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ASSOCIATION

香港零售管理協會

## Hong Kong Retail Management Association

### Comments on the Exemptions for Statutory Bodies on the Competition Bill

(24 February 2012)

The Hong Kong Retail Management Association (HKRMA) welcomes the invitation to comment on the Government's proposed exemption arrangements for statutory bodies under the Competition Bill.

Our overriding concern is the "opt-in" approach adopted by the Government, such that all statutory bodies are exempted from the application of the Bill unless the Government decides to specifically make any of them "opt-in". This de facto exemption for statutory bodies is neither logical nor appropriate and is also unnecessary for the reasons explained below.

The Government has given no real justification as to why the 6 bodies which are proposed for "opt-in" meet the criteria in Clause 5(2) of the Bill, whilst the other 160 bodies which also engage in economic activity do not. In reviewing the lists at Annex A and Annex B to the Government's paper dated 14<sup>th</sup> February 2012, there are a number of glaring anomalies and inconsistencies. For example:

- Why should the Hong Kong Association of Banks be exempted from the outset, and yet the various trade associations representing SME's will be subject to the new law?
- Similarly, why should certain professional associations representing engineers, architects and surveyors be excluded, but similar associations representing lawyers or teachers apparently not be?
- Why should bodies such as Kadoorie Farm and the Helena May private members' club be subject to the new law (based on the proposed "opt-in"), but a company of the scale and nature of KCR be exempted?
- Why should Matilda Hospital be caught by the new law, but not the Tung Wah Group of Hospitals and Yan Chai Hospital?

These inconsistencies result from and illustrate the fact that the proposed exemption of statutory bodies in the Bill is misconceived for the following reasons:

#### 1) Illogical and Inappropriate

The constitutional status of an entity as a "statutory body" should not be the overarching criteria for exemption. It is discriminatory to exclude statutory bodies which are engaging in commercial activity from the scope of the Bill, whilst their private sector counterparts



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(including companies, partnerships, SMEs or sole traders) are subject to the Bill's remit. This infringes the fundamental principle of equality before the law.

All entities should be subject to the proposed competition law, irrespective of their legal status, otherwise 'form' is allowed to prevail over 'substance' – which is contrary to the principle underlying competition law. The UK's Office of Fair Trading ("OFT") in its recent guidance entitled 'Public bodies and Competition Law' (published in December 2011) confirms this exact point stating:

*“it is the nature of the particular activity being conducted that is key, not the legal form, or public or private sector status, of the body that carries it out. Thus, a body – including a public body – may be an undertaking (and therefore subject to competition law) in respect of some of its activities, but not others.”*

To the extent statutory bodies engage in commercial activities they have the ability to affect competition in the market. The only rational approach is to include them within the scope of the Bill from the outset, so that the Commission can intervene promptly if they behave anti-competitively, in the same as it could with any other business.

Again the OFT guidance is instructive on this point:

*“Where public bodies do engage in economic activities, a level playing field and a similar commitment to compliance exists for all operators in those markets, particularly in mixed markets in which public bodies, private firms and third sector organisations (for example, charities) compete alongside one another. Effective competition in those markets can benefit the wider economy by encouraging greater productivity and innovation and preserving long term growth, while continuing to provide greater value for money to the taxpayer.”*

If the statutory bodies are not engaging in commercial activity, or are not acting anti-competitively, there will be no grounds for intervention, so they will have nothing to fear.

## 2) Unnecessary

If the Government's concern is that statutory bodies will be targeted or that they will be hampered from carrying out their public functions, the Bill already addresses these concerns, and therefore the proposed exclusion for statutory bodies is unnecessary.

The definition of “undertaking” in the Bill itself makes it clear that only entities engaging in “economic activity” will be caught. EU case law interpreting this concept makes it clear that entities will not be caught to the extent that they are performing public functions.



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To the extent statutory bodies are engaged in economic activity, they may also benefit from the exemption in Schedule 1 paragraph 3 of the Bill applying to undertakings entrusted with providing services of “general economic interest”. In addition where there are exceptional and compelling reasons based on public policy grounds, statutory bodies may seek exemption under Section 31 of the Bill.

#### Proper explanation for the application of the Exemption

Even if the proposed exemption provisions were to be retained (which we believe they should not be, for the reasons stated above) then the Government should provide proper reasoning to enable Legco to make an informed and rational decision as to which statutory bodies should be “opt in” and which should be “opt out”.

We would therefore respectfully ask the Government to answer the following questions as to the application of the criteria in Clause 5(2) of the Bill:

- (i) In respect of the 160 bodies engaged in economic activity which are to be exempted - how are they “directly related” to the provision of essential public services or the implementation of public policy? And to which services or policies?
- (ii) For each of the 6 bodies which are proposed for “opt-in”:
  - a. what is the identified economic activity which the body is engaging in?
  - b. what is the relevant market for considering whether it is “directly competing” with another undertaking in respect of that activity?
  - c. how is the body’s economic activity “affecting the economic efficiency” of a specified market?

#### Vertical Agreements

As well as focusing on the exemptions for statutory bodies, the Government should be making provisions for other important exemptions, such as for vertical agreements. It is generally accepted that vertical agreements are pro-competitive and hence in most other competition regimes they are expressly exempted. For the sake of legal certainty we would urge the Government to deal with this issue now, rather than leaving it to the future Competition Commission.

#### Conclusions

- As explained the HKRMA believes that the broad exemption approach for statutory bodies is inappropriate and irrational. Why should the legal status of an entity as a “statutory body” be the overarching criteria for exemption? The focus should be on the nature and substance of the activities.



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- The general exemption is also unnecessary as statutory bodies which are not engaged in economic activity would already fall outside the Bill by virtue of not being an “undertaking”.
  - To the extent a statutory body engages in ‘economic activity’ it should be subject to the same regulatory requirements under the Bill as its private sector counterparts.
  - This is the approach adopted in jurisdictions with established competition law, such as the UK, Europe and the United States, where public bodies are subject to the law only to the extent they engage in economic or commercial activities.
  - We would urge the Government to focus on applying specific exemptions, where appropriate, on a case-by-case basis, rather than adopting the proposed broad exemption.
  - The criteria for granting any such exemptions should be objective and economics based.
  - The Government should also act now to exempt vertical agreements so that Hong Kong businesses are not disadvantaged compared to their counterparts elsewhere in Asia, such as Singapore.

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