

**立法會**  
**Legislative Council**

LC Paper No. CB(1)3059/10-11  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/12/09

**Bills Committee on Competition Bill**

**Minutes of seventeenth meeting on  
Tuesday, 21 June 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)  
Hon Albert HO Chun-yan  
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., 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-ye, 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  
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 Paul CHAN Mo-po, MH, JP  
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-yea, GBS, JP  
Hon Paul TSE Wai-chun  
Hon Alan LEONG Kah-kit, SC  
Hon Tanya CHAN  
Hon WONG Yuk-man

**Members absent :** Hon LEE Cheuk-yan  
Hon Fred LI Wah-ming, SBS, JP  
Hon Emily LAU Wai-hing, JP  
Hon LEUNG Kwok-hung

**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 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

Miss Lilian MOK  
Council Secretary (1)7

Action

**I Confirmation of minutes**

(LC Paper No. CB(1)2417/10-11 -- Minutes of meeting held on 28 April 2011)

The minutes of the meeting held on 28 April 2011 were confirmed.

**II Meeting with the Administration**

Major prohibitions, exclusion and exemption

(LC Paper No. CB(1)2363/10-11(01) -- List of follow-up actions arising from the discussion at the meeting on 31 May 2011

LC Paper No. CB(1)2420/10-11(01) -- List of follow-up actions arising from the discussion at the meeting on 7 June 2011

LC Paper No. CB(1)2420/10-11(02) -- Administration's response to CB(1)2363/10-11(01) and CB(1)2420/10-11(01)

LC Paper No. CB(1)2420/10-11(03) -- Administration's paper on Guidelines on Market Definition

LC Paper No. CB(1)2420/10-11(04) -- Administration's paper on Guidelines on the Second Conduct Rule

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  
(*English version issued on 30 May 2011, Chinese version issued on 31*

*May 2011)*

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))

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) consider stating expressly in the Bill the policy intent that only conduct which had an appreciable adverse effect on competition would be caught by the conduct rules;
- (b) consider following the Competition Act of Singapore that while vertical agreements would generally be exempted from the first conduct rule, the government could regulate those vertical agreements that would have an adverse impact on competition as and when necessary by orders;
- (c) in respect of vertical agreements and exchange of information, provide overseas case law examples to which the Administration had made reference in drafting the Bill;
- (d) at the request of Dr Hon LEUNG Ka-lau, advise whether a private hospital that allocated its resources, such as hospital beds and facilities, to certain affiliated specialists only or restricted the right of other equally qualified specialists to use its resources would be a contravention of the second conduct rule;
- (e) in relation to clause 153 of the Bill concerning appeals against any decision, determination or order of the Competition Tribunal, advise whether the requirement of leave to appeal under the Bill, i.e. the appeal had a reasonable prospect of success, was the same as that for appeals from the Court of First Instance to the Court of Appeal and if not, the reason(s) for the difference;

- (f) with reference to the Guidelines on Market Definition (the Guidelines) –
  - (i) provide information on typical overseas case law examples to help illustrate the concept of substitution; and
  - (ii) advise how long it would normally take for overseas competition authorities to conduct the hypothetical monopolist test;
- (g) in relation to clause 6 of the Bill concerning the application of the first conduct rule, explain the rationale for choosing the three examples stated in subclause (2), and advise why it did not follow the competition laws of the United Kingdom and Singapore by including the following scenario in subclause (2) –
  - (i) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
  - (ii) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- (h) in relation to clause 7 of the Bill concerning the "object" of an agreement, consider the proposal of the Law Society of Hong Kong (Law Soc) to revise subclause (2) to spell out explicitly that the inference of an undertaking's object would be reached objectively;
- (i) in relation to clause 8 of the Bill concerning territorial application of the first conduct rule, consider revising the present drafting of the provision such that the first conduct rule would only apply "if the agreement is, or is intended to be, implemented in Hong Kong";
- (j) provide information on –
  - (i) existing arrangements of enforcement of judgments between Hong Kong and other jurisdictions; and

- (ii) international co-operation arrangements/agreements in competition matters;
  - (k) at the request of Ir Dr Hon Raymond HO, advise whether a tender exercise stipulating that a certain number of staff of the bidding companies should be members of a certain professional body would be an anti-competitive conduct contravening the conduct rules;
  - (l) consider deleting clause 9(3); and
  - (m) in relation to clauses 9 to 14 of the Bill, advise whether the competition laws of other overseas jurisdictions provided for a procedure under which undertakings might obtain a decision from the competition authorities as to whether or not an agreement, concerted practice or decision would contravene the conduct rules or was excluded or exempted from the application of the conduct rules.
4. The Chairman requested the clerk to seek members' views whether they would like to obtain overseas case law examples from the Administration on a certain subject, e.g. vertical agreements and exchange of information, for reference.

*(Post-meeting note: The Clerk relayed the above to members of the Bills Committee for consideration on 23 June 2011.)*

5. The Chairman instructed the Clerk to invite members to indicate their availability for meeting(s) in August 2011 since no meetings would be held in September 2011.

*(Post-meeting note: Having noted members' response to LC Paper No. CB(1)2562/10-11 issued on 22 June 2011, the Chairman decided not to hold meetings in August 2011.)*

6. The Chairman reminded members that the next meeting of the Bills Committee would be held on 5 July 2011 at 4:30 pm.

### **III Any other business**

7. There being no other business, the meeting ended at 6:28 pm.

Council Business Division 1  
Legislative Council Secretariat  
4 October 2011

**Proceedings of the seventeenth meeting of  
Bills Committee on Competition Bill  
on Tuesday, 21 June 2011, at 2:30 pm  
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000617 – 000653	Chairman	<p>Opening remarks by the Chairman.</p> <p>Confirmation of minutes of meeting on 28 April 2011 (CB(1)2417/10-11).</p>	
000654 – 001718	Chairman Administration	The Administration outlined its response to members' views and concerns raised at the meetings of the Bills Committee held on 31 May and 7 June 2011 (CB(1)2420/10-11(02)).	
001719 – 002013	Chairman Mr CHAN Kin-por Administration	<p>Mr CHAN Kin-por enquired about whether the collection of information by the insurance sector on the annual total claims would be a breach of the competition law.</p> <p>The Administration explained that exchange of aggregated data would be unlikely to have an appreciable adverse impact on competition. Whether a particular practice or arrangement had an object or effect of preventing, restricting or distorting competition in Hong Kong would be a question of fact to be adjudicated by the proposed Competition Tribunal (the Tribunal).</p>	
002014 – 002628	Chairman Dr LEUNG Ka-lau Administration	<p>In response to Dr LEUNG Ka-lau's concern that the Competition Commission (the Commission), the Tribunal and undertakings might have different interpretations as to whether a conduct would be a concerted practice or independent decision, the Administration advised that the Bill provided for a two-tier mechanism under which the Commission would be tasked to investigate and bring proceedings to substantiate an alleged contravention of competition rule with evidence before the Tribunal, which would be an adjudicative body under the Bill. While the burden of proof would rest on the enforcement authorities, the undertakings concerned would be able to defend and argue for its case before the Tribunal in the legal proceedings.</p> <p>Dr LEUNG raised concern about the allocation of beds by private hospitals which had blocked the entry of new practitioners. The Administration advised that an undertaking was free to decide how to allocate its resources independently as a matter of legitimate business decision.</p>	
002629 – 003548	Chairman Administration Assistant Legal Adviser (ALA)	Noting the Administration's earlier advice that case law and regulatory guidelines in other competition jurisdictions suggested that only conduct that had an appreciable adverse effect on competition would be caught, the	The Administration to take action as requested in paragraph 3(a) and



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		<p>Chairman requested the Administration to consider stating expressly in the Bill the policy intent that only conduct which had an appreciable adverse effect on competition would be caught by the proposed conduct rules. This would serve as a good reference to SMEs on the threshold for breaching the competition law. ALA supplemented that while the request concerned a policy decision, there were precedents whereby rulings of cases were incorporated into legislation.</p> <p>In response to the Chairman's request of granting exemption to all vertical agreements, the Administration pointed out that a vertical supply arrangement might be used to disguise an agreement between direct competitors to limit competition between them. Carving out vertical agreements entirely might undermine the ability of the competition authorities to regulate these agreements effectively.</p> <p>Notwithstanding the above explanation, the Chairman requested the Administration to consider following the Competition Act of Singapore that while vertical agreements would generally be exempted from the first conduct rule, the government could regulate those vertical agreements that would have an adverse impact on competition as and when necessary by orders.</p>	(b).
003549 – 004041	Chairman Mr CHAN Kam-lam Administration	<p>Mr CHAN Kam-lam urged the Administration to explain different overseas case law examples to members and relevant stakeholders to enhance their understanding of what would or would not be caught by the proposed conduct rules. He considered it more desirable for Hong Kong to formulate its own competition law instead of relying heavily on overseas case law examples which might not suit Hong Kong's unique market circumstances.</p> <p>The Administration agreed to provide some typical examples from overseas case law in respect of vertical agreements and exchange of information for members' reference.</p>	<p>The Administration to provide information as requested in paragraph 3(c).</p> <p>The Clerk to take action as requested in paragraph 4.</p>
004042– 004626	Chairman Dr LEUNG Ka-lau Administration	<p>In response to Dr LEUNG Ka-lau's enquiry about the allocation of hospital beds, the Administration explained that an undertaking was free and legitimate to allocate its resources independently. Hence, a private hospital's own decision to give priority to certain affiliated specialists in its allocation of resources such as hospital beds would unlikely amount to an infringement of the first conduct rule. Whether or not there was any abuse of substantial market power by a single hospital under the second conduct rule would require more in-depth analysis of the market structure.</p>	
004627 –	Chairman	Mr Jeffrey LAM urged the Administration to give more	

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005	Mr Jeffrey LAM Administration	<p>concrete overseas case law examples to enhance understanding of the business sector on the implementation of the proposed conduct rules. He also expressed concern about the arrangement that many important and sensitive issues identified now were left to the Commission to consider and decide in future.</p> <p>The Administration agreed to provide some typical examples from overseas case law for members' reference. It also noted the concerns of the small and medium enterprises (SMEs) and was considering details of the "de minimis" arrangements and other suggestions with a view to addressing the business concerns.</p>	
005139 – 005243	Chairman Dr LEUNG Ka-lau Administration	Dr LEUNG Ka-lau requested the Administration to advise whether a private hospital which allocated its resources, such as hospital beds and facilities to certain affiliated specialists only or restricted the right of other equally qualified specialists to use its resources would be a contravention of the second conduct rule.	The Administration to provide information as requested in paragraph 3(d).
005244 – 010543	Chairman ALA Administration Ms Audrey EU Dr Margaret NG	<p>The Administration was requested to re-consider providing the definition of the term "competition" in the Bill.</p> <p>With regard to the concerns of the Chairman about the right of appeal, ALA referred to the submission from Law Soc which considered the leave requirement to appeal as currently provided in the Bill, i.e. the appeal had "a reasonable prospect of success", higher than that for appeals from the Court of First Instance (CFI) to the Court of Appeal (CA), i.e. leave should normally be granted unless the grounds of appeal had "no realistic prospects of success".</p> <p>Despite the same test for granting leave applied in section 14AA of the High Court Ordinance (Cap. 4) in respect of interlocutory appeals, Ms Audrey EU opined that the Administration should give reason(s) for setting out a higher leave requirement in the Bill than that for the appeals from CFI to CA.</p> <p>The Administration explained that while the Tribunal was a superior court of record, it was not part of the High Court. Being a special court within the Judiciary, the Tribunal's decision should be respected and leave to appeal against its decision should only be granted if the appeal had a reasonable prospect of success or there were some other reasons in the interests of justice why the appeal should be heard. It was noted that the same appeal arrangement was adopted in section 11AA of the Lands Tribunal Ordinance (Cap. 17).</p> <p>The Administration was requested to advise whether the requirement of leave to appeal as stipulated in clause 153</p>	The Administration to provide information as requested in paragraph 3(e).

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		<p>of the Bill, i.e. the appeal had a reasonable prospect of success, was the same as that for appeals from the CFI to CA and if not, the reason(s) for the difference.</p> <p>Dr Margaret NG expressed grave concern that the issue under consideration was a policy matter outside the jurisdiction of the Judiciary, and the Administration should not have consulted it.</p>	
010544 – 011111	Chairman Mr Jeffrey LAM Administration	Discussion on the findings of the reviews on the impact of competition law enforcement in overseas jurisdictions summarized by the Administration which should include both positive and negative impacts of the competition law.	
011112 – 011417	Chairman Administration	<p>The Chairman reminded the Administration to provide the following papers as soon as possible:</p> <p>(a) Guidelines on the Second Conduct Rule ;</p> <p>(b) details of the "de minimis" approach and the commitment mechanism;</p> <p>(c) functions of the Commission spreading over various parts of the Bill that might be delegated to any person or committee established under its auspices; and</p> <p>(d) interpretation and usage of "shadow director" in other Hong Kong ordinances.</p>	
011418 – 012230		Break	
012231 – 014202	Chairman Administration	Briefing by the Administration on the Guidelines on Market Definition (Market Guidelines) (CB(1)2420/10-11(03)).	
014203 – 014852	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM enquired about –</p> <p>(a) the persons whom the Commission would consider appropriate to consult in drafting the regulatory guidelines or making amendments to them;</p> <p>(b) how to determine which products would be regarded by buyers as close substitutes for a focal product;</p> <p>(c) why the hypothetical monopolist test would be carried out using a 5% to 10% increase in price above competitive levels; and</p> <p>(d) whether a substantial price reduction would tantamount to abuse of market power and infringe the second conduct rule.</p> <p>The Administration responded that –</p>	

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		<p>(a) the Commission would consult relevant stakeholders or industry representatives in drafting the regulatory guidelines;</p> <p>(b) information on buyers' preference for substitutes might be obtained from a variety of sources, e.g. interviews with buyers;</p> <p>(c) it had made reference to overseas practice in setting out the range of price increase percentage in the Market Guidelines, i.e. 5% to 10% to sustain prices above the competitive levels; and</p> <p>(d) if an undertaking with a substantial degree of market power engaged in predatory pricing, it might constitute an abuse of market power and thus a breach of the second conduct rule.</p>	
014853 – 020017	Chairman Mr CHAN Kam-lam Administration	<p>In response to the enquiry of Mr CHAN Kam-lam about the definition of substitute products, the Administration explained that in carrying out the hypothetical monopolist test, if a significant number of buyers and volume of purchases switched to some other products in a market following an increase in price from 5% to 10% of a product (i.e. the focal product), these products would be regarded as substitutes and hence should be included in the definition of the product market.</p> <p>As regards the definition of geographic market, the Administration advised that if a 5% to 10% increase in the price of a product in an area (i.e. the focal area) would lead to buyers switching to sellers in neighbouring areas, these neighbouring areas would be included in the market definition. Given that Hong Kong was a small territory, switching costs would not be substantial when compared with overseas jurisdictions. The geographic market normally referred to Hong Kong as a whole. The significant volume of imports also indicated that the market might even be wider than Hong Kong.</p> <p>While Mr CHAN argued that some consumers might be very loyal to certain products or brands even if their prices increased, the Administration pointed out that the hypothetical monopolist test concerned about whether a significant number of buyers in a market would stick to a particular product or shift to other close substitutes, not the behaviour of individual buyer. Nevertheless, there might be circumstances where consumers were very loyal to a product or brand and a market might be defined to include only that product or brand.</p>	
020018 – 020833	Chairman Mr Jeffrey LAM Administration	Mr Jeffrey LAM expressed concern that it would be dangerous to determine whether there was substitution of a product from the perspective of buyers. He also found it	The Administration to provide information as

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		<p>difficult to understand the interpretation of the "chains of substitution" as set out in the Market Guidelines.</p> <p>The Administration assured members that the Commission was required to issue guidelines to interpret and give effect to the proposed conduct rules upon consultation with relevant stakeholders and any persons the Commission considered appropriate. The guidelines should adequately reflect the market landscape and suit the local context.</p> <p>In response to the enquiry of the Chairman as to whether selling a product at different price levels in different districts of Hong Kong would constitute a breach of the competition rules, the Administration said that for competition analysis, it would be necessary to define the market boundary before examining the effect of a particular practice on competition in a specified market. If an undertaking sold a product at different price levels in different districts of Hong Kong and profitably sustain the prices, it might suggest separate markets across different districts.</p> <p>To facilitate better understanding of the content of the Market Guidelines, the Chairman requested the Administration to –</p> <p>(a) provide information on typical overseas case law examples to help illustrate the concept of substitution; and</p> <p>(b) advise how long it would normally take for overseas competition authorities to conduct the hypothetical monopolist test.</p>	<p>requested in paragraph 3(f).</p>
020834 – 021209	Chairman Mr CHAN Kam-lam Administration	<p>With regard to the example cited by Mr CHAN Kam-lam about substitution, the Administration advised that even if there was only one supplier in a product market, it did not necessarily suggest that the supplier would abuse its substantial market power to prevent, restrict or distort competition. The Commission would be required to conduct competition analysis to define the boundaries of a market before examining the effect of the conduct by an undertaking on competition in that market.</p>	
021210 – 022218	Chairman ALA Administration	<p><u>Continuation of clause-by-clause examination</u></p> <p><u>Clause 6 – Prohibition of anti-competitive agreements, concerted practices and decisions</u></p> <p>In relation to clause 6 of the Bill concerning the application of the first conduct rule, ALA pointed out that while matters to be considered in determining whether competition was substantially lessened by a merger were listed in the proposed section 6 of Schedule 7 to the Bill,</p>	<p>The Administration to provide information as requested in paragraph 3(g).</p>

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		<p>those matters which might be taken into account in determining whether an agreement, concerted practice or decision had prevented, restricted or distorted competition were not spelled out in clause 6.</p> <p>ALA further suggested members to consider inviting the Administration to explain the rationale for choosing the three examples stated in subclause (2) of clause 6, and advise why it did not follow the competition laws of the United Kingdom and Singapore by including the following scenarios in subclause (2) –</p> <p>(a) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and</p> <p>(b) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.</p> <p>In response to ALA's observations, the Administration explained that while the merger rule applied only in merger cases, the first conduct rule covered a much wider range of anti-competitive agreements or conduct and hence, it would be difficult to include all the relevant matters to be taken into consideration by the Commission in clause 6 exhaustively.</p> <p>As regards subclause (2), the Administration said that the three scenarios specified therein were of a hard core nature whereas the other two cited by ALA were non-hard core conduct the anti-competitive effect of which should be considered on a case-by-case basis. As such, the two scenarios were not included in subclause (2). Notwithstanding the above explanation, the Chairman requested the Administration to consider including the two scenarios in subclause (2).</p>	
022219 – 022257	Chairman Mr CHAN Kam-lam Administration	Mr CHAN Kam-lam said that he would propose Committee Stage amendments (CSAs) to clause 6 of the Bill at a later stage such that only those agreements or conduct that had both the "object <u>and</u> effect" to prevent, restrict or distort competition in Hong Kong would be caught under the Bill.	
022258 – 023001	Chairman Administration CHAN Kam-lam ALA	<p><u>Clause 7 – "Object" of agreement</u></p> <p>In response to the comment of Law Soc and for the avoidance of doubt, the Administration undertook to introduce CSAs to add a provision similar to subclause (1) so that if an agreement, concerted practice or decision had more than one effect, it had the effect of preventing,</p>	The Administration to take action as requested in paragraph 3(h).

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		<p>restricting or distorting competition under the Bill if one of its effects was preventing, restricting or distorting competition.</p> <p>The Administration also agreed to consider the proposal of Law Soc to revise subclause (2) to spell out explicitly that the inference of an undertaking's object would be reached objectively.</p>	
023002 – 023445	Chairman Mr Ronny TONG Administration	<p><u>Clause 8 – Territorial application of first conduct rule</u></p> <p>In response to the Chairman's enquiry about territorial application of the Bill, the Administration advised that the first conduct rule would apply to representative offices of overseas undertakings in Hong Kong. If overseas undertakings did not have any legal representative in Hong Kong, the Administration would follow the existing arrangements of enforcement of judgments between Hong Kong and other overseas jurisdictions when taking legal actions against them.</p> <p>Mr Ronny TONG supplemented that the arrangements of enforcement of judgments would depend on whether the judgment of a case was of civil or criminal nature. Hong Kong had been concluding bilateral agreements on mutual legal assistance for criminal matters or reciprocal arrangements on enforcement of judgment of civil cases.</p> <p>The Administration pointed out that contravention of the competition rules under the Bill would be subject to civil actions. If a substantial pecuniary penalty was to be imposed on a breach of the competition law, the criminal standard of proof would apply and criminal safeguards would be attracted to the legal proceedings.</p>	
023446 – 024504	Chairman Mrs Regina IP Administration	<p>Mrs Regina 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 might be in conflict with the proposed conduct rules under the Bill. The Administration explained that a standardization agreement was not anti-competitive in nature. However, competition concerns might arise if such agreement contained provisions restricting a contracting party from developing alternative standards or new products.</p> <p>In response to Mrs IP's further enquiry about whether there would be competition concerns if new or potential competitors were restricted to enter into the market unless they adopted a particular prevailing technical standard, the Administration advised that the foreclosure effect of such restrictions had to be examined with reference to the facts and circumstances of individual cases.</p>	The Administration to take action as requested in paragraph 3(i).

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		To enhance the clarity of the territorial application of the first conduct rule, the Chairman requested the Administration to consider revising the present drafting of the provision such that the first conduct rule would only apply "if the agreement was, or was intended to be, implemented in Hong Kong".	
024504 – 025416	Chairman Mr CHAN Kam-lam Administration	Discussion on the application of the Bill to international trade disputes.	
025417 – 025938	Chairman Mr Jeffrey LAM Administration	<p>In response to the worries of Mr Jeffrey LAM about the enforcement of judgment in overseas countries, the Administration explained that possible co-operation arrangements or mechanism could be worked out with other overseas jurisdictions after the passage of the Bill and the establishment of the Commission.</p> <p>To enhance members' understanding of the subject, the Administration was requested to provide the following information –</p> <p>(a) existing arrangements of enforcement of judgments between Hong Kong and other jurisdictions; and</p> <p>(b) international co-operation arrangements/agreements in competition matters.</p>	The Administration to provide information as requested in paragraph 3(j).
025939 – 031033	Chairman Mrs Regina IP Administration Mr Ronny TONG Mr Albert HO	<p>In response to the concerns of Mrs Regina IP, the Administration emphasized that introducing a competition law could effectively protect the local business players from anti-competitive cartels or abuse of a substantial market power by large companies including those from the overseas. On the other hand, local companies were already subject to regulation by overseas competition law if the agreement they entered into had an effect on competition in overseas markets.</p> <p>At this point, Mr Ronny TONG made a clarification that clause 8 of the Bill provided for the territorial application of the first conduct rule which referred to an agreement, concerted practice or decision that had the object or effect of preventing, restricting or distorting competition in Hong Kong even if it was made or engaged outside Hong Kong. In the event that the undertaking breaching the first conduct rule was not represented in Hong Kong, enforcement of judgment made by the Tribunal would rely on international co-operation arrangements/agreements with other jurisdictions. Although overseas competition law was not legally binding in Hong Kong, regulatory authorities abroad could seek assistance from the Judiciary in enforcing their judgment.</p> <p>The Chairman concluded that the Administration should</p>	



Time marker	Speaker	Subject(s)	Action required
		consider revising the present drafting of the provision such that the first conduct rule would only apply "if the agreement was, or was intended to be, implemented in Hong Kong".	
031034 – 031407	Chairman Mr CHAN Kam-lam Administration Mr Ronny TONG	In reply to Mr CHAN Kam-lam's enquiry, the Administration explained that Hong Kong had entered into different forms of administrative or bilateral agreements with overseas jurisdictions in respect of co-operation in law enforcement. Mr Ronny TONG remarked that the Commission could make reference to the current practice of the Securities and Futures Commission which had signed bilateral agreements with different jurisdictions concerning enforcement co-operation.	
031408 – 032545	Chairman Ir Dr Raymond HO Administration	In response to the enquiry of Ir Dr Raymond HO, the Administration advised that statutory electoral arrangements were not economic activities subject to regulation under the Bill. Ir Dr HO requested the Administration to advise whether a tender exercise stipulating that a certain number of staff of the bidding companies should be members of a certain professional body would be an anti-competitive conduct contravening the conduct rules.	The Administration to provide information as requested in paragraph 3(k).
032546 – 033528	Chairman Administration Mrs Regina IP	<p><u>Clause 9 – Application for decision</u></p> <p>Noting that clause 9 provided for a procedure under which undertakings might obtain a decision from the Commission as to whether or not an agreement, concerted practice or decision was excluded from the application of the first conduct rule, Mrs Regina IP expressed concern that there might be great demand for such decisions and the Commission might not possess the required expertise and resources to handle the applications.</p> <p>The Administration explained that to minimize the risk of opening up a floodgate of applications for decisions, clause 9(3) of the Bill provided that the Commission would not be required to consider an application if it concerned hypothetical questions or agreements. Furthermore, the Commission would also be specifically tasked to promote public understanding of the Bill and the value of fair competition through public education during the transitional period before the proposed conduct rules came into effect.</p> <p>Notwithstanding the Administration's explanation, Mrs IP held the view that it was quite a fine line between eligible and not eligible applications for determination by the Commission and it would be difficult for the Commission to provide a definite answer to a wide range of circumstances.</p>	

Time marker	Speaker	Subject(s)	Action required
033529 – 033819	Chairman Mr Ronny TONG Administration	<p>Given that clause 9(1) of the Bill clearly stated that only those undertakings which had made or given effect to, was giving effect to or was proposing to make or give effect to an agreement might apply to the Commission for a decision, Mr Ronny TONG suggested deleting clause 9(3) and asked whether similar provision was present in the Telecommunications Ordinance (Cap. 106) (TO).</p> <p>The Administration explained that although there was no such provision in TO, clause 9(3) acted as an important safeguard against any hypothetical questions which might arise in relation to an agreement which an undertaking had made or given effect to, was giving effect to or proposing to make or give effect to.</p>	The Administration to take action as requested in paragraph 3(l).
033820 – 034619	Chairman Administration Mr Ronny TONG	<p>The Chairman expressed grave concern about whether there would be adequate manpower and resources of the Commission to handle enquiries from the public and give advice/make decisions within a reasonable period of time.</p> <p>In response, the Administration said that the Commission would come to a decision based on the facts provided by the undertakings making applications. The Commission's decisions under clause 9 of the Bill would be legally binding and subject to review by the Tribunal. As provided in clause 10(3) of the Bill, the Commission must publish a notice of the application to specify that representations might be made to the Commission about the application within at least 30 days beginning after the day on which the notice was first published.</p>	
034620 – 035035	Chairman Mrs Regina IP Administration	<p>In response to the concern of Mrs Regina IP that the decisions of the Commission would be adjudicatory, the Administration explained that the Commission would be required to consider and give advice as to whether or not an agreement or a conduct would be excluded or exempted from the application of the first conduct rule according to clause 9(1). However, even if an agreement or a conduct was not excluded or exempted from the application of the proposed conduct rules, it did not necessarily breach the proposed conduct rules. Whether or not an agreement or a conduct constituted a contravention of the competition law would be adjudicated by the Tribunal, whose decisions would be subject to appeal before the Court of Appeal with the leave of court.</p> <p>Concerning clauses 9 to 14 of the Bill, the Administration was requested to advise whether the competition laws of other overseas jurisdictions provided for a procedure under which undertakings might obtain a decision from the competition authorities as to whether or not an agreement, concerted practice or decision would contravene the conduct rules or was excluded or exempted from the application of the conduct rules.</p>	The Administration to provide information as requested in paragraph 3(m).

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
035036 – 035401	Chairman Mr Paul TSE Administration	Mr Paul TSE questioned why undertakings could not seek advice from the Commission on whether their agreement or conduct would possibly infringe the proposed conduct rules. The Administration responded that in doing so, the Commission would be granted not only the investigative powers but also adjudicative function which should rest with the Tribunal.	
035402 – 035623	Chairman Mrs Regina IP Administration	In response to the request made by Mrs Regina IP earlier for information on the academics, experts and professionals who had contributed their views on the drafting of the Guidelines and expressed support for the Bill, the Administration said that there was no conflict of interest.  Mrs IP expressed concern that agreements on technical or design standards would fall prey to the new legislation.	
035624 – 035857	Chairman	Meeting arrangements	

Council Business Division 1  
Legislative Council Secretariat  
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