

立法會
Legislative Council

LC Paper No. CB(1)1701/10-11
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of eighth meeting on
Tuesday, 15 February 2011, at 4:30 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
Dr Hon Margaret NG
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 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
Hon Starry LEE Wai-king, JP
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Hak-kan
Hon Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
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
Dr Hon Samson TAM Wai-ho, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Tanya CHAN

Members absent : Hon Emily LAU Wai-hing, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon Paul TSE Wai-chun
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)

Mr Raymond WU Wai-man
Principal Assistant Secretary for Commerce &
Economic Development (Commerce & 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

Mr Ken WOO
Council Secretary (1)6

Action

I Confirmation of minutes

LC Paper No. CB(1)1261/10-11 -- Minutes of meeting held on 17
January 2011

The minutes of the meeting held on 17 January 2011 was confirmed.

II Meeting with the Administration

Matters arising from last meeting

(LC Paper No. -- List of follow-up actions arising
CB(1)1258/10-11(01) from the discussion at the
meeting on 25 January 2011

LC Paper No. CB(1)1258/10-11(02) -- Administration's response to
CB(1)1258/10-11(01)

LC Paper No. CB(1)1305/10-11(01) -- Administration's supplementary
(*tabled and issued on 16 February 2011*) response to
CB(1)1258/10-11(01))

Object, Commencement and Interpretation of the Bill

(LC Paper No. -- Summary of views expressed by
CB(1)1034/10-11(04) deputations on the object,
commencement and
interpretation of the Bill, and
the Administration's response

LC Paper No. CB(1)320/10-11(03) -- Assistant Legal Adviser's letter dated 26 October 2010 to the Administration (clause 2)

LC Paper No. CB(1)1034/10-11(05) -- Administration's response to CB(1)320/10-11(03) (paragraphs 2 and 3))

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) the "de minimis" arrangements should be provided in the Bill by –
 - (i) setting out the relevant level(s) in a schedule to the Bill and the level(s) might be amended in future by a delegated authority by way of subsidiary legislation subject to either positive or negative vetting; or
 - (ii) empowering a delegated authority to set out the relevant level(s) in a subsidiary legislation to be made under the Bill which would be subject to either positive or negative vetting;
- (b) with reference to the Competition Act 2004 of Singapore in which "undertaking" was defined to mean "any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services", consider revising the definition of "undertaking" in clause 2 of the Bill to make it clearer; and
- (c) according to section 2(1) of the Companies Ordinance (Cap. 32), "shadow director", in relation to a company, meant "a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act". As the phrase "or a majority of the directors" was not included in the definition of "shadow director" under clause 2 of the Bill, the Administration was requested to provide a list of the definition of "shadow director" used in other Hong Kong ordinances and explain the interpretation and the usage of "shadow director" in these ordinances.

4. The Chairman reminded members that the next meeting of the Bills Committee would be held on 22 February 2011 at 4:30 pm.

III Any other business

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

Council Business Division 1
Legislative Council Secretariat
25 March 2011

**Proceedings of the eighth meeting of
Bills Committee on Competition Bill
on Tuesday, 15 February 2011, at 4:30 pm
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000358 – 000440	Chairman	(a) Opening remarks by the Chairman. (b) Confirmation of minutes of the meeting on 17 January 2011 (LC Paper No. CB(1)1261/10-11).	
000441 – 001400	Chairman Administration	<u>Matters arising from last meeting</u> The Administration outlined its response to members' views and concerns raised at the meeting of the Bills Committee on 25 January 2011 (LC Paper Nos. CB(1)1258/10-11(02) and CB(1)1305/10-11(01)).	
001401 – 002453	Chairman Dr LAM Tai-fai Administration	<p>In reply to Dr LAM Tai-fai's enquiry, the Administration advised that as there was much difference in market concentration for different products or services, it would be more appropriate for the future Competition Commission (the Commission) to set out the "de minimis" arrangements in the regulatory guidelines after it had conducted relevant market studies and public consultation.</p> <p>The Chairman suggested that the "de minimis" arrangements should take into account both market share threshold and annual turnover of the undertaking concerned. He further relayed the worries of small and medium enterprises (SMEs) and said that if the "de minimis" arrangements would not be provided during the scrutiny of the Bill, members might have difficulties in supporting the Bill.</p> <p>The Administration remarked that SMEs generally lacked market power and their actions would unlikely have the effect of appreciably preventing, restricting or distorting competition. It kept an open-mind on the ways in which the "de minimis" arrangements were determined and effected and welcomed members' views on the matter.</p> <p>Dr LAM Tai-fai referred to an example of anti-competitive conduct (CB(1)1258/10-11(02)) in which the Laundry Association of Hong Kong Limited (LAHK) placed an advertisement in various local newspapers on 5 November 2004 calling on laundry shops to raise their charges by 10%, and asked whether Association members who did not support the action would be considered in breach of the proposed competition rules. The Administration responded that it would have to be determined on the facts of the case.</p> <p>Dr LAM cited a hypothetical case whereby some taxi companies jointly agreed to increase fare which was</p>	

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		subsequently approved by the Chief Executive-in-Council, and asked whether the agreement was an anti-competitive conduct.	
002454 – 003029	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM expressed concern that the Administration had, on one hand, stressed that regulation of SME conduct was not normally pursued as a priority by competition authorities, while on the other hand pointed out that when SMEs involved in "hard-core" anti-competitive conduct, such conduct should be prohibited. Mr LAM said that SMEs did not believe that they would not be the target of enforcement.</p> <p>The Administration stressed that since "hard-core" anti-competitive conduct, such as price-fixing, output restriction or market allocation, would almost always have an adverse effect on competition and rarely have any redeeming economic benefit, they should be prohibited by law regardless of the size of the firms concerned.</p>	
003030 – 003705	Chairman Ir Dr Raymond HO Administration	<p>Ir Dr Raymond HO expressed grave concern that the Government had time and again left important and sensitive issues to be dealt with by the future authorities to be established after the enactment of the bills, such as the "de minimis" arrangements under the Bill. He also refuted the Administration's claim about SMEs engaging collectively in an anti-competitive behaviour, and considered that it would in practice be difficult for SMEs, which made up more than 95% in individual sectors, to do so. He conveyed the deep concerns of the engineering sector over the vagueness of the Bill and said that he had difficulties in supporting the Bill if the "de minimis" approach was not clearly provided.</p> <p>The Administration remarked that there was majority support in the two rounds of extensive public consultation held in 2006 and 2008 for the introduction of a cross-sector competition law. While international best practices indicated that the "de minimis" arrangements of competition law enforcement, such as the market share threshold, were commonly set out in the guidelines or regulations rather than in the principal legislation, the Administration kept an open-mind on the ways the "de minimis" arrangements of the Bill were determined and effected. The Administration further advised that, in a report entitled "Positive Impact 09/10 - Consumer benefits from the OFT's work" (OFT 1251) published in July 2010 by The Office of Fair Trading in UK, it was estimated that consumers directly saved £84 million per year on average over the period 2007 to 2010 from the OFT's work on enforcement of competition law. If the deterrent effect of competition enforcement work was also taken into account, the estimated savings would have amounted to £506 million. The benefits brought about by a competition law</p>	

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		to consumers thus should not be underestimated.	
003706 – 004613	Chairman Mr CHAN Kam-lam Administration	<p>Mr CHAN Kam-lam urged the Administration to provide the "de minimis" threshold in the principal legislation, and considered it necessary to clearly define the scope of "hard-core" anti-competitive conduct to allay the concerns of SMEs. The Chairman opined that stipulating the "de minimis" arrangements in the principal legislation would give legal certainty to the business community.</p> <p>The Administration expressed that whilst stipulating in the principal legislation the "de minimis" arrangements might help enhance legal certainty and clarity, this was not the usual practice among some 120 competition jurisdictions. Moreover, this would curtail the ability of the future Commission to react quickly to changing market landscapes and it would also be difficult to set out a fixed "de minimis" threshold in the light of the differences in market concentration for different products and services. In addition, granting exemption to SMEs was not an international practice as "hard-core" anti-competitive conduct should not be tolerated and should be sanctioned. Notwithstanding this, the Bill had provided a commitment mechanism to deal with minor contravention of the proposed competition rules.</p> <p>Mr CHAN Kam-lam further suggested that changes to market share threshold could be amended in the future by way of subsidiary legislation if the Commission considered necessary. The Chairman agreed with Mr CHAN's suggestion.</p>	
004614 – 005149	Chairman Mr Albert HO Assistant Legal Adviser (ALA) Administration	<p>Mr Albert HO said that while Members belonging to the Democratic Party supported the Bill, it had repeatedly emphasized that elements of the contravention, such as the "de minimis" threshold, should be clearly stated in the principal legislation instead of being promulgated through guidelines which should only serve to elaborate on the legal requirements. He agreed that the relevant level(s) under the "de minimis" approach should be set out in the principal legislation and to be amended by way of subsidiary legislation in the future if necessary.</p> <p>In view of members' suggestion, ALA advised that the "de minimis" arrangements could be provided in the Bill by either setting out the relevant level(s) in a schedule to the Bill and the level(s) might be amended in future by a delegated authority by way of subsidiary legislation subject to either positive or negative vetting; or empowering a delegated authority to set out the relevant level(s) in a subsidiary legislation to be made under the Bill in the future which would be subject to either positive or negative vetting.</p>	The Administration to provide information as requested in paragraph 3(a) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>The Chairman said that he preferred positive vetting procedure and urged the Administration to clarify how the conduct rules would be interpreted and implemented.</p> <p>The Administration responded that the Bill set out what constituted a contravention with examples while the guidelines would seek to explain some key concepts pertinent to the application of the conduct rules (such as market definition and market power), and provide more examples of anti-competitive conduct which would likely be targeted by a competition law.</p>	
005150 – 010138	Chairman Dr LAM Tai-fai Administration ALA	<p>In reply to Dr LAM Tai-fai's follow-up question on the example of anti-competitive conduct by LAHK, the Administration took members through clauses 6(1)(c) and 89(a) and (b) of the Bill which provided that "an undertaking must not as a member of an association of undertakings, make or give effect to a decision of the association", and "a person being involved in a contravention of a competition rule means a person who attempts to contravene a rule, aids, abets, counsels or procures any other person to contravene the rule" respectively. The Administration explained that if the undertakings in question were found to have committed a course of action that had prevented, restricted or distorted competition, whether or not their member companies were held liable for the action would rest upon their involvement in making or giving effect to the anti-competitive decisions in question.</p> <p>ALA opined that according to clause 6(1)(c), a member of an association of undertakings might not contravene the law if it was not actually involved in making or giving effect to the decisions in question, e.g. it did not in fact increase the laundry charges. It was, however, dependent on the facts to be established under the particular cases.</p>	
010139 – 010638	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM pointed out that according to clause 6, an undertaking must not engage in anti-competitive agreements, concerted practices or decisions if the object or effect of which was to prevent, restrict or distort competition in Hong Kong. As such, he asked whether SMEs which were involved in "hard-core" anti-competitive conduct would still be sanctioned if the SMEs did not possess any market power or the conduct per se would bring about economic efficiency.</p> <p>The Administration reiterated that "hard-core" anti-competitive conduct, which rarely had any redeeming economic benefit, should be prohibited regardless of the size of the firms concerned. In reply to Mr LAM's further query, the Administration clarified that it was the Singapore Medical Association (SMA) which sought the view of the Competition Commission of Singapore in respect of its</p>	

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		<p>guidelines on fee schedule, and it was later ruled that the guidelines were anti-competitive. The case did not involve any legal actions against SMA.</p>	
010639 – 011302	<p>Chairman Mr WONG Ting-kwong Administration</p>	<p>Mr WONG Ting-kwong considered the Administration's response to the question on LAHK that contravention of the competition rules or otherwise would have to be determined on a case-by-case basis unacceptable as future application of the Bill should be made clear at this stage. He also considered that the guidelines on fee schedule issued by SMA should not be considered anti-competitive as they were said to be provided with a view to enhancing consumer protection by improving price transparency and preventing overcharging by general medical practitioners. He urged the Administration to provide detailed analysis on the examples with reference to the legislative intent of the Bill.</p> <p>The Administration reiterated the object of the Bill and its response to the example of increase in charges by laundry shops. Whilst a competition law would not restrict SMEs, which did not possess market power, to slash their product prices/service charges in response to market situation, the law would prohibit a firm possessing market power from predatorily reducing its product prices/service charges with a foreclosure effect upon its competitors. In any event, a more competitive environment would generally lead to lower prices of products and services, thereby benefiting the public at large.</p>	
011303– 011914	<p>Chairman Mr James TO Administration</p>	<p>Mr James TO enquired about the Administration's view on the pros and cons in setting out the relevant level(s) under the "de minimis" arrangements in the Bill.</p> <p>The Administration explained that the "de minimis" arrangements for individual sectors might not be the same after the Commission had conducted market studies and public consultation. The Commission would also conduct public education programmes before the competition rules came into effect. It assured members that the commencement of the various parts of the Bill would be by notice published in the Gazette which would be subsidiary legislation subject to the scrutiny of the Legislative Council when the "de minimis" arrangements would have been prepared by the Commission.</p>	
011915 – 012747	<p>Administration Mr LEUNG Kwok-hung Administration</p>	<p>Mr LEUNG Kwok-hung reiterated his earlier requests to include an express provision stating that the object of the Bill was to, inter alia, enhance economic efficiency and thus the benefit of consumers, and to appoint an SME representative to the Commission. He opined that the principle of setting out the relevant level(s) under the "de minimis" approach should be set out in the Bill.</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>In response to the Administration's explanation that the Bill already provided sufficient protection for both downstream buyers and end-consumers, Mr LEUNG emphasized that the end-consumers should be better off, and not worse off, with the introduction of the Bill. He urged the Administration to consider his suggestion on stating enhancing consumer benefits as an object of the Bill.</p>	
012748 – 013326	Chairman Mr Albert HO Administration	<p>Considering that price-fixing, such as minimum wage, should be allowed by law on the ground of overriding public need, Mr Albert HO expressed concern that throat-cutting price, such as "zero-fare" tours, would lead to poor service quality to the detriment of consumers and asked whether this was anti-competitive practice to be regulated by the Bill.</p> <p>The Administration referred members to clause 31 of the Bill which set out that exemption might be given to agreements if there were exceptional and compelling reasons of public policy for doing so. The Administration further explained that, in view of the damage caused to the tourism sector by "zero-fare" tours, guidelines had been in place to refrain receiving agents from offering a tour fare lower than the cost. Whether a pricing arrangement might contravene the Bill hinged on whether it carried an object or effect to prevent, restrict or distort competition. Nevertheless, even with the guidelines in place, receiving agents could still compete through cost saving and service quality.</p>	
013327– 014243	Chairman Administration ALA	<p><u>Object, commencement and interpretation of the Bill</u> <u>Clause-by-clause examination</u></p> <p><u>Clause 2 - Interpretation</u></p> <p><i>"undertaking"</i></p> <p>ALA said that he had requested the Administration in his letter (CB(1)320/10-11(03)) to consider specifying the nature of economic activity for defining "undertaking" under the Bill. He also drew members' attention to the definition of "undertaking" in the Competition Act 2004 of Singapore, and to deputations' view (CB(1)1034/10-11(05)) on the meaning of "undertaking".</p> <p>The Administration advised that it had followed the practices in most major competition jurisdictions to elaborate the term of "undertaking" through case laws which had developed some guiding principles to elaborate on "economic activity" which included offering goods or services in a given market. Members' views in this regard were welcomed.</p> <p>The Chairman requested the Administration to revise the</p>	The Administration to provide information as requested in paragraph 3(b) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		definition of "undertaking" in clause 2 of the Bill to make it clearer.	
014244– 015635	Chairman Administration ALA Miss Tanya CHAN Mr Albert HO	<p><u>Clause 2 - Interpretation</u></p> <p><i>"shadow director"</i></p> <p>ALA pointed out that according to section 2(1) of the Companies Ordinance (Cap. 32), "shadow director", in relation to a company, meant "a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act". However, in the definition of "shadow director" under clause 2 of the Bill, the phrase "or a majority of the directors" was not included.</p> <p>The Administration explained that by defining the scope of "director" to include a "shadow director", the Bill enabled the proposed Competition Tribunal to make a disqualification order against a person who was not occupying the position of director or apparently involved in the management of a company, but nevertheless had significant influence over the directors of the company through his/her directions or instructions on a particular director (and not a majority of directors) and should thus be held responsible for contravening the competition rules, if any. The definition of "shadow director" adopted in the Bill was broadly the same as that stipulated in the UK Company Directors Disqualification Act 1986, the Securities and Futures Ordinance (Cap. 571) and the Financial Reporting Council Ordinance (Cap. 588). The definition as currently proposed would best fit the purpose of the Bill, despite its deviation from the one in the Companies Ordinance which served to reflect the typical situation for passage of company board decisions by a majority of the directors.</p> <p>Miss Tanya CHAN and Mr Albert HO expressed reservations on adopting in the Bill a different definition of "shadow director" from that of the Companies Ordinance. They requested the Administration to provide a list of the definition of "shadow director" used in other Hong Kong ordinances and explain the interpretation and the usage of "shadow director" in these ordinances.</p>	The Administration to provide information as requested in paragraph 3(c) of the minutes.
015636 – 015700	Chairman	Date of next meeting	