

LCQ11: Exemptions and exclusions under proposed competition law

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Following is a written reply by the Secretary for Commerce and Economic Development, Mr Frederick Ma, to a question by the Hon Fred Li in the Legislative Council today (June 11):

Question:

Recently, the Government is consulting the public again on the competition law. One of the proposals in the Consultation Paper is that the competition law should not apply to the Government or statutory bodies. Moreover, private sector undertakings' activities that are essential to fulfilling their obligation to provide essential public services should be excluded from the application of the competition law in so far as the prohibition in the law will obstruct the performance of the obligation. In this connection, will the Government inform this Council:

(a) of the definitions of the above statutory bodies and public services, and the respective lists of organisations which belong to these two categories; if the definition of statutory bodies includes business organisations (such as banks, etc.) established in accordance with Hong Kong legislation, whether the competition law will not apply to such organisations; and

(b) given that quite a number of public service organisations (e.g. bus companies and the two power companies, etc.) are subject to regulation by the relevant scheme of control agreements ("SCAs") or licensing conditions, and such organisations, according to the above Consultation Paper, may also be exempted from regulation by the competition law, whether certain public service organisations (such as The Hong Kong and China Gas Company Limited) which are not subject to regulation by SCAs or licensing conditions will also be granted the same exemption?

Reply:

Madam President,

(a) Under our proposed framework, the competition law would not apply to the Government or statutory bodies. The law also would not apply to business organisations entrusted with the operation of "essential public services of an economic nature" where the application of the law would hinder the organisation's ability to perform such services.

We are discussing with the Department of Justice how best to define statutory bodies in the new law, as such we currently do not have a list of these statutory bodies. Taking Singapore's approach as an example, we note that the Singapore competition law defines a statutory body as a body corporate established by or under any written law. In any event, we have no intention to include business organisations (such as banks, etc) within the definition of statutory bodies.

As to what constitute "essential public services of an economic nature", in overseas jurisdictions this is decided by the regulator on a case-by-case basis. We have mentioned briefly in paragraphs 10 and 11 in Chapter VII of the consultation document the general criteria adopted overseas. Generally speaking, the services in question should be provided in all cases and must be widely available. In other jurisdictions these are typically services provided in "big network" industries such as public transport, water supply, power supply and postal services.

We propose that Hong Kong adopt the same approach, and that the Competition Commission should decide on a case-by-case basis whether an undertaking should be excluded on the grounds that it is entrusted with the operation of "essential public services of an economic nature". The Government currently does not have a list of business organisations that provide such services. If necessary, the Commission could issue guidelines to explain in detail its considerations when making a decision. The Commission would consult stakeholders before issuing guidelines.

(b) As mentioned above, the competition law would not apply to business organisations entrusted with the operation of "essential public services of an economic nature" where the application of the law would hinder the organisation's ability to perform such services. This would be regardless of whether the organisation is regulated by a scheme of control agreement or by licence. Nonetheless, the organisation would only be excluded when providing the relevant services. It would still be regulated under the competition law if it engaged in anti-competitive conduct in other areas of activity.

Ends/Wednesday, June 11, 2008