

**立法會**  
**Legislative Council**

LC Paper No. CB(1)646/10-11  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/12/09

**Bills Committee on Competition Bill**

**Minutes of second meeting on  
Tuesday, 9 November 2010, at 2:30 pm  
in the Chamber of the Legislative Council Building**

**Members present** : Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)  
Hon Ronny TONG Ka-wah, SC (Deputy Chairman)  
Hon Albert HO Chun-yan  
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP  
Hon LEE Cheuk-yan  
Hon Fred LI Wah-ming, SBS, JP  
Hon James TO Kun-sun  
Hon CHAN Kam-lam, SBS, JP  
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Miriam LAU Kin-yee, GBS, JP  
Hon Emily LAU Wai-hing, JP  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Vincent FANG Kang, SBS, JP  
Hon WONG Kwok-hing, MH  
Hon Jeffrey LAM Kin-fung, SBS, JP  
Hon WONG Ting-kwong, BBS, JP  
Hon CHIM Pui-chung  
Prof Hon Patrick LAU Sau-shing, SBS, JP  
Hon Cyd HO Sau-lan  
Hon Starry LEE Wai-king, JP  
Dr Hon LAM Tai-fai, BBS, JP  
Hon CHAN Hak-kan  
Hon CHAN Kin-por, JP  
Dr Hon Priscilla LEUNG Mei-fun

Dr Hon LEUNG Ka-lau  
Hon CHEUNG Kwok-che  
Hon WONG Kwok-kin, BBS  
Hon Mrs Regina IP LAU Suk-yee, GBS, JP  
Hon Paul TSE Wai-chun  
Dr Hon Samson TAM Wai-ho, JP  
Hon Alan LEONG Kah-kit, SC  
Hon LEUNG Kwok-hung  
Hon Tanya CHAN  
Hon Albert CHAN Wai-yip  
Hon WONG Yuk-man

**Members absent** : Dr Hon Margaret NG  
Hon Paul CHAN Mo-po, MH, JP  
Hon IP Kwok-him, GBS, JP

**Public Officers attending** : Agenda item II

Mr Gregory SO Kam-leung, JP  
Under Secretary for Commerce and Economic  
Development

Ms Linda LAI Wai-ming, JP  
Deputy Secretary for Commerce and Economic  
Development (Commerce and Industry)

Miss Wendy CHUNG  
Principal Assistant Secretary for Commerce and  
Economic Development (Commerce and Industry)

Mr Michael LAM Siu-chung  
Senior Assistant Law Draftsman  
Department of Justice

Ms Phyllis POON Hon-ying  
Senior Government Counsel  
Department of Justice

Mr David Alan GROVER  
Senior Government Counsel  
Department of Justice

**Clerk in attendance** : Ms Debbie YAU  
Chief Council Secretary (1)6

**Staff in attendance** : Mr Timothy TSO  
Assistant Legal Adviser 2

Ms Diana WONG  
Senior Council Secretary (1)8

---

Action

**I Confirmation of minutes**

(LC Paper No. CB(1)348/10-11 - Minutes of meeting held on 25 October 2010)

The minutes of the meeting held on 25 October 2010 were confirmed.

**II Meeting with the Administration**

2. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

**A. Proposed Work Plan**

(LC Paper No. CB(1)320/10-11(01) - Proposed work plan prepared by the Commerce and Economic Development Bureau and the Legislative Council Secretariat)

3. The Bills Committee endorsed the proposed work plan.

**B. General Introduction of the Bill**

(LC Paper No. CB(1)320/10-11(02) - Administration's information paper on overview of major components of the Competition Bill)

Follow-up actions required to be taken by the Administration

4. The Bills Committee requested the Administration to provide written responses to the following concerns/requests raised at the meeting –
- (a) provide draft guidelines on interpretation and implementation of the conduct rules which the Administration would provide for the reference of the future Competition Commission (the Commission) which was statutorily required to issue the guidelines in consultation with persons it considered appropriate;
  - (b) in respect of the proposed pecuniary penalty not exceeding 10% of the global turnover of the undertaking involved in the contravention of the competition rule for the year in which the contravention occurred,
    - (i) consider confining the scope for calculation of pecuniary penalty to local rather than global turnover with reference to the approach adopted in Singapore;
    - (ii) consider confining the scope for calculation of pecuniary penalty to the type of business activity relating to the contravention in question rather than all types of business activities engaged by the undertaking;
    - (iii) clarify whether the turnover of the subsidiary company concerned only or those generated by the subsidiary together with the parent company would be taken into account in the calculation of pecuniary penalty; and
    - (iv) provide overseas case law examples in which the proposed pecuniary penalty was imposed;
  - (c) consider stating explicitly consumer protection as one of the objects of the Bill having regard that "allowing consumers a fair share of the resulting benefit" was spelt out in the legislation of the United Kingdom and European Union and that as set out in the public consultation paper entitled "Detailed Proposals for a Competition Law" issued by the Government in May 2008, "the purpose of the legislation should be to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition";

- (d) to allay the concerns of Small and Medium Enterprises (SMEs) with regard to abuse of market power,
  - (i) consider stating in the Bill the relevant matters to be taken into account in considering whether an undertaking had a substantial degree of market power; and
  - (ii) consider amending the Chinese text of clause 21(1) of the Bill from "在市場中具有相當程度的市場權勢的業務實體" to "具有足以影響市場的權勢的業務實體";
- (e) provide information on the total number of complaints vis-à-vis those made against SMEs received by the Competition Policy Advisory Group since its establishment in 1997;
- (f) provide the Administration's comment on matters relating to SMEs in respect of competition policies in selected jurisdictions as set out in "Competition policies in selected jurisdictions" (LC Paper No. RP02/09-10) and consider stating provisions in the Bill relating to the "de minimis" approach (Proposal 43 in the Government's public consultation paper issued in May 2008); and
- (g) provide the number of multi-national corporations in Hong Kong which had engaged business activities in more than one product/service market.

Date(s) of next meeting(s)

5. The Chairman reminded members that the third meeting would be held on Monday, 29 November 2010 at 4:30 pm to meet with deputations. If necessary, another meeting will be held on 30 November 2010 for the same purpose.

**III Any other business**

6. There being no other business, the meeting ended at 4:30 pm.

**Proceedings of the second meeting of  
Bills Committee on Competition Bill  
on Tuesday, 9 November 2010, at 2:30 pm  
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 – 000217	Chairman	(a) Opening remarks by the Chairman  (b) Confirmation of minutes of meeting on 25 October 2010 (LC Paper No. CB(1)348/10-11)	
000218 – 000900	Chairman Ms Miriam LAU Miss Tanya CHAN Mrs Regina IP	Members discussed and endorsed the proposed work plan (LC Paper No. CB(1)320/10-11(01)).	
000901 – 001704	Chairman Administration	The Administration gave an overview of major components of the Competition Bill (LC Paper No. CB(1)320/10-11(02)).	
001705 – 002229	Chairman Dr Philip WONG Administration	Dr Philip WONG enquired about the parties initiating the Bill. Highlighting that in 1970s, some companies were protected by the Government and were not subject to any competition, Dr WONG was concerned whether this situation will continue even after the enactment of the Bill.  The Administration advised that the Bill was the fruit of lengthy deliberations and there was majority support in the community for the introduction of a cross-sector competition law. The Government's competition policy was to enhance economic efficiency and the free flow of trade through promoting sustainable competition to bring benefits to both the business sector and consumers.	
002230 – 002904	Chairman Mr Jeffrey LAM Administration Assistant Legal Adviser (ALA)	Mr Jeffrey LAM hoped that the Government could take heed of its pledge to carefully listen to views of the Small and Medium Enterprises (SMEs). He did not agree that the establishment of the proposed Competition Commission (the Commission) and Competition Tribunal (the Tribunal) could address the concern of the business sector over concentration of too much power in one body. They still had doubt about the Commission's power as it could investigate into competition-related complaints and bring enforcement action before the Tribunal either on receipt of complaints, on its own initiative, or on referral from the Government or a court. He also expressed concern that in Singapore, the pecuniary penalties to be imposed for contravention of competition rules were only confined to the undertaking's turnover in Singapore rather than global turnover.  The Administration advised that –  (a) at present, there was difficulty in mounting effective	The Administration to provide information as requested in paragraph 4(b) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>investigations into the complaints made to the Competition Policy Advisory Group (COMPAG). The Bill sought to establish a credible and impartial institutional framework which allowed for effective and efficient enforcement of the competition law. Before exercising its investigative powers, the Commission must have reasonable cause to suspect that a contravention of any of the competition rules had taken place, was taking place or was about to take place;</p> <p>(b) the annual recurrent funding for the Commission and Tribunal was tentatively \$67 million and \$15 million respectively; and</p> <p>(c) the proposed pecuniary penalties not exceeding 10% of the global turnover of the undertaking involved in the contravention of the competition rule for the year in which the contravention occurred was a maximum penalty that could be imposed by the Tribunal. According to overseas experience, the Tribunal would take into account other relevant matters in determining the level of fines, including but not limited to :</p> <p>(i) the nature and extent of the conduct that constituted the contravention;</p> <p>(ii) the product or market involved; and</p> <p>(iii) whether the undertaking had previously contravened the competition law.</p>	
002905 – 003955	Chairman Ms Miriam LAU Administration ALA	<p>Ms Miriam LAU expressed the following concerns –</p> <p>(a) whether the penalties imposed by the United Kingdom (UK) for contravention of the competition rules were confined to local or global turnover ;</p> <p>(b) the worries of the business sector stemmed from the complexity of the Bill and the lack of clarity of the law because it provided for general prohibitions in two major areas of anti-competitive conduct. According to the Administration's paper (LC Paper No. CB(1)372/08-09(03)) issued in December 2008, to improve the clarity of the law, the Commission would consult members of the community when drawing up its regulatory guidelines to supplement the general prohibition against anti-competitive conduct. She expressed grave concern that the Administration did not take heed of its pledge made in December 2008 to table the draft guidelines when introducing the Bill into the Legislative Council (LegCo);</p>	The Administration to provide information as requested in paragraphs 4(a), (b) and (f) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>(c) it was proposed in the Consultation Paper that the Commission would not pursue an agreement if the aggregate market share of the parties to the agreement did not exceed a certain level (i.e. the "de minimis" approach) except where "hard core" conduct was involved. Such approach and the relevant market share level was not provided in the Bill; and</p> <p>(d) statutory bodies which were providing public services to SMEs should not be brought under the purview of the Bill.</p> <p>The Administration explained that –</p> <p>(a) the market share level under the "de minimis" approach would be determined by the Commission and laid down in the regulatory guidelines; and</p> <p>(b) the Bill provided that the parts of the Bill on prohibition and enforcement would not apply to statutory bodies or their activities unless the statutory bodies or their activities were specified in regulation(s) to be made by the Chief Executive (CE) in Council under clause 5(1)(a). The Administration was working on its proposals on which statutory bodies or their activities would be brought under the purview of the Bill and would brief the Bills Committee in early 2011.</p> <p>The Chairman remarked that the Administration should apprise the Bills Committee of the details of the regulatory guidelines to be issued by the Commission, such as the market share level under the "de minimis" approach. Otherwise, it would be difficult for Members to consider whether to support the Bill.</p> <p>ALA advised that while the Bill was silent about the "de minimis" approach, it was adopted in the context of the competition law in the UK and Singapore. For instance, as stated in the guidelines, the competition authority in Singapore would not pursue the undertakings in question if the aggregate market share of the parties to the agreement did not exceed 20% on any of the relevant markets affected by the agreement where the agreement was made between competing undertakings etc.</p>	
003956 – 004635	Chairman Mrs Regina IP Administration	In reply to Mrs Regina IP's enquiry, the Administration advised that the Government had engaged the law firm, King and Wood, at a fee of \$19 million in providing consultancy services on competition-related matters. The Administration considered that there was no conflict of interest in the appointment of the firm. The Bill was prepared by law draftsman in the Department of Justice.	The Administration to provide information as requested in paragraph 4(b) of the minutes.



Time marker	Speaker	Subject(s)	Action required
		<p>Mrs IP considered it reasonable to use global turnover for calculating the proposed pecuniary penalty in view of the prevailing trend of globalized business operation, but the penalty should be confined to turnover relating to the product/service market in question. For example, if a bank's business activities relating to the credit card market or MTR's octopus operation were found contravening the proposed conduct rules, it was grossly unfair to take into account the turnover of the entire company in the calculation of pecuniary penalty.</p> <p>The Administration explained that the proposed pecuniary penalty not exceeding 10% of an undertaking's global turnover was a maximum level which the Tribunal had discretion to impose having regard to various matters.</p>	
004636 – 005214	Chairman Mr WONG Kwok-hing Administration	<p>In reply to Mr WONG Kwok-hing's concerns about the composition of the Commission, possible conflict of interest and the establishment of the executive arm, the Administration advised that –</p> <p>(a) as competition law was a multi-disciplinary subject, a good mix of expertise was essential to the Commission's effective discharge of its statutory duties;</p> <p>(b) the Commission would make its own rules with regard to conflict of interests. Failure to comply with conflict of interests disclosure obligations might result in being removed from the Commission; and</p> <p>(c) the Commission would be funded by the Government. It would be underpinned by an executive arm with staff having experience and expertise in different areas including administration, public education, public relation and investigatory work.</p>	
005215 – 010008	Chairman Mr Albert HO Administration	<p>Noting that the details concerning the anti-competitive conduct of abusing a substantial degree of market power in a market (the second conduct rule) would be provided in the regulatory guidelines to be made by the Commission, Mr Albert HO considered that the details of contravention should be provided in the Bill having regard to the heavy fines to be imposed and in particular, the guidelines were not subsidiary legislation subject to LegCo's scrutiny.</p> <p>The Administration explained that due to rapid changes in market landscape, it was more flexible for the Commission to define "substantial degree of market power" in the regulatory guidelines which could reflect market changes more closely. The Commission and Tribunal could refer to overseas case law concerning assessment of market power and consider the following matters:</p>	The Administration to provide information as requested in paragraph 4(d)(i) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>(a) market share;</p> <p>(b) ease of entry into the market;</p> <p>(c) the bargaining power of the buyers or service users; and</p> <p>(d) product differentiation and choice in the market.</p> <p>In reply to Mr HO's further enquiry, the Administration advised that the CE in Council would have to be satisfied that all of the criteria set out in clause 5(2) of the Bill were met before making the regulation to apply the provisions referred to in clause 3(1) to any statutory body or its activities.</p>	
010009 – 010615	Chairman Mr LEUNG Kwok-hung Administration	<p>Mr LEUNG Kwok-hung expressed concern that unlike UK's <i>Competition Act 1998</i> which aimed at, inter alia, "allowing consumers a fair share of the resulting benefit", the Bill had not stated this object explicitly despite the public consultation paper on "Detailed Proposals for a Competition Law" issued in May 2008 had set out that "the purpose of the legislation was to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition". He added that Article 1 of the Mainland's Anti-monopoly Law had also stated that the Law was formulated to, inter alia, safeguard the interests of consumers and the public interest.</p> <p>The Administration explained that unlike the Commission, the Office of Fair Trading which was tasked to implement <i>Competition Act 1998</i> had a statutory role in consumer protection and hence it was necessary to clearly spell out the purpose of consumer protection in the Act.</p> <p>Mr LEUNG expressed worries that if the object of consumer protection was not stated in the Bill, the Tribunal would not consider this factor when hearing and adjudicating on competition cases.</p>	The Administration to provide information as requested in paragraph 4(c) of the minutes.
010616 – 011043	Chairman Mr CHAN Kam-lam Administration ALA	Discussion on the criteria set out in clause 5(2) of the Bill which should all be met before the CE in Council would make the regulation to apply the provisions referred to in clause 3(1) to any statutory body or its activities.	
011044 – 011550	Chairman Mr Ronny TONG Administration	Mr Ronny TONG suggested that to allay the concerns of SMEs with regard to the abuse of market power, the Administration should consider amending the Chinese text of clause 21(1) of the Bill from "在市場中具有相當程度的市場權勢的業務實體" to "具有足以影響市場的權勢的業務實體". However, SMEs should not be exempted from the first conduct rule as they might engage in concerted practices to prevent, restrict or distort competition in Hong Kong and impact general consumers	The Administration to provide information as requested in paragraph 4(d) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>adversely.</p> <p>The Administration re-iterated the adoption of the "de minimis" approach the details of which would be given in the regulatory guidelines.</p>	
011551 – 012118	Chairman Mr Fred LI Administration	<p>Mr Fred LI expressed concern about Government's actions taken to allay the concerns of SMEs about enactment of the competition law in past few years. SMEs were still worried that large consortia might abuse the law and institute legal actions against them. Such concern, however, was not substantiated by international experience. Mr LI was very concerned whether SMEs were misled to believe that the law was targeting at them.</p> <p>In reply to Mr LI's enquiry, the Administration advised that the CE in Council might make a regulation to apply the provisions in clause 3(1) of the Bill to a statutory body, which was subsidiary legislation subject to the scrutiny of LegCo. The Administration was working on its proposals on which statutory bodies or their activities would be brought under the purview of the Bill and would brief the Bills Committee in early 2011.</p>	
012119 – 012724	Chairman Ms Emily LAU Administration ALA	<p>Discussion on the title of the Bill.</p> <p>Echoing the view of Mr Fred LI over the worries expressed by SMEs, Ms Emily LAU shared the suggestion made by Mr Ronny TONG to allay SMEs' concerns. She requested the Administration to provide information on the total number of complaints vis-à-vis those made against SMEs received by COMPAG since its establishment in 1997.</p>	The Administration to provide information as requested in paragraph 4(e) of the minutes.
012725 – 013325	Chairman Mr Albert CHAN Administration	<p>Mr Albert CHAN highlighted the complexity of the Bill and cautioned the need to exercise due care in scrutiny of the Bill and avoid overlooking some important matters as in the case of scrutinizing the Copyright Bill. He requested the Administration to provide as early as practicable information on which statutory bodies or their activities that would be brought under the purview of the Bill.</p>	
013326 – 014136	Chairman Mr CHAN Kin-por Administration ALA	<p>On enforcement before Tribunal, Mr CHAN Kin-por considered that the proposed pecuniary penalty should be reasonable.</p> <p>In response to Mr CHAN's concern about whether the proposed pecuniary penalty would be imposed on both the subsidiary company that had contravened the proposed conduct rules as well as its parent company, the Administration advised that the Tribunal would exercise due diligence when applying the remedy and assess, for example, whether the subsidiary was acting on the instructions of the parent company. Moreover, if the</p>	The Administration to provide information as requested in paragraph 4(b) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>penalty was only confined to the subsidiary, such arrangement might invite companies to conduct anti-competitive behaviour through subsidiary or other special vehicles that might not generate meaningful turnover to circumvent the pecuniary penalty.</p> <p>ALA was of the view that the outcome would depend on whether the parent company had actually taken part in contravening the proposed competition rules because the amount of pecuniary penalty imposed might not exceed in total 10% of the turnover of "the undertaking concerned".</p> <p>The Chairman considered that the scope of the proposed pecuniary penalty should be limited to the turnover relating to the product/service market concerned.</p>	
014137 – 014635	Chairman Administration	<p>The Chairman noted with concern that the number of SMEs in the United States and their market share had dropped after the introduction of the Anti-trust Law. He highlighted the special circumstances in Hong Kong where 98% of business undertakings were SMEs. It was therefore necessary to improve the clarity of the Bill, such as providing details of the market share or aggregate market level under the "de minimis" approach and the definition of "market" in the Bill.</p> <p>The Administration responded that as the enactment of Competition Bill could help enhance economic efficiency and the free flow of trade through promoting sustainable competition, it should in theory benefit the operation of SMEs.</p>	
014636 – 014850	Chairman Mr Jeffrey LAM	Mr Jeffrey LAM pointed out that the separation of powers in the Commission and the Tribunal did not allay the fear of the trade that excessive power would be given to the authorities. He urged the Administration to consider limiting the proposed pecuniary penalty to the local turnover and/or the turnover from the product/service market in question.	The Administration to provide information as requested in paragraph 4(b) of the minutes.
014851 – 015110	Chairman Mrs Regina IP	<p>Mrs Regina IP reiterated that it was more reasonable to confine the proposed pecuniary penalty to turnover relating to the product/service market in question.</p> <p>Mrs IP requested the Administration to provide comment on matters relating to SMEs in respect of competition policies in selected jurisdictions as set out in LC Paper No. RP02/09-10.</p>	The Administration to provide information as requested in paragraph 4(f) of the minutes.
015111 – 015350	Chairman Mr LEUNG Kwok-hung	Mr LEUNG Kwok-hung reiterated his request for the Administration to consider explicitly stating consumer protection as one of the objects of the Bill.	

Time marker	Speaker	Subject(s)	Action required
015351 – 015820	Chairman Mr Ronny TONG Administration	<p>Mr Ronny TONG shared the view that the proposed pecuniary penalty should be confined to the business activity in question. He urged the Administration to consider amending the definition of "turnover" in clause 91(4) to "the total gross revenues of an undertaking <u>in the relevant market</u> whether obtained in Hong Kong or outside Hong Kong". He requested the Administration to provide the number of multi-national corporations in Hong Kong which were engaged in business activity in more than one product/service market.</p> <p>The Administration remarked that if the proposed pecuniary penalty would only be applied to turnover relating to the product/service market in question, deterrence might not be effective in case where -</p> <ul style="list-style-type: none"> <li>(a) a company took part in market allocation in multiple product/service markets;</li> <li>(b) a parent company deployed its subsidiary to carry out duties which were anti-competitive in nature but the turnover of the subsidiary was insignificant; and</li> <li>(c) a big company involved in anti-competitive behaviour in one product/service market which constituted only a small portion of the company's business turnover but the behaviour had seriously prevented, restricted or distorted competition in that particular market due to the size of the company.</li> </ul> <p>The Administration assured members that in determining the amount of the proposed pecuniary penalty, the Tribunal must have regard to the matters listed in clause 91(2) of the Bill.</p>	The Administration to provide information as requested in paragraph 4(g) of the minutes.
015821 – 015900	Chairman Administration	Date(s) of next meeting(s).	