

global sources

By email to mjylee@legco.gov.hk

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Bills Committee on Competition Bill
Legislative Council Complex
1 Legislative Council Road
Central

Dear Chairman and Deputy Chairman,

Clarifications regarding proposed exclusion regime for statutory bodies

As you know, Global Sources shares the concerns expressed by many stakeholders in Hong Kong regarding the proposed exclusion regime for statutory bodies. The proposed exclusion regime is very controversial and has not received broad support from the community.

Global Sources requests that the proposed exclusion for statutory bodies be removed or at the very least substantially revised. On numerous previous occasions, Global Sources has explained:

- why the proposed exclusion regime defeats the legislative intention of promoting a competitive level-playing field;
- why the proposed exclusion regime is contrary to Hong Kong's free market principles and a blatant retreat from Hong Kong's existing competition policy;
- why the proposed exclusion regime is arbitrary and contrary to international best practices; and
- why the proposed exclusion regime is not necessary to enable statutory bodies to continue performing their statutory missions.

Please refer to our previous submissions made on 17 November 2010 (reference no. CB (1)516/10-119(04)), 11 July 2011 (reference no. CB (1)2730/10-11 904)) and 12 November 2011 (reference no. CB (1)91/11-12(01)) for more detailed explanations as to why the proposed regime is totally inappropriate and unjustified for Hong Kong.

Global Sources believes that any remaining community support for the proposed exclusion of statutory bodies is based on certain misconceptions about the underlying justifications for the proposed regime. We hope that the present submission - in the form of simple questions and answers - will help to dissipate some of these misconceptions and show that there is no convincing reason to treat statutory bodies any differently from any other private or governmental entity that will be subject to the law.

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Q1: Will a competition law regime that excludes statutory bodies promote a competitive level-playing field for Hong Kong?

No, it will not. As a general principle, to ensure a competitive level-playing field, all entities competing with one another in the same market should be subject to the same conduct rules under the competition law. The law should govern economic “activities” regardless of “who” conducts those economic activities, be they private entities or statutory bodies. Fairness is valued highly in Hong Kong. It is a fundamental principle of fairness that all market players should be treated equally, unless there are objective and reasonable justifications to differentiate amongst economic operators. There are no such objective and reasonable justifications for excluding statutory bodies from the scope of application of the competition law. Excluding statutory bodies would be the same as putting them above the law.

Q2: Is the proposed exclusion regime consistent with Hong Kong’s current competition policy?

No, the proposed exclusion regime marks a blatant retreat from Hong Kong’s current competition policy. The Government’s Statement of Competition Policy (available at: www.compag.gov.hk/policy/content.htm) does not provide for any differential or preferential treatment for statutory bodies. On the contrary, the Government’s policy expressly provides “that government entities should ensure that all statutory bodies under their charge pay heed to the Statement as well.” Similarly, the Competition Policy Advisory Group (COMPAG) Guidelines adopted in 2003, expressly direct “all government entities (including all statutory bodies) to adhere to the policy statement.” Since its creation, COMPAG has received several complaints involving statutory bodies - including a 2009 complaint from Global Sources relating to conduct by the Hong Kong Trade Development Council (TDC) which is still under review. The Competition Bill should facilitate and promote the effective enforcement of Hong Kong’s competition policy, rather than limiting the possibility for the Competition Commission to address similar cases in the future.

Q3: Is it true that statutory bodies in Hong Kong do not engage in economic activities and that therefore they can be excluded across the board?

No it is not true. Certain statutory bodies (such as the Urban Renewal Authority, the TDC, the Airport Authority or Ocean Park) undoubtedly engage in economic activities in direct competition with the private sector.

In the exhibition industry, the TDC is even the leading exhibition operator with a 45 per cent market share. According to the TDC's most recent financial report (2010/11), revenues from organizing exhibitions and missions amounted to \$1,556,740,000 or more than 65 per cent of its total income. There is no doubt that the TDC's trade exhibitions and its other related profit-generating activities are "economic" activities, which if excluded from competition law would create unfair and artificial market distortions.

Q4: Is it true that statutory bodies are exempt from competition law in most jurisdictions?

No, it is not true. In the overwhelming majority of jurisdictions (including mainland China, the EU, France, Japan, Korea,...etc) there is no blanket exclusion regime for statutory bodies. As a general rule, all operators engaging in economic activity - irrespective of their public or private nature or ownership structure - are subject to the competition law provisions. International best practice recommends that competition law should be of general application and apply to all sectors and economic agents. Excluding statutory bodies would mean Hong Kong deviates from such international best practice and would - rightly - be perceived as arbitrary and contrary to Hong Kong's rule of law tradition. It would negatively impact upon Hong Kong's reputation as a place of excellence for doing business in Asia.

Q5: Is it true that if the TDC is subject to the competition law, it will have to give up its exhibition business and that it will not be able to provide effective services to SMEs?

No, it is not true. Competition law will not prevent the TDC from engaging in commercial activities and running its exhibition business. Governments around the world can play an active role in the exhibition industry - including by subsidizing trade shows - without benefiting from any across-the-board exclusions. Subjecting the TDC to competition laws will not prevent it from carrying out its statutory missions, nor will it limit the possibility for the government to grant subsidies directly to exhibitors to support and promote SME businesses. Article 3 of Schedule 1 of the Bill expressly provides for an exclusion ground for services of general economic interest. This provision - in line with international best practice - already provides adequate and sufficient guarantees that statutory bodies will not be prevented from carrying out their statutory missions and from receiving appropriate public funding accordingly.

Q6: Is it true that if the TDC is subject to the competition law, it will be prohibited from pricing below costs and that this will result in higher exhibition fees for SMEs and other customers of the TDC?

No, it is not true. It is up to the TDC to decide upon its pricing policy. It is basics economics that competition will bring prices down, not up. Hong Kong's experience in the telecommunications industry is a case in point. There is no reason why being subject to competition law will translate into higher exhibition fees. On the contrary, a key benefit of competition law is it that it creates strong incentives for economic operators (including statutory bodies engaging in economic activities, like the TDC, if made subject to the competition law) to improve their competitiveness in the form of lower prices, improved products or services, and wider ranges/choices of product or service offerings. There is no reason why this should be any different in the Hong Kong exhibition industry - unless of course the TDC does not have to comply with the competition law principles, in which case nothing will prohibit the TDC from using its privileged position to engage in exclusionary or exploitative practices (such as for instance predatory pricing tactics or excessive prices) to the detriment not only of the Hong Kong exhibition industry, but ultimately SME exhibitors as well.

As mentioned above, if the TDC is subject to the competition law, nothing will prevent it from continuing to carry out its statutory missions, nor will the government be prohibited from granting subsidies to the TDC or other trade fair organisers to ensure that SME exhibitors will continue to benefit from the same or even lower access fees than is the case today.

Q7: Is it true that the competitiveness of the Hong Kong exhibition industry will be weakened if the TDC is subject to the competition law?

No it is not true. On the contrary, subjecting the TDC to competition law will be beneficial not only for the competitiveness of the Hong Kong exhibition industry but more generally for the numerous Hong Kong SMEs and other companies which increasingly rely on the exhibition industry to promote and develop their business. This principle has been recognized also in mainland China, where the exhibition industry is booming and where the Antimonopoly Law ensures a competitive level-playing field to attract more and more private exhibition organizers to enter and develop the local exhibition market. If Hong Kong is to maintain its leading position in exhibition, Hong Kong cannot afford the risk of creating artificial market distortions by subjecting the market players to different rules. The Hong Kong exhibition sector is already more concentrated than in other comparable jurisdictions. The TDC is by far the largest trade fair organizer in Hong Kong with a market share of around 45 percent. The number of trade fair organizers active in Hong Kong is much lower than in other exhibition hubs such as Tokyo, Sydney or Singapore.

If anything, the high level of market concentration in the exhibition industry increases the risk of abuses of market power and the need to ensure a competitive level-playing field. This is particularly important, as Global Sources believes that the TDC may be leveraging some of its statutory missions to obtain an unfair competitive advantage in relation to its commercial activities. Subjecting the TDC to the competition law will ensure a healthy competitive level-playing field in the exhibition industry to the ultimate direct benefit of Hong Kong SME exhibitors, who will benefit from lower prices, improved products or services, and wider ranges/choices of product or service offerings.

Q8: Is it true that the TDC is monopolizing the exhibition industry when it engages in economic activities as a statutory body?

Yes, unless there is an effective competitive level-playing field, there is certainly a risk that the TDC could monopolize and adversely affect the competitiveness of the Hong Kong exhibition industry. Already today, Global Sources has serious concerns with some of TDC's business practices. The TDC was established to promote, assist and develop Hong Kong's trade, but as far as the exhibition sector is concerned, the TDC is not adequately fulfilling its statutory missions. On the contrary, Global Sources believes that the TDC is leveraging some of the privileges it enjoys as a statutory body to unfairly strengthen its commercial market presence. For example, Global Sources believes that the TDC has privileged access to governmental policy intelligence which allows it to gain a head start in reaping business opportunities over private exhibition organizers. As co-owner with the government of the Hong Kong Convention and Exhibition Centre (HKCEC), the TDC also controls prime time slots at the HKCEC at the expense of private venue operators and exhibitors. As Hong Kong's only official trade promotion organization, the TDC fails to act as a genuine promoter of Hong Kong trade, as it does not promote to an equal extent those events organized by the private sector, as compared to its own events. As mentioned above, Global Sources has lodged a COMPAG complaint in 2009 relating to the TDC's conduct which is still under review. Any future competition legislation should make it easier and not more difficult to address and remedy these practices and promote a truly competitive level-playing field in the exhibition industry.

Q9: Is it true that under the current regulatory framework, it is difficult to effectively tackle anti-competitive conduct?

Yes, it is true. COMPAG was established in 1997 to promote Hong Kong's competition policy. In 2003, COMPAG issued Guidelines to maintain a competitive environment and to define and tackle anti-competitive practices (available at: www.compag.gov.hk/reference/guideline.pdf).

The Guidelines expressly direct “all government entities (including all statutory bodies) to adhere to the policy statement.” Since its creation, COMPAG has received several complaints involving statutory bodies - including a 2009 complaint from Global Sources relating to conduct by TDC which (after more than 2 years) is still under review. However, COMPAG’s investigations powers are limited and it does not have any binding enforcement powers. For instance, it does not have the power to impose any pecuniary sanctions, nor can it enter into any binding commitments to put an end to anti-competitive conduct - unlike what the Competition Commission would be able to do under the Competition Ordinance. If anything, the competition legislation should strengthen the possibility of having the commercial conduct of statutory bodies reviewed by an independent competition authority, rather than excluding them from the scope of application of the law altogether.

Q10. Is it true that there is no need to subject the TDC to the competition law because it is doing a good job of supporting Hong Kong SMEs?

No, it is not true. The fact that the TDC is supporting SMEs is not a valid reason for excluding the TDC from the scope of application of the competition law altogether. As mentioned above, nothing in a competition law prevents an exhibition organizer from having a favourable policy towards SMEs. Nor will the government in any manner be limited in the possibility of granting subsidies directly to SME exhibitors to ensure that they will continue to benefit from the same or even lower access fees than is the case today. If the Government decides to subsidize exhibitions for SMEs, the organizers will keep prices low or even lower them further. The principle that the Government pays through a subsidy rather than the SMEs paying themselves will not be affected by competition law.

We hope the Bills Committee will find this submission helpful to clarify some of the common misconceptions regarding the proposed exclusion regime for statutory bodies. Should you wish to discuss any of the points raised we would be happy to accommodate the Committee.

Yours sincerely,



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