The Hon Andrew Leung Kwan-yuen, GBS, JP

Chairman

Bills Committee on Competition Bill

Legislative Council Secretariat

Legislative Council Building

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24 February 2012

Dear Mr Andrew Leung,

Submission to Competition Bill Committee on Statutory Body Exemptions

1. Thank you for the opportunity to make a submission on this aspect of the Bill.

2. The short title of the Bill makes it clear that the purpose of the Bill is to prohibit conduct that prevents, restricts or distorts competition in Hong Kong. It is important to note that the Bill seeks to prohibit anti-competitive **CONDUCT.**

3. Thus, the identity and legal status of persons or organizations that conduct anti-competitive activities should be irrelevant. If bodies are exempted wholesale by virtue of their legal status, then an unlevel playing field is created which may be unfair to those business operators who are subject to the law.

4. As a matter of principle, all entities should be equal before the law. Exemptions should be granted sparingly and on clearly identified and transparent criteria that can be individually justified.

5. The current proposals regarding statutory bodies do not adhere to these principles. The wholesale exemption of statutory bodies is thus wrong conceptually.

6. Most other countries that adopt a competition law do not provide wholesale exemptions to similar public bodies in their jurisdictions. The European Union, the UK, Australia do not provide a blanket exemption but rather allow for a process whereby a competition authority carefully weights the anti-competitive activities or conduct of the body and determines whether exemption is justified on criteria similar to those contained in Schedule 1 of the Bill.

7. Thus, exemption by virtue of legal status, rather than the economic effect of conduct undertaken by any organization – public or private – is not in conformity with the stated purpose of the Bill and inevitably creates an environment of unequal treatment and the perception of an unlevel playing field in economic regulation. The Competition Bill should regulate what bodies do, and disregard who they are.

8. This principle is supported internationally and the United Nations has adopted the same presumption of an inclusive law:

"Best practice" advice recommends that competition (antitrust or anti-monopoly) 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.

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Consequently, the Bill's treatment of statutory bodies does not accord with international best practice.

9. The presumption of statutory body exemption by virtue of legal form in the Bill is thus unjustified. Furthermore, the criteria adopted in the Bill (Cl.5) to determine statutory body non-exemption are cumulative and highly restrictive. They make it extremely difficult to 'unexempt' statutory bodies. The criteria require the existence of commercial competitors in the relevant market and take no account of the foreclosing effect of such a body occupying a market and enjoying high or insurmountable barriers to entry for prospective competitors. Additionally, proof of an adverse effect on efficiency is required. If this was not a high enough hurdle to jump, the assertion that the statutory body carries out essential public services or implements public policy provide an

additional cumulative reason to justify continuing exemption. The regime to 'unexempt' statutory bodies is far too narrow, so that it is almost impossible to satisfy the criteria in fact. This, of course, forms the basis of the exercise that government has purported to have carried out in assessing the existing statutory bodies and so it is unsurprising that only six out of over 500 have been 'unexempted.

10. The government paper explaining its policy on statutory bodies makes the bold assertion that the exemption of the the listed bodies is justified using the criteria mentioned above. However, pointedly, no detail of any sort is provided of the process adopted or the evidence weighed to arrive at such its conclusions. This is unsatisfactory and obviously lacks transparency.

11. Turning the specific list of statutory bodies published by the government in relation to their exempt status, the majority of bodies mentioned in the first category as not undertaking economic activities carryout policy, regulatory, technical or adjudicatory functions and, as a general rule, the activities of such bodies would not be expected to have anti-competitive effects. Thus, their activities would not offend against either of the proposed Conduct Rules in any event. In these cases statutory exemption is irrelevant.

12. However, some such bodies, especially if they regulate the admission or qualification or rules of practice (advertising for example) of a profession may indirectly affect competition. Unless such rules are based on criteria that are objectively justified to protect the public or to ensure appropriate standards of competence, they could distort the market by restricting entry to the profession or the mode of practice. This might artificially prevent/restrict or distort competition amongst professionals in such a regulated profession.

13. As regards the second category of statutory bodies, those which do undertake direct economic activity but are granted status-exemption, the 160 bodies mentioned form a very heterogeneous category. Broadly they encompass religious, health care, educational bodies, social or charitable organizations, some professional bodies and some related to trade or economic development. Many of the 160 bodies undertake multiple functions, all of which are proposed to be exempt. This is of great concern as many of these functions are not in the nature of public services but rather revenue raising activities that directly or indirectly compete with each other or with non-exempt bodies.

14. For example, some fee paying schools are exempted by this provision but others are not. If the exempt fee paying schools formed a cartel to raise prices to the detriment of parents in a market where there are severe supply constraints, such conduct would be exempt for the specified bodies but non-exempt bodies would break the law. Similarly, if nominated universities colluded to fix prices for non-government sub-vented courses they would be exempt, whereas private universities would be subject to the law. In the UK such conduct is unlawful. A few years ago, private school fee price fixing was discovered and punished. In Hong Kong, by contrast, exempted bodies would be able to conduct such egregious conduct without fear of detection or punishment.

15. One of the most contentions exempted bodies is the Trade Development Council. This body has multiple functions some of which are undoubtedly a public service but others; in particular, its trade exhibition business may be operated in such a way as to foreclose the exhibition market for potential competitors as a result of its control of vital inputs. As regards the airport authority, whilst it provides monopoly airport services for Hong Kong and that public service may well deserve an exemption, why should its commercial activities, for example the lease of retail outlets at the airport, , be exempt.

16. Consequently, these bodies should not be granted a wholesale exemption but rather a distinction should be made between their public service functions – government sub-vented education or health services for example, but their private income generating activities should be subject to the law in the same way as non-exempt competing private businesses will be. This is the approach in Australia.

17. Turning to the six statutory bodies that will not be exempted it is difficult to see the logic of their non-exemption when one considers the exemption of other similar organizations. In particular the logic of singling out the Kadoorie Farm, the Helena May and the Matilda Hospital is entirely illusive.

18. Government has suggested that exempted public bodies will be policed and disciplined by COMPAG. However, this body is completely discredited. It has no power of investigation or sanction. No full time staff equipped to obtain or analyze information or to provide a competition assessment. It has proved to be a toothless tiger since its creation in 1998. It should be abolished as it serves no useful function. It will be completely incapable of ensuring that public bodies do not undertake anticompetitive activities.

19. In conclusion, the current proposals are unsatisfactory both in principle and as regards the process undertaken to identify the categories of exempt bodies. However, if this flawed mechanism is to be adopted it is necessary to consider whether the presumption of exemption can be removed from the Bill and such bodies should be included in the scope of the prohibitions. If this were so, specific conduct could be specifically exempted based on the criteria already in the bill and granted by the CE in Council or on a case by case basis by the Competition Authority.

20. If government rejects such a change of direction, members must carefully consider whether some amelioration of the existing structure should be adopted such as a 'sun-set clause' namely that the blanket exemption be for a specific period of time say, three years, or the restrictive criteria for 'unexempting' statutory bodies should be amended to make it easier to remove exemption and that the power to do so should be given to the Competition Authority using a transparent process, rather than left to the CE in Council.

21. Members need to weigh whether intransigence by government or members may cause the abandonment of the whole Bill. On balance, despite the manifold deficiencies in the Bill, it is preferable to ensure passage of the Bill as Hong Kong has been waiting for over 15 years for this legislation. Further delay will inevitably tarnish Hong Kong's reputation internationally as a place to do business. Hong Kong is now the only developed jurisdiction in the world not to have a competition law. Passage of the bill is long overdue and must be completed by July 2012.

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22 February 2012