



UNSW
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Exemptions and exclusions under the Hong
Kong Competition Law Proposals: Too Much
Flexibility?

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Exemptions by the Commission

- By application for specific conduct
- By block exemption



Exemption of right

- Essential public services of an economic nature
- Government and statutory bodies



Exemption by Chief Executive in Council

- Particular conduct on public policy reasons



Exemption: the rules

Basic proposition:

“...law should in principle cover all sections of the economy”

Exempt only where :

“..would enhance economic efficiency or achieve other important social or public policy objectives”



Exemption: the rules

How?

“..clear set of criteria and transparent mechanism”



The scoreboard

- Does the Consultation Paper stick to the rules?



Application: general propositions

- Level playing field for all competitors
- Efficiency and equity dictate exemption only on clear public interest grounds
- Otherwise inequitable and resources may be misallocated



ABA submission

- Legal certainty important
- Objectively economics based
- Ultimate test: substantial social interest overrides consumer welfare
- No other way to achieve it
- Narrowly tailored to ensure minimum negative impact



Australia

- Areas largely sheltered from international competition (electricity, ports, private professional services)
- Implemented broader coverage of law
- Narrowed scope for regulating out of law except on transparent grounds
- Transparency means that special treatment is subject to regular scrutiny



Exemption for specific conduct

Test:

- Conduct must yield economic benefits which would outweigh potential anticompetitive harm
- Direct causal link



Block exemptions

- Well understood in the EU
- Avoids multiple applications
- Less flexible than individual applications
- No guidance on practical application
- No time frames or consultation process



“Essential public services of an economic nature”

EU:

“... activities which are of particular importance and would not be supplied (or would be supplied under different conditions) if there was no public intervention”



“Essential public services of an economic nature”

Consultation paper

“... operating environment in such sectors contains aspects which go beyond the objectives of competition law”

Lists:

Public transport, water supply, power supply, postal services



Chief Executive on Public Interest Grounds

- “...overriding policy considerations”



Government or statutory bodies

- Should the ownership of a body be relevant to the application of competition laws?
- Note: it exempts all activities of the body which would otherwise fall within the law



Government or statutory bodies: who are they?

- Jockey Club
- Hong Kong Housing Society
- Hong Kong Society of Accountants
- Various medical associations
- MTRC

“...suggesting these bodies don't have a major economic impact is clearly wrong”



The scoreboard: proposal fails under its own rules

- Level playing field
- Efficiency and equity dictate exemption only on clear public interest grounds
- clear set of criteria and transparent mechanism

