

立法會
Legislative Council

LC Paper No. CB(1)1134/10-11
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

Minutes of fifth meeting on
Monday, 20 December 2010, at 5:30 pm
in Conference Room A of the Legislative Council Building

Members present : Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)
Hon Ronny TONG Ka-wah, SC (Deputy Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Dr Hon Margaret NG
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Emily LAU Wai-hing, 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 Cyd HO Sau-lan
Hon Starry LEE Wai-king, JP
Dr Hon LAM Tai-fai, BBS, JP
Hon Paul CHAN Mo-po, MH, JP
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 IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-ye, 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

Members absent : Hon Albert HO Chun-yan
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-ye, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon CHAN Hak-kan
Hon WONG Yuk-man

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

Mr Ken WOO
Council Secretary (1)2

Action

I Confirmation of minutes

(LC Paper No. CB(1)646/10-11 -- Minutes of meeting held on
9 November 2010)

The minutes of the meeting held on 9 November 2010 were confirmed.

II Meeting with the Administration

General introduction of the Bill

(LC Paper No. CB(1)637/10-11(01) -- List of follow-up actions
arising from the discussion at
the meeting on 9 November
2010

LC Paper No. CB(1)637/10-11(02) -- Administration's response to
CB(1)637/10-11(01))

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

3. The Bills Committee requested the Administration to provide written responses to the following concerns/requests –

(a) in the light of the proposal as put forward in the public consultation paper entitled "Detailed Proposals for a

Competition Law" issued by the Government in May 2008 that "at least one Commission member should have experience in Small and Medium Enterprise matters", the Administration should consider amending the proposed section 2 of Schedule 5 to the Bill to clearly set out the above proposal;

- (b) in relation to the Administration's claim that the proposed pecuniary penalty up to 10% of the global turnover of the undertaking concerned was made to safeguard against possible manipulations through corporate structuring or accounting methods such as in the booking of turnover, the Administration should provide examples, if any, of such manipulations and the details for members' reference; and
- (c) provide examples, if any, of case(s) which multi-national corporation(s) had indicated reservation to invest in Hong Kong if no competition law was in place.

4. The Chairman reminded members that the next meeting of the Bills Committee would be held on 17 January 2011 at 4:30 pm to discuss "Object, Commencement and Interpretation of the Bill".

III Any other business

5. There being no other business, the meeting ended at 7:30 pm.

Council Business Division 1
Legislative Council Secretariat
24 January 2011

**Proceedings of the fifth meeting of
Bills Committee on Competition Bill
on Monday, 20 December 2010, at 5:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000255 – 000336	Chairman	<p>Opening remarks by the Chairman</p> <p>Confirmation of minutes of meeting on 9 November 2010 (LC Paper No. CB(1)646/10-11)</p>	
000337 – 001253	Chairman Administration Ms Cyd HO	The Administration outlined its response to members' views and concerns raised at the meeting of the Bills Committee on 9 November 2010 (LC Paper Nos. CB(1)637/10-11(02) and CB(1)876/10-11(01)).	
001254 – 001911	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM conveyed the concerns of Small and Medium Enterprises (SMEs) that large consortia might abuse the proposed private actions and use them to harass SMEs. As the mechanism of private actions had been introduced in other competition jurisdictions to alleviate the workload of the regulatory bodies which faced a much bigger market, Mr LAM queried whether it was necessary to provide the rights of private actions for a small market like Hong Kong. That said, Mr LAM asked whether the Administration would consider following the practice of the relevant jurisdictions to introduce private actions at a later stage after the Bill was enacted and implemented for some time.</p> <p>The Administration explained that private actions would enable individuals who had suffered loss or damage as a result of a contravention of a conduct rule to seek remedy directly from the infringing undertaking(s). Hence, private actions should be provided in the relevant legislation irrespective of market size, in particular if the regulatory bodies concerned were resource-constrained to deal with cases of a minor nature. The Administration acknowledged that other jurisdictions had not provided stand-alone right of action at the time when the new law was first implemented. The Administration was open to the phased implementation of follow-on right of action and stand-alone right of action, and members' views on the matter were welcomed.</p>	
001912 – 002342	Chairman Mrs Regina IP Administration	Mrs Regina IP considered it inappropriate to model on the legislation in the European Union (EU) which in her view was enacted to serve as a trade weapon against the United States. Mrs IP opined that such modelling would not be conducive to attracting investment to and retaining businesses in Hong Kong. Referring to the recent case of alleged bid-rigging by stallholders in Tai Po Hui Market, Mrs IP held the view that if the bidding prices for the stalls turned out to be higher, then consumers might have to pay	

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		<p>more for the products bought from them. In that circumstance, competition legislation which prohibited bid-rigging would not enhance consumer welfare, which was contrary to the Administration's claim that "enhancing consumer welfare will undoubtedly be one of the outcomes of the Bill" (CB(1)847/10-11(01)).</p> <p>The Administration responded that the legislative intent of all competition laws was to combat all types of anti-competitive conduct thereby enhancing economic efficiency and the free flow of trade, and benefiting consumers. The Administration, while acknowledging the wide scope of the Bill might bring about impacts on the local deep-rooted trade practices, believed that a level-playing field for businesses would in turn foster innovation and emergence of quality products and services, thereby ultimately benefiting consumers.</p>	
002343 – 003306	Chairman Mr LEUNG Kwok-hung Administration	<p>Mr LEUNG Kwok-hung requested the Administration to include an express provision in the object stating "the objective of the Competition Ordinance should be to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition", and add the phrase "allowing consumers a fair share of the resulting benefit" in proposed section 1(a) of Schedule 1 to the Bill. Otherwise, the rights of consumers could not be protected and the proposed Competition Tribunal (the Tribunal) might not consider this factor when hearing and adjudicating on competition cases.</p> <p>The Administration advised that –</p> <p>(a) the object of the Bill 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. Enhancing consumer welfare would undoubtedly be one of the outcomes of the Bill. Moreover, the Administration was separately working on legislative proposals to enhance protection for consumers against unfair trade practices; and</p> <p>(b) as the current drafting of proposed section 1 of Schedule 1 to the Bill already sufficed to capture the rationale of granting exclusion from the first conduct rule on economic benefit grounds, it was not appropriate to add the phrase "allowing consumers a fair share of the resulting benefit", lest how to determine what constituted a "fair" share.</p>	
003307 – 003817	Chairman Mr CHAN Kin-por Administration	<p>Mr CHAN Kin-por pointed out that as there were significant differences between Hong Kong and EU in terms of market size as well as business and political environment, Hong Kong should enact a competition law specific to its context rather than modelling on those in other competition jurisdictions. Mr CHAN expressed</p>	

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		<p>grave concern over the uncertainties and vagueness of the Bill which might subject businesses to high compliance costs and might even discourage innovation and hinder business development. As such, enterprises might choose not to invest in Hong Kong for the sake of protecting their brands that had been established with a lot of efforts over time.</p> <p>The Administration advised that –</p> <ul style="list-style-type: none"> (a) the Administration would continue to give due consideration to the local context when assisting the Bills Committee in scrutinizing the Bill, e.g. when considering the market share threshold under the "de minimis" arrangements; (b) as multi-national corporations (MNCs) were already familiar with the implementation of competition laws in other jurisdictions, they should not find it difficult to comply with the new law in Hong Kong. In fact, the level-playing field created as a result of the Bill would help attract MNCs to come to invest in Hong Kong as the new law was conducive to the building and continuous development of their brands; and (c) with the regulatory guidelines on the interpretation and implementation of the conduct rules to be issued by the proposed Competition Commission (the Commission) in place before commencement of different parts of the new Ordinance, SMEs should find the new law conducive to their development. 	
003818 – 003941	Chairman Administration	<p>In response to the Chairman's enquiry on the details of staggered commencement of the new Ordinance, the Administration advised that according to clause 1(2) of the Bill, different parts of the Ordinance would come into operation on a day to be appointed by notice published in the Gazette, and the commencement notice would be subsidiary legislation subject to the scrutiny of the Legislative Council (LegCo). For example, the provisions regarding the establishment of the future Commission would commence operation first for it to draw up the guidelines, before the competition rule provisions etc. would take effect.</p>	
003942 – 005508	Chairman Mr LEUNG Kwok-hung Administration Assistant Legal Adviser (ALA) Mrs Regina IP	<p>Mr LEUNG Kwok-hung questioned why the Bill did not include the proposal of "at least one Commission member should have experience in SME matters" as put forward in the public consultation document entitled "Detailed Proposals for a Competition Law" issued by the Government in May 2008. Mr LEUNG expressed grave concern that a person truly representing SMEs might not be appointed to the Commission.</p> <p>The Administration explained that as set out in proposed section 2(2) of Schedule 5 to the Bill, in considering the</p>	The Administration to provide information as requested in paragraph 3(a) of the minutes.

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		<p>appointment of a person as a member of the Commission, the Chief Executive might have regard to that person's expertise or experience in, inter alia, SMEs.</p> <p>ALA pointed out that –</p> <ul style="list-style-type: none"> (a) the current drafting of proposed section 2(2) of Schedule 5 to the Bill only required that the Chief Executive "may have regard" to that person's expertise or experience in SMEs rather than a pre-requisite of appointment; (b) the Bill provided that the Commission was to consist of not less than five members vis-à-vis a minimum of seven members as proposed in the 2008 public consultation document, bearing in mind that the types of expertise or experience listed in proposed section 2(2) of Schedule 5 which might be considered by the Chief Executive was six; and (c) in order to ensure that there was at least one Commission member having experience in SME matters, members may wish to consider whether the proposed section 2 of Schedule 5 should be amended to clearly reflect this. <p>The Administration highlighted the Government's legislative intent in appointing a member with expertise or experience in SMEs to the Commission. The current drafting provided flexibility to cater for the unlikely circumstances that certain appointed Commission members having the required expertise or experience could not be on board at a particular timing. Moreover, the current drafting could also help avoid disputes on the representativeness of the member from "SMEs" due to different interpretations of the term.</p> <p>Sharing Mr LEUNG's concerns, Mrs Regina IP noted that administrative definitions for SMEs were in place for the Government's internal reference. She pointed out that Mr CHAN Wing-kee and Mr YU Kwok-chun who had been appointed the Chairman of the Small and Medium Enterprises Committee actually came from large consortia.</p>	
005509 – 010301	Chairman Mrs Regina IP Administration	<p>Notwithstanding similarities in the business environment between Hong Kong and Singapore, Mrs Regina IP queried why it was necessary for Hong Kong to adopt a much more stringent competition law than Singapore which, for example, sought to prohibit the abuse of a dominant position (which was a lower threshold than the Bill's abuse of market power), gave block exemption for ocean shipping conferences and linked pecuniary penalty to the turnover of the business of the infringing undertakings in Singapore (rather than globally). Mrs Regina IP considered the Bill a disincentive to investors who might turn to Singapore. The Chairman shared similar views.</p>	

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		<p>The Administration responded that –</p> <ul style="list-style-type: none"> (a) the Singapore approach in calculating pecuniary penalty was undesirable as the local turnover of most MNCs were insignificant when compared to global turnover, and the local turnover might be subject to possible manipulations through corporate structuring or accounting methods such as in the booking of turnover; (b) the European Commission had adopted new method for calculating the amount of the fine for competition law infringements, starting with the derivation of "basic amount" of the fine, which was then subject to appropriate upward/downward adjustments with reference to various factors and circumstances; and (c) while the future Commission would consider issues relating to block exemptions, the block exemption provided by EU for ocean shipping conferences was time-limited and would not continue after the expiry of the exemption period. 	
010302 – 011346	Chairman Mr Paul TSE Administration	<p>Highlighting the similarities between Hong Kong and Singapore in terms of market size, cultural background and trade practices, Mr Paul TSE queried why the Government would propose imposing a pecuniary penalty up to 10% of global turnover which was considered unsuitable by Singapore as it only linked the maximum pecuniary penalty to the infringing undertaking's local turnover. He also expressed concern that the Administration's persistent claim that the proposed penalty was just a legal maximum subject to the Tribunal's determination had already undermined the intended deterrent effect of the proposal.</p> <p>The Administration responded that the Tribunal had full discretion to determine an appropriate amount of the pecuniary penalty having regard but not limiting to factors listed in clause 91(2) of the Bill, including the nature and extent of the anti-competitive conduct in question. In fact, according to a recent survey in EU of cartel cases, the pecuniary penalty in about half of the cases for contravention of engaging in anti-competitive agreements, concerted practices and decision was less than 0.99% of the global turnover of the undertakings concerned.</p> <p>Mr TSE also questioned the need to enact the Bill at this stage as it might worsen the business environment and dampen the desire of MNCs to invest in Hong Kong. He asked whether any MNCs had indicated reservation to invest in Hong Kong due to monopolistic conduct found in a certain market or because there was no competition law in place locally.</p> <p>The Administration advised that there was majority support</p>	

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		<p>in the two rounds of public consultation conducted in 2006 and 2008 for the introduction of a cross-sector competition law in Hong Kong. The Competition Policy Advisory Group had in the past received complaints that some local companies having a major share in a certain market had hindered the entry of other companies into the market concerned. While it was believed that the absence of a competition law by itself might not discourage foreign investment and MNCs from investing in Hong Kong, the enactment of the Bill will give them increased confidence in investing here.</p>	
011347 – 011644	<p>Chairman Mr Paul CHAN Administration</p>	<p>Mr Paul CHAN expressed reservation about the proposal to link pecuniary penalty to the global turnover of the undertaking(s) in question. Noting the Administration's claim that the proposal was made to safeguard against possible manipulations through corporate structuring or accounting methods such as in the booking of turnover, he requested the Administration to provide examples, if any, of such manipulations and the details for members' reference.</p>	<p>The Administration to provide information as requested in paragraph 3(b) of the minutes.</p>
011645 – 012137	<p>Chairman Mr Ronny TONG Administration</p>	<p>In reply to the concerns of Mr Ronny TONG, the Administration advised that –</p> <ul style="list-style-type: none"> (a) the member of the Commission with expertise and experience in SMEs, if any, would be able to facilitate the Commission in drawing up the regulatory guidelines by providing information on the operation of SMEs and the difficulties faced by them. This member would have the same function and power as other members servicing the Commission; and (b) the proposed pecuniary penalty not exceeding 10% of the global turnover was a maximum penalty and in determining the level, the Tribunal, which was a superior court of record, would exercise its due diligence and reasonableness, including drawing reference to case law examples in overseas competition jurisdictions. The proposed penalty was in line with the enforcement framework in other legislation. 	
012138 – 012613	<p>Chairman Mr LEUNG Kwok-hung Administration</p>	<p>Mr LEUNG Kwok-hung requested the Administration to make reference to section 39 of the Competition Act 1998 in the United Kingdom (UK) and stipulate that a party to a "small agreement" was immune from the Bill.</p> <p>The Administration explained that the future Commission would set out the details of any "de minimis" arrangements, i.e. the Commission would not pursue a case where the aggregate market share or combined annual turnover of the undertakings involved did not exceed a certain level, in the guidelines before the competition rule came into effect. This approach would help allay SMEs' concerns.</p>	

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		<p>Mr LEUNG urged that the details of the "de minimis" arrangements should be made subsidiary legislation so as to better protect the interests of the small players. The Administration responded that in UK, the "de minimis" thresholds were promulgated under a regulation which was subject to the scrutiny of the Members of the Parliament. However, it was less flexible in adapting to market changes.</p>	
012614 – 013122	Chairman Mr Paul TSE Administration	<p>Mr Paul TSE expressed concern that the Government had introduced a number of legislation in recent years that might adversely impact the existing free flow of trade. He urged the Administration to exercise flexibility in considering members' requests and addressing their concerns about the Bill.</p> <p>The Administration undertook to maintain communication with Bills Committee members and take on board their views as appropriate with a view to coming up with a competition law that best fit Hong Kong.</p> <p>Mr TSE requested the Administration to provide example(s), if any, of cases which MNCs had indicated reservation to invest in Hong Kong if no competition law was in place.</p>	The Administration to provide information as requested in paragraph 3(c) of the minutes.
013123 – 013448	Chairman Mr Ronny TONG Administration	<p>Mr Ronny TONG remarked that the Government should step up public education among SMEs that the Bill sought to protect their interests. To allay their worries, the Government should explain the followings –</p> <p>(a) an anti-competitive conduct would be prohibited if the object or effect of it was to "prevent, restrict or distort competition in Hong Kong" which was unlikely achieved by SMEs; and</p> <p>(b) there were provisions in the Bill to guard against abuse of private actions, for example, the person who initiated the private action had to prove that he had suffered loss or damage as a result of a contravention of a conduct rule.</p> <p>Discussion on provisions in the Bill that helped allay SMEs' concerns.</p>	
013449 – 013802	Chairman Mr Vincent FANG Administration	<p>Mr Vincent FANG was prepared to arrange seminars for the Administration to brief different sectors, such as the Hong Kong Suppliers Association about the provisions in the Bill. The Administration indicated its pleasure to do so.</p>	
013803 – 014328	Chairman Mr Paul TSE Administration	<p>Mr Paul TSE pointed out that despite their small market share, SMEs engaged in anti-competitive conduct which had the "object" of preventing, restricting or distorting competition in Hong Kong would still be prohibited.</p>	

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		<p>The Administration highlighted the two-tier commitment mechanism under which the Commission would be empowered to accept commitments from a person/persons, e.g. SME(s), to refrain from taking certain actions to address the Commission's concerns about a possible contravention of the competition rules in exchange for cessation of investigation and/or proceedings against the person(s).</p> <p>The Chairman echoed Mr TSE's view and considered it necessary to clearly set out in the Bill the types of conduct carried out by SMEs, e.g. bid-rigging, that would lead to enforcement before the Tribunal since the Commission had the discretion not to accept the commitments from SMEs. Moreover, the SMEs concerned could also be brought to the court by ways of private actions.</p>	
014329 – 014905	Chairman Mr CHAN Kam-lam Administration	<p>Mr CHAN Kam-lam shared the concerns of SMEs which, in order to remain viable, might easily fall foul of the new law. He requested the Administration to clearly set out the market share threshold below which SMEs would be exempted from the Bill. The Chairman recalled that the Administration had once indicated that the market share level under the proposed "de minimis" arrangements would be around 20%.</p> <p>The Administration referred to clauses 35 and 38 of the Bill which provided that the Commission had to issue guidelines on interpretation and implementation of the conduct rules and guidelines regarding complaints. To allay the concerns of SMEs, the guidelines would explain some key concepts pertinent to the application of the conduct rules (such as market definition and market power) and provide examples of anti-competitive conduct which would likely be targeted by a competition law. The Administration remarked that it maintained an open mind as to whether the guidelines should be subsidiary legislation subject to LegCo's scrutiny.</p>	
014906 – 015444	Chairman Mrs Regina IP Administration	<p>Mrs Regina IP pointed out that by adopting a "substantial degree of market power" threshold under the proposed second conduct rule, Hong Kong would be different from Singapore, which used a "dominance" threshold in the prohibition on abuse of market power. The Competition Commission of Singapore had adopted the market share threshold as an indicator, which was currently above 60%. Mrs IP pointed out that in the case of Hong Kong, it was necessary to define "market", for example, whether the "Women Street" in Mongkok or the Tai Po Hui Market in the recent case of alleged bid-rigging by stallholders' pre-auction agreement would be considered a "market" under the Bill.</p> <p>The Administration advised that while the definition of "market" would be discussed in details at a later stage, in</p>	

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		<p>brief, the market definition primarily focused on the product (including goods or services) and geographical substitutability. From the product angle, the investigator needed to judge whether buyers would switch to other products when the seller raised the price of the product in question by a "small but significant amount" for a "non-transitory" continuous period. From the geographical angle, the question was whether buyers would switch to a source at another location in response to a small but significant and non-transitory price increase.</p> <p>Mrs IP considered that the delineation of a "market" above required in-depth econometric analysis which would incur significant cost on the Government as it needed to deploy such experts from overseas. The Administration explained that according to overseas experience, only major cases involving large enterprises would require in-depth econometric analysis.</p>	
015445 – 015511	Chairman Administration	Meeting arrangements	