

立法會
Legislative Council

LC Paper No. CB(1)2801/10-11
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of fifteenth meeting on
Tuesday, 31 May 2011, 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)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
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 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
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Hak-kan
Hon CHAN Kin-por, JP
Dr Hon LEUNG Ka-lau
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-yeet, GBS, JP
Hon Paul TSE Wai-chun, JP

Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon WONG Yuk-man

Members absent : Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon Miriam LAU Kin-yee, GBS, JP
Hon Starry LEE Wai-king, JP
Hon Paul CHAN Mo-po, MH, JP
Hon Tanya CHAN

Public Officers attending : Agenda item II

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 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

Miss Lilian MOK
Council Secretary (1)7

Action

I Confirmation of minutes

(LC Paper No. CB(1)2305/10-11 -- Minutes of meeting held on 13 April 2011)

The minutes of the meeting held on 13 April 2011 were confirmed.

II Meeting with the Administration

(LC Paper No. CB(1)2283/10-11(01) -- List of follow-up actions arising from the discussion at the meeting on 12 May 2011

LC Paper No. CB(1)2283/10-11(02) -- Administration's response to CB(1)2283/10-11(01)

LC Paper No. CB(1)2283/10-11(03) -- Letter from Dr Hon LEUNG Ka-lau dated 21 April 2011 (Chinese version only)

Major prohibitions, exclusion and exemption

(LC Paper No. CB(1)320/10-11(02) -- Administration's information paper on overview of major components of the Competition Bill (paragraphs 15 to 24 on major prohibitions, exclusion and exemption)

LC Paper No. CB(1)2283/10-11(04) -- Summary of views expressed by deputations on major prohibitions, exclusion and exemption of the Bill, and the Administration's response

LC Paper No. CB(1)2336/10-11(01) -- Administration's paper on Guidelines on the First Conduct Rule

- LC Paper No. CB(1)320/10-11(03) -- Assistant Legal Adviser's letter dated 26 October 2010 to the Administration (clauses 6, 9, 11, 21, 24, 26 and 33 and Schedules 1 and 7)
- LC Paper No. CB(1)1034/10-11(05) -- Administration's response to CB(1)320/10-11(03) (paragraphs 5-12 and 17-20))

Submission received since last meeting

- (LC Paper No. CB(1)2283/10-11(05) -- Submission from the Consumer Council received on 25 May 2011 (English version only))

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) provide case law examples in other jurisdictions, e.g. the European Union, the United Kingdom and Singapore to which the Administration has made reference in drafting the guidelines on the first conduct rule;
- (b) provide information on the academics, experts and professionals who have contributed their views on the drafting of the guidelines on the first conduct rule and expressed support for the Bill;
- (c) in respect of the examples of agreements that may infringe the first conduct rule, advise
 - (i) whether a price announcement made to the public (including both buyers and competitors in the market) would be considered as anti-competitive; and
 - (ii) whether restrictions imposed by an association or a statutory body on advertising activities carried out by its members would be regarded as anti-competitive;

- (d) consider applying the first conduct rule to conduct having both the "object and effect" of preventing, restricting or distorting competition in Hong Kong; and
- (e) re-consider making the guidelines on the first conduct rule as subsidiary legislation subject to scrutiny of the Legislative Council.

4. The Chairman reminded members that the next meeting of the Bills Committee would be held on 7 June 2011 and the meeting time would be changed from 3:30 pm – 7:30 pm to 2:30 pm – 5:30 pm.

III Any other business

5. There being no other business, the meeting ended at 6:13 pm.

Council Business Division 1
Legislative Council Secretariat
22 July 2011

**Proceedings of the fifteenth meeting of
Bills Committee on Competition Bill
on Tuesday, 31 May 2011, at 2:30 pm
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000251 – 000323	Chairman	<p>Opening remarks by the Chairman.</p> <p>Confirmation of minutes of the meeting on 13 April 2011 (CB(1)2305/10-11).</p>	
000324 – 001209	Chairman Administration	<p>The Administration outlined its response to members' views and concerns raised at the meeting of the Bills Committee on 12 May 2011 (CB(1)2283/10-11(02)).</p> <p>The Chairman reminded the Administration to provide a written response to the letter from Dr LEUNG Ka-lau dated 21 April 2011 (CB(1)2283/10-11(03)) as early as possible.</p>	
001210 – 002048	Chairman Administration	<p><u>Part 2 – Major prohibitions, exclusion and exemption</u></p> <p>Briefing by the Administration (CB(1)2283/10-11(04) and CB(1)2236/10/11(01))</p>	
002049 – 002923	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM commented that the guidelines on the first conduct rule (the Guidelines) were not drafted in clear terms, and unable to address the worries of the business sectors, in particular the small and medium enterprises (SMEs). The Administration advised that the Guidelines were drawn up with reference to the regulatory guidelines and case law examples of other competition jurisdictions.</p> <p>Taking note that in the normal course of business, undertakings joining trade association meetings from time to time would exchange views on business operation, market updates and even price information etc, Mr LAM expressed concern that they might breach the law for doing so according to the Guidelines.</p> <p>The Administration clarified that generally, exchange of information between competitors or under the aegis of a trade association would not give rise to competition concerns if the information exchanged were purely historical, aggregate data, or concerned about the latest market trend or development opportunities. However, exchange of information that reduced or removed the uncertainty amongst competitors, such as information on pricing strategy leading to price fixing or other co-ordinated practices, might have an appreciable adverse impact on competition and would be prohibited.</p>	
002924 – 004101	Chairman Mr CHAN Kam-lam	Mr CHAN Kam-lam considered the Guidelines not clear enough to protect the SMEs from falling foul of the first	

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	Administration	<p>conduct rule. He criticized that not only market competition and the free flow of trade would be undermined by the Bill, consumers were not to be benefited. Citing the increase in retail pump prices by oil companies one after another, Mr CHAN cast doubt how the Bill could prevent such practice.</p> <p>The Administration said that the objective of the Bill was to combat anti-competitive behaviour, thereby enhancing economic efficiency and facilitating market entry such that consumers would benefit from better and more supply of goods or services.</p> <p>The Chairman was concerned whether the aforesaid practice of the oil companies would be regarded as a "concerted practice". Noting the Administration's earlier advice that each competition case would be judged with reference to previous case law, the Chairman considered that this would impose excessive compliance burden on the SMEs due to the lack of legal certainty. The Chairman further pointed out that many overseas trade associations would read out disclaimers at the beginning of a meeting so as to protect themselves from being accused of breaching the prevailing competition rules.</p> <p>The Administration advised that it was common and legitimate for market players to respond to competitors' move in the market, particularly when the market was oligopolistic. Such parallel action did not necessarily suggest cartel behaviour if business decisions were made independently. Even with same price, competitors could still compete in terms of loyalty discounts, special deals or additional or better services. As cartel conduct was difficult to detect, the Bill provided the proposal Competition Commission (the Commission) with a range of investigatory powers. The Commission might also make leniency agreements with a person, such as the whistle blower in a cartel case, in exchange for his/her co-operation in the investigation. As regards disclaimers made at meetings, the Competition Tribunal (the Tribunal) would take into consideration the fact and circumstances of each case to determine whether contravention of the competition rules took place despite the disclaimers.</p>	
004102 – 004958	Chairman Dr LEUNG Ka-lau Administration	<p>Dr LEUNG Ka-lau enquired whether it would breach any provisions in the Bill for the Hong Kong Medical Association, individual practitioners or Consumer Council to publicize the current pricing.</p> <p>The Administration advised that exchange of information that was sufficiently historical and aggregate was unlikely to have an appreciable adverse impact on competition. Individual sellers or the Consumer Council publicizing pricing information to the public would indeed help</p>	The Administration to provide information as requested in paragraph 3(c)(i) of the minutes.

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		<p>consumers become more informed, thereby enhancing competition. However, exchanging price information between competitors, or listing recommended prices by trade association, might lead to price co-ordination and reduce competition; and such exchange would be prohibited by the competition law.</p> <p>The Administration was requested to advise whether a price announcement made to the public (including both buyers and competitors in the market) would be considered as anti-competitive.</p>	
004959 – 005250	Chairman Mr Ronny TONG Administration	The Administration was requested to provide case law examples in other jurisdictions, e.g. the European Union, the United Kingdom and Singapore to which the Administration had made reference in drafting the Guidelines.	The Administration to provide information as requested in paragraph 3(a) of the minutes.
005251 – 005644	Chairman Mr WONG Ting-kwong Administration	Mr WONG Ting-kwong found that the Guidelines were unclear, and it would be difficult for SMEs as well as the trade associations to understand if their act would contravene the first conduct rule or not. As a result, they might fall foul of the legislation unknowingly.	
005645 – 005811	Chairman Dr Philip WONG	Dr Philip WONG criticized that the Government was out of touch with the pulse of society and did not understand public aspirations. He said that it was common for the trade associations to discuss the minimum selling prices for their products or services.	
005812 – 010255	Chairman Mrs Regina IP Administration	<p>In response to Mrs Regina IP's enquiry, the Administration said that the draft Guidelines were drawn up on the basis of the provisions in the Bill as currently drafted. The Administration had also made reference to the regulatory guidelines and case law examples of other overseas jurisdictions during drafting. Views from the academics, experts and professionals specializing in competition law and practices were also sought. The Administration emphasized that the draft Guidelines were prepared to facilitate members' scrutiny of the Bill. The Commission was required by the Bill to prepare the regulatory guidelines in consultation with the stakeholders after the enactment of the Bill.</p> <p>Mrs IP criticized that the Administration's arrangement of inviting the academics and experts, who had expressed support for the Bill publicly, to assist in the drafting of the Guidelines would give rise to conflict of interest in future if they were to be appointed to the Commission or apply for senior positions in the Commission. She considered that these academics and experts should have declared interest at this stage as Hong Kong's future economy might be subject to their heavy influence.</p>	

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		<p>Referring to the Chief Executive's remark in his Question and Answer Session on 19 May 2011 that there was no deadline for passing the Bill, Mrs IP indicated that she would lobby other Bills Committee members' support to withdraw the Bill.</p>	
010256 – 010807	Chairman Mr CHAN Kin-bor Administration Mrs Regina IP	<p>Mr CHAN Kin-por shared the concerns of the SMEs about the lack of legal certainty of the Bill as their legal advisers and the courts might have different interpretations of the proposed provisions. Mr CHAN opined that instead of regulating SMEs' business activities, the Bill should aim to guard against market monopoly by large consortia which, being multi-national corporations, should have already accustomed to competition laws in overseas jurisdictions.</p> <p>Mr CHAN considered the Guidelines superficial and not practicable in terms of implementation. He said that many trade associations were established to safeguard the interests of industries, promote best practice amongst member organizations and conduct market research. For example, the insurance industry used to collect information on the level of total claims made in the past year with a view to determining the premium for the current year.</p> <p>The Administration explained that Schedule 1 to the Bill provided the general exclusion from the proposed conduct rules for certain agreements which resulted in net economic benefit. The Commission might also issue block exemption order, after consultation with the stakeholders, to exempt certain classes of agreements that enhanced overall economic efficiency.</p> <p>Notwithstanding the Administration's explanation, Mrs Regina IP understood that regulatory authority in the European Union (EU) had issued block exemption order for ocean shipping conferences only.</p>	
010808 – 011849	Chairman Mr WONG Yuk-man Mr Abraham SHEK Administration	<p>Mr WONG Yuk-man criticized that the Bill was unable to prevent market monopoly by large consortia and failed to safeguard the interests of both the SMEs and consumers. Noting that most Bills Committee members who spoke today did not support the Bill, he urged the Government to prudently consider whether to proceed with the scrutiny of the Bill.</p> <p>Mr Abraham SHEK also held the view that foreign experience in implementing competition law might not suit the local context. He proposed that the Bills Committee should invite the Acting Secretary for Commerce and Economic Development (Atg SCED) to attend the Bills Committee meeting to answer members' enquiries. He further enquired about the industries which had expressed support for the Bill and the Guidelines.</p>	

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		<p>The Administration reiterated the policy intent of the Bill to deter and tackle anti-competitive conduct in the market. There was general support for introducing a cross-sector competition law in Hong Kong, as affirmed by two rounds of public consultation conducted in 2006 and 2008. Views received during the public consultation had been taken into account when drafting the Bill. The Administration was considering proposals to address the prevailing concerns of the SMEs, e.g. the "de minimis" approach.</p>	
011850 – 012223	<p>Chairman Mr Jeffrey LAM Administration</p>	<p>Given that Hong Kong was a small-scale economy, Mr Jeffrey LAM pointed out that there were considerable differences between Hong Kong and other major economies like EU. While the effectiveness of the Bill in lowering market price were yet to be proved, relevant compliance cost would likely be significant, particularly to SMEs. Mr LAM urged the Administration to seriously consider members' views, and suggested temporary suspension of subsequent Bills Committee meetings until the Administration provided response to members' previous enquiries.</p> <p>The Administration said that it was consolidating responses to various issues raised by members and would provide responses to most of the enquiries by the end of June 2011.</p>	
012224 – 012756	<p>Chairman Mr CHAN Kam-lam Administration</p>	<p>Citing paragraphs 4.18 and 4.19 of the Guidelines concerning joint purchasing/selling as an example, Mr CHAN Kam-lam pointed out that in the absence of the definition of market and a threshold of market share, it would be difficult for undertakings to ascertain the purchase volume of an agreement or a threshold that would be considered as sufficiently large to cause appreciable adverse effect on competition in a market. As such, the interpretation of the proposed conduct rules would be subject to the discretion of the Commission. Despite the explanation of the Administration that the Bill aimed to create a level-playing field for all in conducting businesses and to bring consumer benefits, Mr CHAN believed that there would be limited incentives for new entrants to enter into the market if the worries of the existing market players were not addressed.</p> <p>The Administration explained that the Bill sought to prohibit any anti-competitive conduct that created artificial entry barriers. For example, if the purchasing party of a joint purchasing agreement exercised its substantial buying power to foreclose the market to the exclusion of existing or potential competitors, the agreement would cause competition concern.</p>	
012757 – 013354	<p>Chairman Mrs Regina IP</p>	<p>Mrs Regina IP requested the Administration to provide information on the academics, experts and professionals</p>	<p>The Administration to provide</p>

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	Administration	<p>who had contributed their views on the drafting of the Guidelines and expressed support for the Bill.</p> <p>Mrs IP advocated for free market in which consumer prices would be adjusted according to market situation. The Administration advised that the Bill aimed at prohibiting conduct that distorted genuine competition in the market so that market force could operate in its full strength.</p> <p>Mrs IP remarked that if stall operators who had secured the stalls at a lower cost through bid-rigging and sold their goods at a lower price as a result, then bid-rigging might not necessarily be harmful to consumers. The Administration said that bid-rigging was commonly prohibited in overseas competition jurisdictions as it restricted competition in the tendering process. It was also uncertain whether bidders would transfer their savings or benefits as a result of bid-rigging to consumers in terms of lower product prices.</p> <p>Referring to paragraph 4.31 of the Guidelines concerning standardization agreements, Mrs IP observed that many major players in the market strived to develop their own technical standards or protocol for the purpose of foreclosing competitors. The strong bargaining power stemmed from technology advancement would be in conflict with the conduct rules under the Bill. The Administration explained that a standardization agreement was not anti-competitive in nature; competition concerns might arise from such agreement if it contained provisions restricting a contracting party from developing alternative standards or limiting supply of a product.</p>	information as requested in paragraph 3(b) of the minutes.
013355 – 013950	Chairman Dr LAM Tai-fai Administration	<p>Taking note that the Guidelines was prepared on a provisional basis serving merely as an indication of the topics that future guidelines on the first conduct rule might address and the actual guidelines could only be prepared after the enactment of the Bill by the Commission after consultation with relevant stakeholders, Dr LAM Tai-fai considered it a waste of time to discuss the Guidelines at the current stage. He looked forward to Mrs Regina IP's proposal to move a motion to withdraw the Bill. He also supported that Atg SCED should be invited to brief the Bills Committee on the way forward.</p> <p>Dr LAM questioned how the Bill could deal with market allocation in respect of car parking services in certain districts such as Tsim Sha Tsui and Mong Kok. He requested the Administration to brief individual trade associations in Hong Kong on the practices that would or would not breach the proposed conduct rules so as to enhance their understanding of the Bill.</p> <p>The Administration acknowledged that policies should be</p>	

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		<p>adapted to suit local circumstances, and there were many other legislation regulating different matters in the market. While the Administration would continue to promote understanding of the Bill among the stakeholders including the trade associations, the Commission would be specifically tasked to conduct public education, especially during the transitional period, to facilitate compliance of the law before the implementation of the proposed conduct rules. The Administration would relay members' request to Atg SCED for him to attend the Bills Committee meeting.</p>	
013951 – 014303	<p>Chairman Dr Philip WONG Administration</p>	<p>Apart from protecting consumers' benefits, Dr Philip WONG was of the view that whether or not the introduction of the Bill would affect the survival of the business sector in Hong Kong was also a crucial consideration. He understood that the objective of fixing a minimum price by many trade associations was to ensure the survival of the industry members, rather than to reap lucrative profits, which would in turn safeguard the interests of consumers.</p> <p>The Administration responded that while it was legitimate for individual undertakings to adopt their own pricing strategies in response to market changes in a free economy, it would be another matter if undertakings co-ordinated pricing or gave effect collectively to a trade association's decision of recommended or minimum prices, which would have the effect of price-fixing.</p>	
014304 – 014617	<p>Chairman Mr Jeffrey LAM Administration</p>	<p>Noting that the Guidelines were not legally binding on the Commission, Mr Jeffrey LAM questioned their reference value.</p> <p>Referring to the new initiative of the Government to limit the number of beds allocated to pregnant women from the Mainland, Mr LAM enquired whether such limitation would be a contravention of the Bill. The Administration said that it would provide a separate response to answer members' concerns or questions about the application of the conduct rules to the medical and health sector. In general, the Bill would empower the Chief Executive in Council (CE in Council) to make orders (subject to the scrutiny of the Legislative Council (LegCo)) to exempt agreements or conducts from the proposed conduct rules if the CE in Council was satisfied that there were exceptional and compelling reasons of public policy that the proposed conduct rules should not apply. As these orders were granted on public policy grounds, prior consent of the Commission would not be required.</p>	
014618 – 020148		Break	
020149 –	Chairman	Continuation of briefing by the Administration on the	

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022011	Administration	Guidelines (CB(1)2336/10-11(01))	
022012 – 022458	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM commented that the Guidelines did not convey clear meaning. For example, paragraph 4.26 stipulated that exchanges of purely historical information would unlikely have an appreciable adverse impact on competition. However, when discussing pricing policies, SMEs could not ascertain whether a piece of information was historical or otherwise for free exchange amongst undertakings under the aegis of a trade association.</p> <p>The Administration said that exchange of historical data and aggregate information would unlikely have an appreciable adverse effect on competition. Whether any conduct was anti-competitive would depend on the facts and circumstances of each individual case. Hence, it would be more appropriate to set out the general principles which the Commission would take into account in enforcing the law.</p>	
022459 – 023904	Chairman Mr CHAN Kam-lam Administration	<p>Mr CHAN Kam-lam noted that the Commission would be empowered to acquire records of meetings between undertakings to see if the agreement they entered had as its object to prevent, restrict or distort competition in Hong Kong. It was necessary for the Commission to prove that the agreement would have an anti-competitive effect in order to find an infringement of the first conduct rule. Moreover, according to the Guidelines, if an agreement having an anti-competitive object would be likely to have only a minimal effect on competition if it were carried out, then the first conduct rule might not apply. To this end, Mr CHAN criticized that this might give rise to confusions among SMEs. He considered that the Bill should only catch conduct which had an appreciable adverse "effect" on competition as this was more objective and observable. The Chairman considered that this together with the "de minimis" approach would address some of the SMEs' concerns. The Administration added that the notion of "appreciable effect" formed part and parcel of the "de minimis" arrangements.</p> <p>The Administration clarified that with reference to paragraph 3.3 of the Guidelines, "object" referred to the objective purpose of an agreement considered in the economic context in which it was to be applied, and did not mean the subjective intention of the parties when entering into the agreement. With limited resources, the Commission had to 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 before exercising its investigative powers. The Bill also provided for the establishment of the Tribunal within the Judiciary to hear and adjudicate on competition cases which were subject to appeals. As the Bill modelled on</p>	

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		<p>overseas legislation adopting similar general prohibitions against agreement or conduct that had an "object or effect" to prevent, restrict or distort local competition, the Commission or the Tribunal could draw reference from the case law in EU, Singapore and the United Kingdom when dealing with competition cases in Hong Kong in future.</p>	
023605 – 023904	Chairman Mr Ronny TONG Administration	<p>Mr Ronny TONG enquired whether there would be any difference under overseas legislation in penalty levels between agreements with an "object" and those with an "effect" to prevent, restrict or distort local competition. As he understood, former types of agreements could be dealt with by the commitment mechanism while penalties would be imposed for the latter agreements.</p> <p>The Administration responded that following overseas practice, the Bill provided for a commitment mechanism under which the Commission would agree not to bring proceedings before the Tribunal against a person engaging in smaller-scale contravention of the competition rules in return for the person making a commitment to comply with certain specified requirements. Insofar as application of penalties was concerned, there was also no distinction between agreements having an object, or those with the effect, of preventing, restricting or distorting competition.</p>	
023905 – 024235	Chairman Dr Philip WONG Administration	<p>Dr Philip WONG anticipated that there might be many unnecessary lawsuits brought to the Tribunal due to subjective interpretation of the proposed conduct rules by various parties and the high litigation fees to be incurred by SMEs would lead to their closing down. He urged the Administration to draft the Guidelines in clear terms to facilitate SMEs' compliance with the law.</p> <p>The Administration emphasized that the Commission was expected to act according to the future regulatory guidelines which indicated the manner in which it expected to interpret the law or exercised certain powers. At this point, the Chairman urged the Administration to provide as early as possible details of the "de minimis" arrangements to allay the concerns and worries of members and SMEs.</p>	
024236 – 024503	Chairman Administration	<p>Referring to paragraphs 4.14 and 4.15 of the Guidelines concerning agreements to limit output or control production or investment, the Chairman enquired about whether or not the production or selling of limited-edition products would breach the first conduct rule. The Administration explained that the first conduct rule referred to agreements between undertakings, and an agreement imposing certain sale conditions without restricting competition in the market would not constitute a breach of the first conduct rule if an undertaking controlled its output or that of its subsidiaries. As regards paragraphs 4.29 and 4.30 of the Guidelines in relation to advertising, it was</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>noted that restrictions imposed by a professional body on its members' advertising activities might raise competition concerns if the adverse effect of restricting competition outweighed the benefit of achieving certain regulatory objective of the professional body.</p>	
024504 – 025529	Chairman Mr CHAN Kam-lam Administration	<p>Mr CHAN Kam-lam reiterated his concern that instead of "object <u>or</u> effect", the Bill should prohibit anti-competitive agreements, concerted practices and decisions with an "object <u>and</u> effect" to prevent, restrict or distort competition in Hong Kong, or with "effect" alone. It would be difficult to assess the effect of the agreements having anti-competitive objects before they were carried out.</p> <p>The Administration stressed that conduct with an intention to lessen competition in Hong Kong should not be tolerated even if it was not implemented successfully. Competition law in some major jurisdictions also adopted a strict prohibition against "hard-core" conduct such as price-fixing and bid-rigging without having to prove their adverse "effect" on competition. Nevertheless, the Administration was requested to consider applying the first conduct rule to conduct having both "object <u>and</u> effect" of preventing, restricting or distorting competition in Hong Kong. In this connection, Mr CHAN urged the Administration to provide as early as possible details of the "de minimis" arrangements as it might help exempt eligible SMEs meeting the threshold from the first conduct rule.</p>	The Administration to provide information as requested in paragraph 3(d) of the minutes.
025530 – 030627	Chairman Administration	Continuation of the briefing by the Administration on the Guidelines (CB(1)2336/10-11(01))	
030628 – 031314	Chairman Dr LEUNG Ka-lau Administration	<p>In response to Dr LEUNG Ka-lau, the Administration explained the relevant considerations in the Guidelines in respect of advertising. In general, whether restrictions imposed by a professional body on advertising activities carried out by its members would be regarded as anti-competitive depended on whether the restrictions of competition were necessary and commensurate with the regulatory objective of the professional body. It was also noted that certain professional bodies were statutory bodies exempt from the application of the competition rules. Dr LEUNG requested the Administration to re-consider making the Guidelines as subsidiary legislation subject to LegCo's scrutiny.</p>	The Administration to provide information as requested in paragraph 3(c)(ii) and take action as requested in paragraph 3(e) of the minutes.
031316 – 031659	Chairman Mr Jeffrey LAM Administration	<p>Referring to paragraphs 5.5 and 5.6 of the Guidelines about general exclusions and exemptions from the first conduct rule, Mr Jeffrey LAM enquired about how to assess whether the overall economic efficiency of an agreement outweighed its anti-competitive effects. The Administration advised that the competition experts in the Commission would conduct economic analysis to ascertain</p>	

Time marker	Speaker	Subject(s)	Action required
		whether the claimed efficiencies were significant enough, and had a direct causal link with the agreement. The decisions of the Commission were subject to review by the Tribunal.	
031700 – 031739	Chairman Administration	The Administration undertook to provide two more sets of guidelines on market definition and the second conduct rule to the Bills Committee in due course.	
031740 – 033332	Chairman Administration Dr Philip WONG	Briefing by the Administration on major prohibition, exclusion and exemption (CB(1)320/10-11(02))	
033333 – 033804	Chairman Administration Mr Ronny TONG Assistant Legal Adviser (ALA)	<p>In response to the request of making the guidelines on the proposed conduct rules subsidiary legislation subject to scrutiny of the LegCo, the Administration emphasized the importance to allow flexibility for the Commission to issue and amend the guidelines as and when necessary in order to respond swiftly to the rapid changes in market landscape. As a principle-based legislation, the competition law had to be applied to the facts of each individual case, taking account of the prevailing market circumstances. Following international experience, the regulatory guidelines to be issued by the Commission would not be subsidiary legislation. The Administration assured members that the LegCo would have sight of the guidelines before examining the commencement notice for bringing the provisions relating to the proposed conduct rules into operation, which would be subsidiary legislation subject to the scrutiny of the LegCo.</p> <p>ALA supplemented that there were different arrangements as to whether or not a set of guidelines or code of practice would be subject to the scrutiny of the LegCo under different circumstances.</p>	
033805 – 034056	Chairman Mr CHAN Kam-lam Administration	Mr CHAN Kam-lam pointed out that despite the guidelines on the proposed conduct rules were not legally binding, the business sector would make reference to the guidelines to ensure their compliance with the competition law. Taking into consideration that the law would have significant impact on both the market and business sector, Mr CHAN urged the Administration to consider enhancing the transparency when drawing up the guidelines. The Administration took note of Mr CHAN's concern for further consideration.	
034057 – 034350	Chairman Dr Philip WONG Administration	<p>Dr Philip WONG considered that the general public would likely fall under the impression that the guidelines on the proposed conduct rules would carry legal effect.</p> <p>Citing the guidelines of the Securities and Futures Commission (which were neither a piece of subsidiary legislation nor having any legal effect) as an example, the Administration advised that the language used in general</p>	

Time marker	Speaker	Subject(s)	Action required
		guidelines would be significantly different from that used in a statute. Legislation was crafted in legal language that would not suit the purpose of the guidelines, which should provide up-to-date, practical and useful guidance to undertakings.	
034351 – 034512	Chairman	Meeting arrangements	

Council Business Division 1
Legislative Council Secretariat
22 July 2011