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By e-mail: mjylee@legco.gov.hk

Clerk to Bills Committee
Bills Committee on Competition Bill
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Hong Kong

Attn: Ms Sarah Yuen

Dear Sirs

Competition Bill

We write to give further comments of the Hong Kong Association of Banks (HKAB) on the exemption arrangements for statutory bodies under the Competition Bill (Bill) for the consideration of the Bills Committee.

HKAB has previously submitted a number of comments on the Bill via a letter to the Bills Committee dated 23 November 2010. That submission highlights the firm belief of HKAB that the Bill should support the continued growth of the Hong Kong economy and provide maximum benefit to the community. That is, any new competition law should balance the interests of safeguarding competition in Hong Kong with the benefits of facilitating the free play of market forces and continue to promote a business friendly environment in the region. In this context, HKAB has recommended that the Bills Committee seek amendments to the Bill to remove the specific form of exemption for statutory bodies contained in clause 5 of the Bill.

We note the view of the Administration¹ that because the activities of many statutory bodies are non-economic and regulatory in nature or involve provision of essential public service, they should be excluded from the application of the key provisions in the competition law except those statutory bodies which are specified in regulations made by the Chief Executive in Council under clause 5(1)(a) having regard to the four criteria set out in clause 5(2) which are:

¹ See paragraphs 25 and 26 of the paper prepared by Commerce and Economic Development Bureau for the Bills Committee dated November 2010, ref. CB(1)320/10-11(02).

Chairman The Hongkong and Shanghai Banking Corporation Ltd
Vice Chairmen Bank of China (Hong Kong) Ltd
Standard Chartered Bank (Hong Kong) Ltd
Secretary Ronie Mak

主席 香港上海匯豐銀行有限公司
副主席 中國銀行(香港)有限公司
渣打銀行(香港)有限公司
秘書 麥依敏

- (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 efficiency of a specific 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.

Among a total of 581 statutory bodies, the Administration has proposed that 575 statutory bodies should remain exempted (see Annex A of the paper prepared by the Commerce and Economic Development Bureau (CEDB) for the Bills Committee dated February 2012) and that 6 statutory bodies should not be exempted (see Annex B of the same paper). We seek clarification on how the four criteria in clause 5(2) have been applied by the Administration in coming up with the two lists in Annex A and Annex B. Our interpretation of clause 5(2) is that the criteria are cumulative given the operative word "and" i.e. a statutory body must meet all the four criteria in order to be qualified for exemption from the relevant provisions of the Bill.

In this context, we note that Hong Kong Export Credit Insurance Corporation (HKECIC) has been included in Annex A (see item 54 on page 32) which means that it would be exempted from the relevant provisions of the Bill. HKECIC offers certain insurance services to Hong Kong exporters, in clear competition with private sector entities. As such, HKECIC clearly would have satisfied the first and second criteria in clause 5(2). Further, with reference to the third criteria, HKAB is of the view that however important the services provided by HKECIC may be considered to be, they could not reasonably be considered to be "essential public services" (a term more appropriately applied to services in areas such as health and transport).

This being the case, with reference to the remaining criteria, we assume the Administration has concluded that exemption of HKECIC is necessary for public policy reasons. It is not clear to HKAB what these reasons could be. Application of the competition law to HKECIC would not prevent it from providing the full range of services it provides today, it would simply preclude HKECIC from acting in an anti-competitive manner when engaging in such service provision. In any case, to the extent HKECIC's services were considered to be of general economic interest and that application of the law would hinder its ability to provide such services, it is clear HKECIC would be protected by the exclusion in section 3 of Schedule 1 to the Competition Bill.



What is also clear is that the failure to subject HKECIC to the competition law would potentially put it at a significant competitive and regulatory advantage over private sector organisations that were subject to such a law and the obligations it imposes. We believe this would be contrary to the objective of the Bill.

Accordingly, we respectfully request that the Bills Committee seeks explanation from the Administration as to what justifiable public policy reasons there are to exempt HKECIC from the law. This will ensure a reasonable degree of transparency in the decision making process, and allow private sector organisations which compete with HKECIC to understand the policy reasons that lead the Administration to effectively seek to place them at a competitive disadvantage via-a-vis this organisation.

Furthermore, we understand that Hong Kong Exchanges and Clearing Ltd (HKEx) and Hong Kong Mortgage Corporation (HKMC) are excluded from the definition of "statutory body" in clause 2 of the Bill. We also note that HKEx and HKMC appear on neither Annex A nor Annex B of the CEDB paper dated February 2012. Such exclusion means that HKEx and HKMC would be subject to the competition law, like other private sector organisations with which they compete. While HKAB supports this position, for the avoidance of doubt, we seek clarification on whether our understanding is correct with respect to these two entities.

We hope the Bills Committee would find the above comments useful. For any further information from HKAB, please contact our Senior Manager Ms Grace Law at 2521 1880.

Yours faithfully

A handwritten signature in black ink, appearing to be "Ronie Mak", written in a cursive style with a long horizontal stroke extending to the right.

Ronie Mak
Secretary

c.c. Dr. the Hon David K.P. Li, GBM, GBS, JP, Member of the Legislative Council