

MTR Corporation Limited  
香港鐵路有限公司  
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November 18, 2010

Clerk to the Bills Committee on Competition Bill  
Legislative Council  
Legislative Council Secretariat  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

Fax : 2978 7569

**Attn : Ms Diana Wong**

Dear *Ms Wong*

**Bills Committee on Competition Bill**

I refer to your letter dated 4 November 2010 inviting MTR Corporation Limited (MTR) to give its views on the Competition Bill.

MTR has given its views in previous consultations on the proposed Competition Bill but wanted to take this opportunity to highlight a particular point of importance to the Corporation.

MTR is principally regulated by the Mass Transit Railway Ordinance and an Operating Agreement made with the Government. The Operating Agreement covers matters such as hours of train operation and service capacity, performance requirements and the construction and operation of new lines. The Operating Agreement also includes a detailed Fare Adjustment Mechanism for the regulation of railway fares. Although referred to in the Mass Transit Railway Ordinance and reviewed in detail by the Legislative Council at the time of MTR merger with the Kowloon-Canton Railway Corporation, the Operating Agreement is a contractual agreement with Government rather than having legislative effect.

It is difficult to reconcile the proposals contained in the draft Competition Bill with the franchise granted to MTR under the Mass Transit Railway Ordinance and the regulation to which MTR is already subject under that Ordinance and the Operating Agreement.



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As an undertaking entrusted, through our franchise, with a significant public transport service, which is subject to separate detailed operational and economic regulation, MTR is concerned that the conduct rules in the new competition law should not apply to its railway operations and will be seeking clarification that: (a) the undertaking by MTR of its railway operations will be considered to be for the purpose of compliance with "legal requirements" (thus falling within the exclusion in Schedule 1(2) to the Bill); and/or (b) the proposed exclusion which is applicable to "an undertaking entrusted by the Government with the operation of services of general economic interest" (set out in Schedule 1(3) to the Bill) will apply to MTR's railway operations services.

By analogy, the similar exclusion in the European legislation (Article 106(2) of the Treaty on the Functioning of the European Union) applies where:

- (i) there has been an act of public authority entrusting the services of general economic interest to an undertaking – this would be satisfied by the Mass Transit Railway Ordinance in MTR's case;
- (ii) the services provided by the undertaking are considered to be of general economic interest – case law in Europe has determined that transport services can fall within this definition; and
- (iii) the conduct rules would obstruct the performance, in law or in fact, of the particular tasks assigned to it. The European Court, in the key *Almelo* case in 1994, determined that, in assessing whether the competition law would obstruct the performance of such services, "it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation ... to which it is subject." The Article 106(2) exclusion has commonly been relied upon where exclusive rights have been granted by the State to the entrusted undertaking to operate a universal service, as is MTR's position in Hong Kong.

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MTR has other areas of business in addition to railway operations and would expect the competition law to apply to these in full. However, in relation to its railway operations business – which is clearly of general economic interest to Hong Kong – we wish to obtain early clarity over how the exclusions and exemptions contained in the draft Bill will apply in practice.

Please note that we are not proposing to give an oral presentation on this issue.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Leonard B. Turk', written over a dashed line.

Leonard B. Turk  
Legal Director & Secretary

cc : Mrs Rita Lau, Secretary for Commerce & Economic  
Development  
Mr Greg So, Under Secretary for Commerce & Economic  
Development

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