



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

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28 February 2012

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

Attention: Ms Sarah Yuen

Dear Sirs,

Comments on the Government's Proposed Exemption Arrangements for Statutory Bodies under the Competition Bill

The Real Estate Developers Association of Hong Kong (REDAs) would like to thank the Bills Committee for the opportunity to submit written submissions regarding the Government's proposed exemption arrangements for statutory bodies under the Competition Bill (LC Paper No. CB(1)1031/11-12(02)).

The Government acknowledges that there are 166 statutory bodies in Hong Kong which engage in economic activities, and that there are 415 others that might engage in some level of economic activity. However it proposes that only six of them be subject to the future Ordinance.

Like many stakeholders who have expressed their views on the matter, REDAs is disappointed with the Government's proposed exclusion of statutory bodies from the scope of the future Competition Ordinance.¹ A particular source of concern is the lack of any explanation or reasoned justification in the Government's proposal as to why particular statutory bodies should be excluded, despite the many months which the Government spent preparing its proposal.

¹ REDAs itself has repeatedly objected to the proposed statutory body exemption in its responses to the Government's public consultation as well as the Bills Committee's invitations for opinion. Our previous submissions are available at http://www.cedb.gov.hk/citb/doc/en/publication/submissions_2008/The%20Real%20Estate%20Developers%20Association%20of%20Hong%20Kong.pdf, <http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121129cb1-622-8-e.pdf> (LC Paper No. CB(1)622/10-11(08)), and <http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121115cb1-482-1-e.pdf> (LC Paper No. CB(1)482/11-12(01)).



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In this submission,

- REDA will first explain why the Government's proposal is unacceptable, inconsistent with international practice and contrary to the rule of law. A significant proportion of economic activity in Hong Kong would be excluded. In the real estate sector, operators accounting for a majority of economic activity would be above the law.
- REDA will then submit that if the Legislative Council were prepared to adopt the Competition Bill despite this major flaw, it should at the very least enshrine in the law its right to approve the list of excluded statutory bodies, and organize a periodic review mechanism to ensure that its right can be effectively exercised.

These points are explained further below.

1 The special exclusion regime for statutory bodies should not be adopted

As stated in previous submissions, the exclusion regime for statutory bodies contained in the current Bill is inappropriate and inconsistent with international practice. Most competition law jurisdictions including the EU, the UK and the Mainland apply the law to all entities engaging in economic activities, irrespective of whether they are owned or operated by public authorities. This is because one of the main goals of competition law is to guarantee a level-playing field for all economic players. This is also recognised in the Government's existing competition policy.²

The proposed exclusion regime is blatantly contrary to the Government's own stated policy and it entails potentially severe market distortions by statutory bodies which engage in economic activities. This is particularly true for economic sectors where statutory bodies play an important role, such as the property sector in which REDA's members are active.

Nearly half of the Hong Kong population lives in public housing³. In addition, a significant part of residential and commercial property in Hong Kong is managed or developed by the Hong Kong Housing Authority, the Hong Kong Housing Society and the Urban Renewal Authority. These statutory bodies all play a significant role in residential housing and commercial property. As the

² Competition Advisory Group, *Government of the Hong Kong Special Administrative Region's Statement on Competition Policy*, May 1998. At paragraph 4, "All government entities, and public- and private-sector bodies are encouraged to adhere to the following pro-competition principles for the purpose of enhancing economic efficiency and free trade - (b) **maintaining a level-playing field**;..." (emphasis added)

³ Hong Kong Housing Authority, *Housing in Figures 2011*.



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Legislative Council will appreciate, excluding the commercial activities of these organizations from the scope of the law would create significant market distortions, to the detriment of the Hong Kong public.

Placing these statutory bodies above the law would allow them potentially to engage in anticompetitive practices. This risk is not theoretical. The Housing Authority, for example, is known to have been involved in discriminatory pricing practices in the past concerning charges to be paid by telecommunications operators for installing radio antennae and base stations in public housing estates.⁴

The only justification presented by the Government for excluding these organizations is that their economic activities “are directly related to the provision of essential public service or the implementation of public policy”. This cause for justification is provided under proposed Clause 5(2)(c) in the Bill. As explained in REDA’s previous submissions, adopting this clause without amendment would constitute a significant departure not only from international best practices but also from the rule of law: the Government should not be above the law, and the bodies it funds or sanctions should also not be placed above the law.

The fact that these bodies engage in economic activities which are related to the provision of public services is not sufficient to exclude them from the scope of the law. The mechanism stipulated in Clause 3 of Schedule 1 to the Bill is sufficient in this regard: under this clause, the constraints of competition law will not apply to any undertaking entrusted with the operation of services of general economic interest only when the constraints would obstruct the performance of such services. In keeping with the rule of law, this partial exclusion applies equally to all undertakings (irrespective of whether they are statutory bodies or not), and is sufficient to address the Government’s justification.

Granting any privilege beyond the activity-based exemption provided in Clause 3 of Schedule 1 would amount to placing statutory bodies above the law, not only defeating the purpose of the future Competition Ordinance, but also endangering the rule of law in Hong Kong.

2 A periodic review mechanism should be built into the law

In the event that the statutory body exclusion regime is to be retained in the Bill, REDA recommends that the Bill should at least be amended to confirm the

⁴ Competition Policy Advisory Group Report, 1999-2000, page 49.



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Legislative Council's right of review and to organize the effective use of this right.

First, the Government in its proposal states that "Regulations made under Clause 5 of the Bill will be subject to negative vetting by the Legislative Council" (paragraph 2 of the proposal). Clause 5 is the clause which allows the Government to adopt a list of statutory bodies which shall be subject to the Ordinance. REDA proposes that Clause 5 be amended to enshrine this right for the Legislative Council, as proposed by the Government.

Secondly, the Government proposes at paragraph 8 of its proposal that statutory bodies "should adhere to the competition rules even though they are not subject to the law". The Government further proposes (at paragraph 9) that "[i]f any exempted statutory bodies are found to have breached competition rules, the Administration would request the statutory bodies concerned to rectify their anti-competitive behaviour. If these statutory bodies refuse to act as requested, the Administration may, subject to the fulfilment of the criteria in Clause 5(2), consider invoking the power of Clause 5(1)(a) of the Bill so that the competition rules and enforcement provisions will apply."

This proposal proceeds from a good premise but is extremely vague and amounts to a blank cheque in favour of the statutory bodies, with the Government free to decide if and when to review their market conduct. For the Government's proposal to be effective, and for the Legislative Council to effectively exercise its right to vet any regulation adopted under Clause 5, this clause should be amended to establish a positive obligation for the Government to review on a regular basis the list of statutory bodies which are excluded from the scope of the law, and to report to the Legislative Council accordingly.

This periodic review obligation is also consistent with the Government's previous statements. In its paper CB(1)389/11-12(02) of November 2011, the Administration has undertaken to conduct a review of the competition law a few years' time after its enactment. It was proposed that the review on the competition law would cover, but not limited to, the differential treatment of hardcore and non-hardcore conduct; the cap on pecuniary penalty; the *de minimis* arrangements; private action rights; and merger control.⁵ To guarantee a level-playing field for all economic players, it would be appropriate to also review the list of statutory bodies that will be subject to competition law.

⁵ See LC Paper No. CB(1)389/11-12(02), available at <http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121122cb1-389-2-e.pdf> (paragraph 12).



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3 Conclusion and concrete proposal

REDA's proposal remains the one outlined in its submission of 29 November 2010 to the Bills Committee on the Competition Bill, which contains specific suggestions by way of amendments for the removal of the statutory body exclusion regime from the Bill.⁶

In the event, however, that the Legislative Council were prepared to retain the exclusion of statutory bodies, REDA suggests the following amendment to Clause 5 in the Bill (our additions are highlighted in bold):

"5. Regulations

- (1) The Chief Executive in Council may, by regulation—
 - (a) apply the provisions referred to in section 3(1) to—
 - (i) any statutory body; or
 - (ii) any statutory body, to the extent that it is engaged in an activity specified in the regulation; and
 - (b) disapply the provisions referred to in section 3(1) to—
 - (i) any person; or
 - (ii) any person, to the extent that the person is engaged in an activity specified in the regulation.

- (2) The Chief Executive in Council may only make a regulation under subsection (1)(a)(i) or (ii) with respect to a statutory body if he or she is satisfied that—
 - (a) the statutory body is engaging in an economic activity in direct competition with another undertaking;
 - (b) the economic activity of the statutory body is affecting the economic efficiency of a specific market;
 - (c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and
 - (d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

- (3) **Any regulation adopted pursuant to subsection (2) is subject to the prior approval of the Legislative Council.**

⁶ See LC Paper No. CB(1)622/10-11(08), available at <http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121129cb1-622-8-e.pdf>.



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(4) The Chief Executive in Council must, once every two years, and for the first time in 2014, provide the Legislative Council with a list of all statutory bodies in Hong Kong, indicating for each such body—

(a) whether the statutory body is engaged in an economic activity;
and

(b) the reasons for which the statutory body is or is not subject to a regulation under subsection (1)(a)(i) or (ii).

(5) In subsection (1), a reference to a statutory body or a person includes an employee or agent of the statutory body or person, acting in that capacity.”

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We hope the Bills Committee will find the above comments helpful. Should you wish to discuss any of the points raised, we would be happy to accommodate the Committee.

Yours sincerely

Louis Loong
Secretary General