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By email to mjylee@legco.gov.hk

10 November 2011

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

Dear Sirs,

Comments on the Government's proposed amendments to the Competition Bill

Global Sources Ltd. and its subsidiaries (collectively, **"Global Sources"**) would like to thank the Bills Committee for this opportunity to submit written submissions regarding the Government's proposed amendments to the Competition Bill (LC Paper No. CB(1)91/11-12(01)).

Global Sources' comments are as follows:

- The proposed exclusion regime for statutory bodies represents a major departure from Hong Kong's current competition policy. It also goes against the fundamental legislative intention underlying the Competition Bill, namely, the provision of a level playing field for businesses in Hong Kong. It is therefore inappropriate for Hong Kong and should be removed or at the very least substantially amended.

- Global Sources welcomes the proposal to introduce *de minimis* rules in the Competition Bill, but believes that, in addition to the proposed turnover thresholds, it would be necessary to also provide for market share thresholds below which non-hardcore agreements should be excluded from the first conduct rule, as a second alternative criteria; and if and when applying market share thresholds in relation to the second conduct rule, below which undertakings will not be found to have a substantial degree of market power (or dominance, should that alternative test be adopted), then the market share thresholds for the first and second conduct rules should nevertheless be different.

The above points are briefly set out in more detail below.

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1 Excluding statutory bodies would be a blatant retreat from Hong Kong's existing competition policy and would also undermine the Competition Bill's fundamental purpose of providing a level playing field

Global Sources is surprised and disappointed that the proposed amendments fail to address or even consider the serious issues and concerns relating to the proposed exclusion regime for statutory bodies. The exclusion regime for statutory bodies is a controversial issue which has not received broad support from the community. Global Sources refers to its previous submissions to the Bill Committee made on 17 November 2010 (LC Paper No. CB 910516/10-11(04)) and on 11 July 2011 (LC Paper No. CB 91)2730/10-11(04)) for detailed reasons as to why the proposed exclusion regime is totally flawed and inappropriate for Hong Kong.

Not only is the proposed exclusion regime inappropriate for Hong Kong, it also marks a blatant retreat from Hong Kong's current competition policy. By proposing a broad exclusion regime for statutory bodies, the Government is in fact retreating from the competition policy it has itself been promoting for many years to enhance Hong Kong's economic efficiency, free trade and consumer welfare. Its *Statement of Competition Policy* (available at: www.compag.gov.hk/policy/content.htm) expressly invites all government entities - including statutory bodies - to comply with the Government's pro-competition principles. The *Statement of Competition Policy* 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".

The *Competition Policy Advisory Group* (COMPAG) was established in 1997 to promote this competition policy and in 2003, COMPAG issued *Guidelines to maintain a competitive environment and 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 the Hong Kong Trade Development Council which is still under review. If anything, the Competition Bill should facilitate the effective enforcement of Hong Kong's competition policy, rather than limiting the possibility for the Competition Commission to investigate similar cases in the future.

A blanket exclusion regime for statutory bodies also undermines the Competition Bill's fundamental purpose of providing a level playing field for businesses in Hong Kong.

In a context where Hong Kong is aiming to strengthen its competition policy, Global Sources therefore urges the Bills Committee to request the Government to withdraw without delay its proposed exclusion regime for statutory bodies, as it is a clear departure from Hong Kong's current competition policy.

2 *De minimis* regulation and the importance of market share

Global Sources is sensitive to the concerns expressed by SMEs that the proposed competition legislation should not result in excessive compliance costs. In that context, Global Sources welcomes the Government's proposal to include *de minimis* rules directly in the Competition Bill. However, in addition to the proposed *de minimis* turnover thresholds, Global Sources believes that it would be necessary to also provide for market share thresholds below which non-hardcore agreements should be excluded from the first conduct rule, as a second alternative criteria.

While Global Sources acknowledges that the main advantage of relying solely on a turnover threshold is that it is easy to apply, it is concerned that the proposed turnover thresholds are "blind figures" which may not be adequate in all industry sectors. This is one of the reasons why many foreign competition law jurisdictions rely on market share thresholds instead. However, rather than to replace the proposed turnover thresholds by market share thresholds, Global Sources would propose - in line with the practice in many other jurisdictions - to complement any *de minimis* turnover thresholds with market share thresholds, which would operate as additional alternative criteria to identify those agreements which are unlikely to affect competition. Global Sources believes that such a dual approach would achieve legal certainty, while at the same time offering sufficient flexibility to be of equal relevance in all industry sectors or markets.

More specifically, Global Sources would propose that in addition to the proposed turnover thresholds, the first conduct rule should also not apply to any agreement between undertakings which does not involve serious anti-competitive conduct where the combined market share of the parties on any market affected by the agreement does not exceed a specific market share threshold to be specified in the Bill. Regarding what would be an adequate market share threshold for Hong Kong, Global Sources invites the Bills Committee to request the Government to provide more detailed information about useful precedents in foreign jurisdictions.

In addition, if and when applying market share thresholds in relation to the second conduct rule, then the market share thresholds should nevertheless be different for the first and second conduct rules. While the goal of the *de minimis* regime under the first conduct rule is to identify parties which are too small to appreciably restrict competition, the objective of the regime under the second conduct rule is to identify parties which will not have a substantial degree of market power (or dominance, if that alternative test is ultimately adopted). In other words, the market share threshold under the second conduct rule should be set at a higher level.

Global Sources agrees with the Government's view expressed in the draft *Guidelines on the Second Conduct Rule* (LC Paper No. CB(1)2618/10-11(01)) that "[i]n general, an undertaking's market share is an important factor in assessing market power." This makes the use of market share thresholds as a complement to turnover-based thresholds all the more necessary. However, Global Sources would suggest to the Bills Committee that, in considering and setting the appropriate level of such market share thresholds, they should properly reflect the market structure of the different industries concerned, in order to ensure relevance, appropriateness and fairness amongst different industries,. As mentioned in the same draft Guidelines, "[a]n undertaking does not operate in a vacuum in a market". This is particularly true for those markets where statutory bodies are active, and the market presence of such statutory bodies should be fully accounted for when assessing the existence of market power, including in the context of market share thresholds.

Finally, and for the sake of clarity, it would be useful if the Bill could clarify that undertakings above the turnover and market share thresholds will merely be subject to the conduct rules, and that their meeting the thresholds does not entail a presumption that they also satisfy other criteria in the conduct rules or are otherwise in violation of the conduct rules. For example, in relation to the second conduct rule, it would be helpful to clarify that if an undertaking exceeds the turnover threshold, it does not necessarily mean that it is then also deemed to have a substantial degree of market power. It would also be useful to obtain more guidance on what the concept of substantial degree of market power entails, and in particular the weight given to market share in the analysis.

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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.

Yours sincerely,

Spenser Au
Chief Executive Officer
Global Sources Ltd.