per organiser | No. of organisers |
|---|---|---|
| Tokyo | 1.49 | 114 |
| Singapore | 1.57 | 44 |
| Sydney | 1.58 | 38 |
| Hong Kong | 2.7 | 30 |

The high level of market concentration in the exhibition industry naturally raises concerns about the need to ensure effective competition. Other factors include the following:

- As noted in the CUHK-BMT Report, the HKTDC/HKCEC has a high degree of vertical integration through the industry, acting as an industry promoter, exhibition organiser and venue owner.
- The HKTDC/HKCEC's market presence is further strengthened through its branding as a public organiser and the unique advantages it extracts from its relationship with government and the HKTDC's trade development functions.
- This position is compounded by HKTDC's operation of trade-related print and internet businesses and the enormous amount of relevant trade information that must be available to both HKTDC and HKCEC as a result of HKTDC's privileged statutory position as the public promoter of trade in Hong Kong.

All of these factors demonstrate the need to ensure a competitive playing field.

**(f) Conclusion**

It is apparent that the HKTDC has a significant and active role engaging in economic activity in the trade exhibition and related trade industry markets in competition with the private sector. No doubt, similar arguments can be made in other industries that Global Sources is less familiar with, such as in relation to the URA, and Ocean Park. However, we believe the example of the exhibition industry demonstrates the real and pressing need to ensure that statutory bodies engaging in economic activity will be subject to the competition law.

The inefficiency of Government intervention in the economy is recognised around the world, as evidenced by the last 20-30 years of liberalisation and privatisation in countries such as United Kingdom, New Zealand, Australia and Mainland China. It would clearly not be in Hong Kong's interests to create an environment that facilitates immunity for statutory bodies that engage in

[24] Business Strategies Group Limited, *Asian Business Media Tracker – South China Exhibitions Market* (revised) dated September 2010 at pp 3-4.
[25] Tables 5.4 and 5.5 of the CUHK–BMT Report.

economic activity or to protect statutory bodies engaging in economic activity from the discipline of competition. Indeed, it would run quite contrary to the most fundamental tenets of Hong Kong's long-standing economic policy of putting markets first, and international best practice (as cited above).

## 6. WAY FORWARD

In view of the above, we respectfully submit that changes need to be made to the Competition Bill to ensure that:

(a) Statutory bodies that are engaging in economic activity are *prima facie* subject to the competition law;

(b) If any statutory body engaging in economic activity considers there are grounds for an exemption, the onus should then be on the statutory body to make an application to the (independent) Competition Commission for an exclusion or exemption;

(c) Clear and economically justifiable criteria should be laid down in the law as to the basis on which such statutory bodies might be entitled to an exclusion or exemption, which should require any application to be assessed against an analysis of the impact of the exclusion or exemption on economic efficiency in a cost-benefit framework that identifies the "winners" and "losers" and whether, indeed, there are over-riding benefits that serve the consumer or broader economic interests.

(d) Any process for seeking such an exclusion or exemption should:

  (i) be transparent and open to the public;

  (ii) allow affected parties to be heard;

  (iii) be addressed by the Competition Commission;

  (iv) be subject to appropriate appeal rights; and

  (v) require the Competition Commission to consider and apply to any exclusion or exemption appropriate sunset clauses and other conditions or limitations deemed appropriate in all the circumstances.

CB(1)2730/10-11(04)

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# HKSAR Legislative Council

## Bills Committee on Competition Bill

## Invitation for Submissions on Three Guidelines

*Submission by Global Sources*

11 July 2011

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## 1 Introduction and statement of interest

Global Sources Ltd. (NASDAQ: GSOL) and its subsidiaries (collectively, **Global Sources**) are a business-to-business media group headquartered in Hong Kong, and a major part of our business includes the operation of trade shows such as the China Sourcing Fairs in Hong Kong (at the AsiaWorld-Expo). We have been closely following the development of the proposed Hong Kong competition ordinance, which would introduce competition law rules to all sectors of the Hong Kong economy. Global Sources has reviewed the three illustrative "regulatory guidelines" which were made available to the Bills Committee by the Commerce and Economic Development Bureau in May and June. We welcome the opportunity to provide comments on the proposed Bill in the context of your Committee's review of the three guidelines.

Over the years, Global Sources has expressed its concerns many times over the competition conditions in Hong Kong's exhibition industry. The industry has unique features that are prone to lead to competition distortions. The Hong Kong Trade Development Council (**TDC**) was established in 1966 as a public body whose statutory duty is to promote, assist and develop Hong Kong's trade with places outside Hong Kong, with particular reference to exports. Over the years the TDC has expanded its activities well beyond its public service mission, and now dominates the exhibition industry in Hong Kong: it owns one of the principal venues for exhibitions (the Hong Kong Convention and Exhibition Centre in Wan Chai), and organises trade fairs in competition with the private sector - those very businesses whose activities it is supposed to promote. In this context it is particularly important to all actors of the Hong Kong exhibition industry, and more generally to all Hong Kong businesses involved in international trade, that competition in the industry remains vigorous, based on the merits and free of undue Government intervention.

The introduction of competition legislation in Hong Kong that would exclude, from its scope of application, statutory bodies carrying out commercial activities (like the TDC) would likely create additional market distortions to the detriment of Hong Kong businesses. The absurdity of a blanket exclusion for statutory bodies, such as the TDC, is further illustrated by the three guidelines on which the Bills Committee is seeking comment.

## 2 Comments on the three "regulatory guidelines"

Global Sources understands that the enforcement model proposed under the Bill is to set out general principles in the legislation while leaving broad discretion to the Competition Commission, the Competition Tribunal and the Courts in interpreting these principles. This broad discretion for the enforcers is compensated in part by an obligation for the Competition Commission to issue guidelines, albeit on a limited list of specific topics.

Global Sources' purpose with the present submission is not to comment on the suitability of the proposed enforcement model. Rather, Global Sources wishes to illustrate <u>how the proposed enforcement methodology set out in the guidelines would be seriously flawed, if the proposed exclusion of all statutory bodies is retained.</u>

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**2.1 The guidelines and the blanket exclusion of all statutory bodies**

As your Committee knows from our previous submission,[1] Global Sources has serious concerns with Article 3 of the current draft of the Competition Bill, which proposes to exclude all statutory bodies from the application of the law by default, until and unless the Chief Executive in Council chooses in his or her discretion to subject a particular statutory body or parts of its operations to the law according to Article 5.

Such a blanket status-based exclusion regime is unprecedented. Even the Chinese competition law subjects all organs of the State engaged in commercial activities to the Antimonopoly Law. In the overwhelming majority of competition law jurisdictions (e.g., the European Union, the UK, the USA, Canada, etc.), all operators engaging in economic activity - irrespective of their nature or ownership structure - are subject to the competition law provisions, with only limited exceptions for the provision of certain public services.

It is therefore very disappointing that none of the three guidelines explains how such a "unique" feature of the proposed legislation (namely, the blanket exclusion of statutory bodies) would affect the enforcement of the Competition Ordinance if and when it is enacted. This omission is all the more startling in view of the fact that the guidelines on the conduct rules do discuss in some detail various other exclusions and exemptions provided for under the Bill – all except for the one relating to statutory bodies.

While Global Sources acknowledges that the guidelines are purely illustrative at this stage, it respectfully submits that a proper discussion of the statutory body exclusion in the guidelines would reveal how flawed this exclusion is in the context of the proposed enforcement model. With the statutory body exclusion, the law will be ineffective to address major competition concerns, will increase costs of doing business for private parties, and will see its scope reduced to only those sectors with no statutory body involvement in Hong Kong. It will not be a cross-sector competition law, but a mere continuation of a sector-specific approach, with an added compliance cost for private businesses.

**2.2 The Guidelines on Market Definition**

The Guidelines on Market Definition appear to be broadly in line with the theoretical framework adopted in established competition law jurisdictions. It is unfortunate, however, that they do not also reflect the pragmatic approach adopted as a first step by foreign competition authorities. Global Sources understands that many foreign competition authorities would typically start their analysis with a common sense approach centred on product characteristics and industry views, before testing this preliminary view using the economics tests described in the Guidelines on Market Definition.

In any case, Global Sources agrees that a proper definition of the relevant market is essential to the implementation of competition law. Unfortunately, the guidelines do not discuss how the proposed market definition methodology would apply to markets where key market players, being statutory bodies, are altogether excluded from the Bill. It would lack common sense and be completely at odds with the economics-based approach proposed in the guidelines to ignore the presence of statutory bodies engaged in commercial activities when defining the relevant markets. Their market presence and market share should be acknowledged in the market definition exercise.

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[1] Global Sources' submission to the Legislative Council Bills Committee on the Competition Bill addressing concerns as to the exclusion and exemption mechanism for statutory bodies engaged in an economic activity, 17 November 2010, available at http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121129cb1-516-4-e.pdf.

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Let us illustrate this with an example from the exhibition industry in which Global Sources operates. According to a 2009 study of the trade exhibition industry conducted by the Chinese University of Hong Kong and BMT Asia Pacific (which was submitted to the Legislative Council's Commerce and Industry Panel at its meeting on 20 April 2010),[2] in 2008 TDC-hosted events took up as much as 45% of local exhibitions and none of the private operators had more than 16% market share based on exhibition space.[3] If the large part of the market controlled by the TDC were to be artificially "excluded" from the market definition on account of TDC being a statutory body, the private operators would see their market shares nearly doubled, in defiance of market reality. Private operators would perhaps even acquire a "substantial degree of market power" in such an artificial market.

A definition of relevant markets that would ignore commercial reality would lead to a misapplication of the law, as the Government itself recognises in the Guidelines. However, even with a proper definition of relevant markets that would (in line with commercial reality) appropriately include the significant market position of statutory bodies in important sectors of the Hong Kong economy, it would still lead to a misapplication of the law if, once the relevant market is properly defined, the Competition Commission and the courts are powerless to enforce the law against those major players in that relevant market because they are excluded from the application of the law in the first place. This demonstrates how flawed and ludicrous it would be to exclude a statutory body, who is a major player in a market, from the application of the competition law in that very same market.

**2.3 The Guidelines on the First Conduct Rule**

The Guidelines on the First Conduct Rule set out a framework under which the prohibition of restrictive agreements will be enforced. They also explain how the regime of general exclusions and exemptions will operate. One glaring omission, however, is an explanation of how the exclusion regime proposed for statutory bodies would operate in relation to the First Conduct Rule.

**The Guidelines fail to deal with the consequences of a statutory body's involvement in a restrictive agreement**

The guidelines do not explain whether private parties involved in restrictive agreements or concerted practices with an excluded statutory body would still be deemed to infringe the first conduct rule. The question is not straightforward and would merit discussion in enforcement guidelines. The text of Article 3 of the Competition Bill is clear: Part 2 (the conduct rules) does not apply to a statutory body. Article 3 allows statutory bodies to enter into restrictive agreements that would otherwise violate the first conduct rule.

Restrictive agreements entered into by excluded statutory bodies with private parties can thus arguably not be found to violate the first conduct rule. Finding otherwise would mean that the agreement would be illegal as regards one party but not for the other party. If that is the position, then private parties will also benefit from the exclusion as soon as a statutory body is involved. In that case many restrictions of competition in Hong Kong will be left unaddressed, and it will be tempting for private parties to involve statutory bodies in their conduct with the sole goal of benefiting from the exclusion.

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2 Available on the website of the Legislative Council or at http://www.ccl.baf.cuhk.edu.hk/Download/HKEI_study.pdf.

3 Figure 3.4 of the CUHK-BMT Report at page 17.

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If, on the other hand, the statutory body will be the only party to benefit from the exclusion, the restrictive agreement will be illegal only as regards the private party. This legal oddity would not only allow bodies set up for the purpose of supporting the public interest to circumvent the law, but would result in making private parties bear the consequence of the statutory bodies' wrongdoing. In addition, private parties will have to bear the cost of verifying legal compliance of their agreements with statutory bodies, while these statutory bodies would bear no such cost, thereby creating an additional disadvantage to private businesses in their dealings with statutory bodies.

This shows that the government has not thought through its proposed exclusion regime for statutory bodies. More harm than good is likely to result from such an ill-conceived policy.

**The services of general economic interest exclusion is sufficient to protect legitimate interests of statutory bodies, including those of the Trade Development Council**

Article 3 of Schedule 1 to the Bill provides for a general exclusion regime for undertakings entrusted with services of general economic interest, on the model of Article 106(2) of the Treaty on the Functioning of the European Union: "Neither the first conduct rule nor the second conduct rule applies to an undertaking entrusted by the Government with the operation of services of general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it." Article 2 of the same Schedule provides an additional exclusion from the application of competition rules for conduct mandated by a legal requirement.

Global Sources considers that these provisions already provide more than sufficient comfort that competition law will allow statutory bodies to fully carry out all of their statutory functions. There is no compelling reason for an additional general exclusion regime for statutory bodies which would be completely at odds with Hong Kong's tradition of minimal intervention in the markets and with international best practice.

Global Sources' view is supported by the Guidelines on the First Conduct Rule, which describe how these exclusion regimes would operate. Under this regime, all undertakings, including statutory bodies, which are entrusted with the operation of services of general economic interest or which are otherwise mandated by law to enter into restrictive conduct, will benefit from an exclusion from the law for the purpose of performing their tasks. This exclusion regime has worked well in foreign jurisdictions. It allows companies to benefit from public subsidies. It allows small and medium enterprises to receive favourable treatment mandated by Government. It allows trade and industry associations to play a role in promoting their industry, including by offering and obtaining discounts. Thanks to this regime, all businesses, including small and medium enterprises, will continue benefiting from the advantageous policies and services provided by statutory bodies.

What this regime does not allow, however, is the creation of appreciable restrictions of competition in commercial markets by undertakings under the guise of serving the public interest. They are allowed to restrict competition when it is necessary for the performance of their statutory duties, but they are not given a blank cheque to enter into anticompetitive conduct in business activities unrelated to their public missions.

This exclusion regime keeps distortions to the free operation of markets to a minimum. It therefore defies logic and is very surprising that the Hong Kong Government would allow for broader distortions to the market economy by excluding all statutory bodies from the scope of the proposed law.

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As described in the Guidelines on the First Conduct Rule, in the Hong Kong context, all statutory bodies entrusted with the operation of services of general economic interest will be allowed to perform their statutory duties unhampered by competition law, even if the Legislative Council were to amend the Bill and remove the blanket exclusion for statutory bodies. Statutory bodies such as the TDC, the Urban Renewal Authority, Ocean Park, etc. would be able to continue to perform their public interest tasks without concern, even if they did not benefit from the proposed blanket exclusion of statutory bodies. Similar bodies in foreign jurisdictions do perform their role very well without however benefiting from a large-scale exclusion from competition law. It is hard to see why their counterparts in Hong Kong would need a more favourable treatment.

### 2.4 Guidelines on the Second Conduct Rule

These guidelines also suffer from the defects already discussed above, the main one being their failure to address how the proposed blanket exclusion for statutory bodies would affect the enforcement of the second conduct rule.

Several issues are apparent with the proposed enforcement policy embodied in these guidelines when read together with the statutory body exclusion. The guidelines rightly focus on the establishment of market power as a first step in the analysis, but fail to address the way the analysis will be carried out in relation to markets where statutory bodies are active: would the sales achieved by statutory bodies be considered when determining a company's market share? will their activities be a relevant factor when considering the extent of barriers to entry? etc. The guidelines state that "[m]ore than one undertaking may have a substantial degree of market power in a relevant market". Would this mean that, facing the inability to challenge conduct engaged into by a statutory body that is the largest actor on the market, the Competition Commission will focus its interest on the largest private party in the market, irrespective of its actual market position?

All of these questions remain unanswered, and show that, far from simplifying the enforcement of the second conduct rule, the statutory body exclusion will instill added complexity and cost in the enforcement of the law.

## 3 What Global Sources wishes the Bills Committee to do

Global Sources welcomes the initiative of your Committee to seek comments on guidelines that illustrate how the proposed legislation would be enforced in practice. A review of the practical details of the proposed enforcement mechanisms clearly shows how ill-conceived the statutory bodies exclusion is, and how at odds it is with the overall architecture of the Bill.

We are conscious that the Bill allows for a "claw-back mechanism" in its Article 5 that would allow the Government to subject part or all of the activities of specified statutory bodies to the application of the Competition Ordinance. The proposed "claw-back mechanism" for statutory bodies is however so limited that there is no guarantee that it could cure any of the flaws of the general exclusion of statutory bodies. First, the substantive criteria for clawing back any blanket exclusion are much more stringent than the general economic interest test. Second, there is no procedural guarantee whatsoever as to when and how the Chief Executive in Council may or may not use the "claw-back" power, nor is there any way for affected parties to be heard in the decision-making process or to appeal against any administrative action or inaction.

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We are also concerned that while statutory bodies would on the one hand be excluded from the burdens and constraints of the law, they would not on the other hand be excluded from the application of the benefits of the law under Article 3 of the Bill. This article allows statutory bodies to complain against violations of the law committed by others and to sue private parties for damages. In other words, they will be able to enjoy all the benefits of the law without suffering from any of its constraints!

**Based on the above, Global Sources wishes to reiterate the following recommendations on the way forward with the Competition Bill. Global Sources respectfully submits that changes need to be made to the Bill to ensure that:**

**(a) Statutory bodies that are engaging in economic activity are *prima facie* subject to the competition law;**

**(b) If any statutory body engaging in economic activity considers there are grounds for an exemption that goes beyond the existing exclusions set out in Schedule 1 to the Bill, the onus should then be on the statutory body to make an application to the (independent) Competition Commission for an exclusion or exemption;**

**(c) Clear and economically justifiable criteria should be laid down in the law as to the basis on which such statutory bodies might be entitled to an exclusion or exemption, which should require any application to be assessed against an analysis of the impact of the exclusion or exemption on economic efficiency in a cost-benefit framework that identifies the "winners" and "losers" and whether, indeed, there are over-riding benefits that serve the consumer or broader economic interests;**

**(d) Any process for seeking such an exclusion or exemption should:**

**(i) be transparent and open to the public;**

**(ii) allow affected parties to be heard;**

**(iii) be addressed by the Competition Commission;**

**(iv) be subject to appropriate appeal rights; and**

**(v) require the Competition Commission to consider and apply to any exclusion or exemption appropriate sunset clauses and other conditions or limitations deemed appropriate in all the circumstances.**

*

* *

We hope the Bills Committee will find these comments helpful. Should you wish to discuss any of the points raised we would be happy to accommodate the Committee.

**Global Sources**

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競爭條例草案委員會

尊敬的主席及副主席，

就《競爭條例草案》建議豁除法定團體的釋疑

環球資源與本港多個團體均關注《競爭條例草案》建議豁除法定團體。有關建議極具爭議性，缺乏社會廣泛支持。環球資源要求政府撤回豁除法定團體(例如：香港貿易發展局(貿發局))的建議，或至少應作大幅修改。我們過往已多次解釋：

- 爲何該建議違背促進公平競爭環境的立法原意；
- 爲何該建議有違香港奉行的自由市場原則，亦嚴重違背香港現行競爭政策；
- 爲何該建議造成雙重標準，並與國際最佳慣例相反；及
- 爲何法定團體無需被豁除，亦能繼續履行法定職務。

閣下可參閱我們分別於2010年11月17日(參考編號CB (1)516/10-119(04))、2011年7月11日(參考編號CB (1)2730/10-11 904))及2011年11月12日(參考編號CB (1)91/11-12(01))提交的意見書，詳細瞭解爲何豁除法定團體的建議全無道理，亦不適合香港。

環球資源相信，少數人士仍然贊同豁除法定團體，是因爲對豁除理據有所誤解。我們希望藉以下簡潔的答問，消除誤解，並說明若私營機構需要受規管，而法定團體獲得豁除，實在令人難以信服。

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**Q1: 競爭法豁除法定團體，能否促進本港公平競爭環境?**

- 不能。爲確保公平競爭環境，基本原則乃在同一市場內所有參與經濟活動的業務實體，不論公營私營，均應受到競爭法行爲守則的規管。
- 公平原則爲本港成功基石，除非有客觀合理原因，否則所有市場參與者都應該受到平等對待。不應豁除法定團體，將它們凌駕於法律之上。
- 在競爭法的問題上，並無客觀合理的原因豁除法定團體。

**Q2: 豁除法定團體是否符合本港現行競爭政策?**

- 不符合。豁除法定團體的建議嚴重違背本港現行競爭政策。政府的競爭政策綱領(網址：www.compag.gov.hk/policy/content.htm)並無優待法定團體，反而表明「期望各政府部門確保轄下的法定組織遵守這份政策綱領」。
- 競爭政策諮詢委員會(競諮會)於2003年採納的指引，亦明確「指令各政府部門（包括所有法定機構）遵守政策綱領及上述指引」。
- 競諮會自成立以來，接獲數宗涉及法定團體的投訴，環球資源亦於2009年投訴貿發局的反競爭行爲，個案仍在處理階段。
- 競爭法應促進本港競爭政策有效推行，而非限制競爭事務委員會(競委會)日後處理類似個案的權力。

**Q3: 本港的法定團體是否不從事經濟活動，所以應該獲得「一刀切」豁除?**

- 不是。部份法定團體（例如市區重建局、貿發局、機場管理局和海洋公園等）在市場上有從事經濟活動，與私營機構直接競爭。
- 在展覽業，貿發局更是市場佔有率最高的展覽主辦商，其市場份額高達45%。根據貿發局最新的財務報告（2010/11年度），來自貿易展覽會及訪問團的收入約爲15.56億港元，佔其總收入超過65%。
- 貿發局的貿易展覽會及其他具盈利性質的活動均爲經濟活動，若貿發局獲豁除，將造成不公平情況，競爭環境將被人爲扭曲。

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**Q4: 大部份司法權區的競爭法是否豁除法定團體?**

- 不是。絕大多數司法權區，包括中國、歐盟、法國、日本、南韓等地並無「一刀切」豁除法定團體。
- 國際最佳慣例建議，競爭法應全面涵蓋所有行業及從事經濟活動的機構。香港競爭法若豁除法定團體，即會偏離國際最佳慣例，難免被質疑本港法例有雙重標準，違背法治傳統，本港作爲區內最適合營商地方之一的聲譽亦會受損。

**Q5: 如貿發局受競爭法規管，是否就要放棄展覽業務，無法爲中小企提供有效服務?**

- 不是。競爭法不會阻止貿發局從事商業活動及經營展覽業務。競爭法更不會阻止貿發局履行其法定職務，亦不會限制政府直接補貼參展商，支援及推廣中小企業務。
- 全球各地政府就算不「一刀切」豁除法定團體，仍可積極推動展覽業發展，包括補貼貿易展覽會。
- 《競爭條例草案》附表一第三條明確指出，令整體經濟受益的服務可作爲豁除理據。有關條文符合國際最佳慣例，已充分保障法定團體可繼續履行法定職務，繼續取得公帑資助。

**Q6: 如貿發局受競爭法規管，定價會否不能低於成本，令到中小企及其他貿發局客戶的參展費用增加?**

- 不會，價格由貿發局自行訂定，因受競爭法規管令展覽費用提高，此說法令人大惑不解。按經濟基本常識，競爭只會令價格下降而非上升，本港電訊業市場開放的經驗就是一例。
- 競爭法可促使業務實體（包括參與經濟活動的法定團體）以減價、改善產品服務質素及提供更多產品服務選擇等方式提升競爭力。套用在本港展覽業，如貿發局受競爭法規管，道理亦是一樣。
- 如不受競爭法規管，貿發局可利用其特權地位任意排擠競爭對手或榨取消費者，例如採用掠奪性或過份進取的定價策略。這樣不單止損害本港展覽業，中小企參展商的利益最終亦會受損。
- 如上文所述，即使受競爭法規管，貿發局仍可繼續履行法定職能，政府亦可繼續向貿發局或其他貿易展覽主辦商提供補貼，確保中小企可繼續受惠於相同甚至更低的參展費用。

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**Q7: 如貿發局受競爭法規管，是否會削弱香港展覽業的競爭力?**

- 不會。競爭法規管貿發局反而可增強香港展覽業競爭力，對越來越倚賴展覽業推廣業務的無數中小企及其他公司更加有利。
- 以中國爲例，當地展覽業發展蓬勃，反壟斷法同時亦監管國有企業，確保公平競爭環境，吸引越來越多私營展覽主辦商加入展覽業市場。香港如要保持區內展覽業的前列位置，對業界不應設雙重標準，人爲扭曲市場。
- 與其他國家城市相比，本港展覽業市場結構更爲集中。貿發局在本港展覽業市場的佔有率高達45%，遠遠拋離其他對手。本港活躍的貿易展覽主辦商數目遠低於東京、悉尼或新加坡等主要展覽中心。
- 本港展覽業市場高度集中，增加濫用市場權勢風險。環球資源相信，貿發局有可能利用其法定職能角色，使其商業活動獲得不公平競爭優勢。只有令貿發局接受競爭法規管，才能保障本港展覽業有公平競爭的環境。

**Q8:貿發局以法定團體身份參與經濟活動，是否正壟斷展覽業市場?**

- 是。沒有公平競爭環境，貿發局可壟斷本港展覽業，損害業界競爭力。環球資源對現時貿發局的某些商業行爲正正有以上憂慮。
- 貿發局成立是爲促進本港貿易，但在展覽業界，貿發局並無充分履行這項法定職能。環球資源相信貿發局利用法定團體所享有的部份特權，不公平地增強在市場的影響力，例如貿發局可率先獲得政府政策消息，可較私營貿易展覽主辦商更早物色商機。
- 貿發局與政府共同擁有香港會議展覽中心(會展)，貿發局盡享會展的黃金檔期，私營展覽主辦商及參展商往往不得其門而入。
- 貿發局是推廣本港貿易的唯一官方機構，卻並未由衷地推動香港貿易，與貿發局本身舉辦的活動相比，私營機構的活動往往未獲得相同力度的推廣宣傳。
- 一如前文所述，環球資源於2009年向競諮會投訴貿發局的反競爭行爲，個案仍在處理階段。日後若競爭法立法應以方便處理及糾正有關行爲爲目標，促進展覽業真正公平競爭環境，而非設置更多關卡。

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**Q9: 現行監管架構是否難以有效對付反競爭行爲?**

- 是。競諮會於1997年成立，以推動本港的競爭政策。於2003年，競諮會發出「維持競爭環境及界定和對付反競爭行爲的指引」(網址: www.compag.gov.hk/reference/guideline.pdf)。指引明確「指令各政府部門(包括所有法定機構)遵守政策綱領及上述指引」。
- 競諮會自成立以來，已收到數宗涉及法定團體的投訴，包括環球資源於2009年投訴貿發局的反競爭行爲，事隔兩年多個案仍在處理階段。
- 競諮會的調查權力有限，亦缺乏具約束力的執行權力。有別於競爭法下的競爭事務委員會，競諮會無權罰款，亦無肯定承諾能終止反競爭行爲。競爭法應創造有利條件，讓法定團體的商業行爲由獨立競爭機構監管，而非豁除於法例監管之外。

**Q10. 是否因爲貿發局有效支援中小企就不須受競爭法規管?**

- 不是。貿發局支援中小企，不能因此將其豁除合理化。一如上文所述，競爭法並無阻止展覽主辦商(如貿發局)爲中小企提供優惠，亦不限制政府直接補貼中小企參展商，確保中小企可繼續以相同甚至以更低的價格參加展覽。
- 如政府決定補貼中小企參加的展覽，展覽主辦商可將參展費用維持在低水平，甚至進一步減價。政府補貼中小企參展的原則，不會受競爭法影響。

我們希望本文有助消除建議豁除法定團體的常見誤解。如　閣下希望作進一步討論，我們十分樂意再作安排。順祝
鈞安

區乃光
環球資源行政總裁

二零一一年十二月一日

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