

立法會
Legislative Council

LC Paper No. CB(1)44/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of eighteenth meeting on
Tuesday, 5 July 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 CHAN Kam-lam, SBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
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 Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon LEUNG Kwok-hung
Hon WONG Yuk-man

Members absent : Hon James TO Kun-sun
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon WONG Kwok-hing, MH
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon Starry LEE Wai-king, JP
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon Tanya CHAN

Public Officers attending : Agenda item II

Mr Gregory SO Kam-leung, JP
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 and
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

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)2626/10-11 -- Minutes of meeting held on 12 May 2011)

The minutes of the meeting held on 12 May 2011 were confirmed.

II Meeting with the Administration

Major prohibitions, exclusion and exemption

(LC Paper No. CB(1)2631/10-11(01) -- List of follow-up actions arising from the discussion at the meeting on 21 June 2011

LC Paper No. CB(1)2631/10-11(02) -- Administration's response to CB(1)2631/10-11(01)

LC Paper No. CB(1)2618/10-11(01) -- Administration's paper on Guidelines on the Second Conduct Rule

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

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) in respect of the Canadian competition law model –

(i) advise whether and under what circumstance(s), the Canadian competition authority could make an interim order during investigation to restrain or prohibit an undertaking from continuing engaging in any conduct that constituted or was likely to constitute a contravention of the competition law; and

(ii) advise the term used in the Canadian Competition Act to describe the level of market power that should not be abused by an undertaking, such as "dominant position" or "substantial degree of market power"; and

(b) advise the numbers of small and medium enterprises vis-à-vis large enterprises in Singapore, the United Kingdom and European Union which had been sanctioned by the competition authorities as having breached the competition law in the past few years.

4. The Chairman reminded members that the next meeting of the Bills Committee would be held on 20 July 2011 at 8:30 am to receive deputations' views on the three Guidelines provided by the Administration.

III Any other business

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

Action

- 5 -

Council Business Division 1
Legislative Council Secretariat
13 October 2011

**Proceedings of the eighteenth meeting of
Bills Committee on Competition Bill
on Tuesday, 5 July 2011, at 4:30 pm
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000553 – 000635	Chairman	<p>Opening remarks by the Chairman.</p> <p>Confirmation of minutes of meeting on 12 May 2011 (CB(1)2626/10-11).</p>	
000636 – 001600	Chairman Administration	<p>The Secretary for Commerce and Economic Development (SCED) briefed members on the following major areas of concerns over the Bill as expressed by stakeholders (CB(1)2681/10-11(01)) –</p> <ul style="list-style-type: none"> (a) the "de minimis" approach; (b) the clarity of the Bill; (c) the Canadian competition law model; (d) the maximum pecuniary penalty; and (e) the stand-alone private rights of action. <p>It was noted that the Administration would respond to these concerns in the fourth quarter of 2011.</p>	
001601 – 002129	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM urged the Administration to give a written response to the submission from the Hong Kong General Chamber of Commerce (HKGCC) dated 4 July 2011 (CB(1)2671/10-11(01)) as well as other outstanding issues raised at the past meetings to facilitate the continuation of clause-by-clause examination of the Bill.</p> <p>SCED responded that the Administration took the views and comments of different sectors very seriously and would provide a response to the said submission from the HKGCC as soon as possible. Regarding members' comments on the Guidelines on the First Conduct Rule, the Second Conduct Rule and Market Definition (the Guidelines), he clarified that these Guidelines were prepared by the Administration on a provisional basis and served merely as an indication of the likely topics that the future Competition Commission (the Commission) might cover in the regulatory guidelines to be issued under the Bill after consultation with relevant stakeholders.</p>	
002130 – 002510	Chairman Mr WONG Ting-kwong Administration	<p>Mr WONG Ting-kwong echoed that the Administration's response to the views and comments from relevant stakeholders would be of pivotal importance in the scrutiny of the Bill. He further expressed concerns about the</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>non-application of the Bill to statutory bodies and the establishment as well as powers of the future Commission.</p> <p>The Administration said that it was working on which statutory bodies or their activities should be brought under the purview of the Bill and would brief members in due course. As regards the establishment of the Commission, the Administration was considering the suggestions made by members in respect of the composition and powers of the Commission. It would put forth any amendments in this regard to the Bills Committee in the fourth quarter of 2011.</p>	
002510 – 002944	Chairman Administration	<p>Referring to the conference organized by the HKGCC on competition law, the Chairman pointed out that many overseas experts attending the conference had suggested focusing on combating hard-core anti-competitive conduct during the initial implementation of the Bill. He believed that phased implementation of the Bill would allow more time for the public to adapt to the new legislative requirements. The Chairman also asked the Administration to consider adopting a "two-track approach" similar to that of the Canadian competition law model by confining the imposition of heavier penalties on several specific categories of hard-core anti-competitive conduct and let go less serious anti-competitive acts.</p> <p>The Administration reckoned that each jurisdiction adopted different approaches to implementing competition law to suit the local circumstances. The Administration would consider whether certain elements of the Canadian model would be suitable for Hong Kong while ensuring the integrity and policy objective of the Bill tailored to the local context.</p>	
002945 – 003444	Chairman Mr Ronny TONG Administration	<p>Referring to his discussion with some overseas experts, Mr Ronny TONG pointed out that the experts appreciated the current drafting of the Bill whereby the proposed Competition Tribunal (the Tribunal) would be established to hear and adjudicate competition cases brought by the Commission.</p> <p>He further enquired about the following –</p> <ul style="list-style-type: none"> (a) in respect of the Canadian competition law model, whether it was principle-based and the regulatory guidelines were made subsidiary legislation; and (b) whether competition cases would be heard and adjudicated in a court of law in other overseas jurisdictions. <p>The Administration advised that the Competition Act of Canada specifically defined categories of hard-core</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>anti-competitive agreements, namely price-fixing, market allocation, output control and bid-rigging, that were subject to strict <i>per se</i> liability, and prosecution of these criminal offences would be brought before the Canadian criminal courts. On the other hand, other non-hardcore anti-competitive agreements or conduct were regulated by general prohibitions and alleged contravention of these general provisions would be dealt with by the Canadian Competition Tribunal under a civil track. In the United Kingdom (the UK), some of the competition cases would be handled by the relevant competition authorities under the civil administrative model, while certain cases involving cartel offences would be brought before a court of law for adjudication. The Administration considered the judicial enforcement model appropriate for Hong Kong as the powers of investigation, bringing of proceedings and adjudication under the Bill were separated, thereby ensuring checks and balances to the exercise of the statutory powers by the Commission and the Tribunal.</p>	
003444 – 004233	Chairman Mr Albert HO Administration	<p>Mr Albert HO expressed concern about the proposed adoption of the Canadian competition law model which had imposed criminal sanctions on hard-core anti-competitive conduct. The Administration clarified that it had no intention to follow the criminal track of the Canadian competition law. Instead, it would consider if certain elements of the civil regime under the Canadian model would have certain reference value to Hong Kong.</p> <p>Mr HO expressed concern that as the Commission would need to take time to investigate and bring proceedings before the Tribunal, undertakings engaging in infringing acts might be able to make a windfall profit during investigation. The Administration said that under the current framework of the Bill, the Commission might accept commitments from an undertaking to take or refrain from taking certain action to address its concerns about a possible contravention of the local competition rules before or during an investigation. Such commitment would be enforceable by the Tribunal.</p> <p>To provide more details about the operation of the Canadian competition law model, the Administration was requested to advise whether and under what circumstance(s), the Canadian Competition Tribunal could make an interim order during investigation to restrain or prohibit an undertaking from continuing engaging in any conduct that constituted or was likely to constitute a contravention of the competition law.</p>	The Administration to provide information as requested in paragraph 3(a)(i) of the minutes.
004234 – 005141	Chairman Mrs Regina IP Administration	At Mrs Regina IP's request, the Administration would provide a written response to advise the term used in the Canadian Competition Act to describe the level of market power that should not be abused by an undertaking, such as	The Administration to provide information as requested in

Time marker	Speaker	Subject(s)	Action required
		<p>"dominant position" or "substantial degree of market power".</p> <p>Citing the alleged bid-rigging by food stall operators in a Court of Final Appeal case in 2010 as an example, Mrs IP did not subscribe to the claims by some experts that the introduction of the Bill would not affect the operation of the small and medium enterprises (SMEs) which accounted for more than 90% of all undertakings in Hong Kong. The Administration responded that bid-rigging was regarded as a hard-core anti-competitive conduct by many competition jurisdictions and hence, it would likely be prohibited by the future competition law.</p> <p>Echoing the views of HKGCC's submission dated 4 July 2011, Mrs IP enquired about why the standards for assessing anti-competitive conduct under the Telecommunications Ordinance (Cap. 106) (TO)/the Broadcasting Ordinance (Cap. 562) (BO) ("substantially restricting competition") and the Bill ("appreciable adverse effect on competition") were different.</p> <p>The Administration explained that the two concepts were not inconsistent, and the economic analysis to ascertain whether an agreement or a conduct was "substantially restricting competition" or had an "appreciable adverse effect on competition" was essentially the same. The general prohibitions in the Bill had followed closely the formulation of the competition rules in other major competition regimes to enable the Commission and the Tribunal to draw reference readily from overseas case law and jurisprudence in future.</p> <p>The Chairman pointed out that there were considerable differences between Hong Kong and other major economies like the European Union (EU) in terms of social and economic contexts. He expressed concern that foreign experience in implementing competition law might not suit local circumstances.</p> <p>The Administration responded that due consideration had been given to the local context when drafting the Bill. To reflect that Hong Kong was a small-scale economy, the Bill proposed "substantial degree of market power" rather than EU's "market dominance" as a threshold to assess whether an undertaking possessed significant market power under the second conduct rule. The Administration supplemented that only when an undertaking had abused its substantial degree of market power by engaging in conduct with an object or effect of preventing, restricting and distorting competition in Hong Kong would constitute a breach of the second conduct rule. In reply to Mrs IP's further query, the Administration clarified that the Herfindahl-Hirschman Index was a commonly accepted</p>	<p>paragraph 3(a)(ii) of the minutes.</p>

Time marker	Speaker	Subject(s)	Action required
		<p>measure of market concentration in the United States, but not an indicator for assessing market power of an undertaking.</p>	
005142 – 010228	Chairman Ms Emily LAU Administration	<p>Ms Emily LAU said that there was general support for introducing a cross-sector competition law in Hong Kong and urged the Administration to spare no effort in taking forward the implementation of the Bill. She also agreed that hard-core anti-competitive conduct like bid-rigging should be subject to regulation under the Bill even if it was made or given effect by SMEs like food stall operators.</p> <p>Drawing reference to the Canadian competition law model, the Chairman proposed to implement the Bill in phases such that the first phase would only cover hard-core anti-competitive conduct. Until after the Commission had made good progress in exercising its statutory powers and educating the public, prohibition of non-hardcore conduct might come into force. However, Ms LAU expressed concern that modelling some parts of different pieces of competition law implemented in other jurisdictions might undermine the deterrent effect of the Bill and make it vulnerable to possible abuses. She added that large consortia engaging in anti-competitive practices, such as manipulating oil and property prices, controlling supplies in supermarkets etc, should be subject to heavier sanctions.</p> <p>The Chairman considered it more appropriate to confine the scope of pecuniary penalties to the turnover relating to the product/service market in question instead of a maximum of 10% of the global turnover of the undertaking(s) in breach of the competition rules for the year in which the contravention occurred.</p> <p>In response, the Administration said that the Bill had proposed a two-tier commitment mechanism under which the Commission might accept a commitment from an undertaking to take or refrain from taking certain actions to address a competition concern, or issue an infringement notice to a person allegedly contravening or having contravened the proposed conduct rules requiring the person to take or refrain from taking certain action in exchange for the Commission's agreement not to institute or continue with proceedings against the person. It was believed that such arrangements would provide sufficient flexibility for the Commission to consider the best approach to deal with competition concerns of each case. The Administration added that while hard-core anti-competitive agreements between undertakings should not be tolerated under the first conduct rule regardless of the size of the undertakings involved, the second conduct rule focused on the abuse of a substantial degree of market power by an undertaking, normally a large company, with the object or effect of foreclosing the smaller players in the</p>	

Time marker	Speaker	Subject(s)	Action required
		market.	
010229 – 010839	Chairman Mr LEUNG Kwok-hung Administration	<p>Mr LEUNG Kwok-hung was in support of the proposed pecuniary penalties with a view to achieving sufficient deterrent effect. Otherwise, undertakings might circumvent the suggestion of confining the pecuniary penalty to local turnover by transferring assets out of Hong Kong.</p> <p>Concerning the alleged bid-rigging by food stall operators in a Court of Final Appeal case in 2010, Mr LEUNG was of the view that both hard-core anti-competitive conduct and abuses of a substantial degree of market power should be included in the first phase of implementation of the Bill.</p> <p>The Administration emphasized that hard-core anti-competitive agreements between undertakings of all sizes in different sectors should be prohibited.</p>	
010840 – 011843	Chairman Ms Miriam LAU Administration	<p>Ms Miriam LAU pointed out that over 98% of undertakings in Hong Kong were SMEs and most of them upheld the spirit of anti-monopoly legislation. As SMEs had expressed concern about falling foul of the Bill easily, public education should be stepped up to facilitate SMEs' understanding of the Bill.</p> <p>The Administration agreed that public education was important to facilitate SMEs' understanding of the new law and their compliance. It was also working on the "de minimis" arrangements with a view to addressing SMEs' concerns. The Administration added that the scope of prohibitions of the Bill and that of the anti-monopoly legislation in some jurisdictions were actually very similar.</p> <p>In response to Ms LAU's enquiry about whether the Bill would allow restricted tendering, the Administration explained that while eligible undertakings taking part in restricted tendering would not contravene the Bill, bid-rigging among restricted tenderers with an object or effect of preventing, restricting or distorting competition would be prohibited.</p> <p>Ms LAU requested the Administration to advise the numbers of SMEs vis-à-vis large enterprises in Singapore, the UK and EU which had been sanctioned by the competition authorities as having breached the competition law in the past few years.</p>	The Administration to provide information as requested in paragraph 3(b) of the minutes.
011844 – 012452	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM relayed the following views of some overseas experts on the Bill for reference of the Administration and the Bills Committee –</p> <p>(a) the regulatory guidelines to be draw up by the Commission should be made clearer and more concrete</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>to facilitate daily business operations thereby promoting sustainable development of the business sector;</p> <p>(b) the new legislation should be implemented step by step in a pragmatic manner so as to allow sufficient time for the business sector to understand the legal requirements and make necessary adjustments accordingly;</p> <p>(c) the competition law of EU to which the Administration had made reference might not suit local circumstances especially when the impact of the EU competition law on its market and economy was uncertain; and</p> <p>(d) competition expertise was limited in Hong Kong.</p>	
012453 – 013645	Chairman Mr Albert HO Mr Ronny TONG Administration Ms Emily LAU	<p>Mr Albert HO was of the view that the proposed pecuniary penalties could be lowered to allay the worries of the business community. He also agreed with the Administration that further discussion should be pursued on whether the stand-alone private rights of action should be implemented at a later stage after the enactment of the Bill.</p> <p>The Chairman reiterated the proposal of implementing the Bill in phases such that the first phase would only cover hard-core anti-competitive conduct as they were more clearly defined. He further urged the Administration to strike a balance between setting the pecuniary penalties at a reasonable level and achieving sufficient deterrent effect to combat anti-competitive practices.</p> <p>Mr Ronny TONG said that as he observed, there were other SMEs which did not oppose to the introduction of a competition law but looked forward to the enactment of the Bill. In view of the tight schedule, Ms Emily LAU urged the Administration to reach a consensus with the business sector as early as possible on the future implementation of the Bill.</p>	
013646 – 014836	Chairman Administration	<p>Briefing by the Administration on the Guidelines on the Second Conduct Rule (the Guidelines) (CB(1)2618/10-11(01))</p> <p>In response to the Chairman's enquiry as to whether the market share threshold would be expressly spelt out in the future guidelines after making reference to other jurisdictions which adopted market share threshold in the range of 40% to 60%, the Administration advised that the Commission would set out an indicative market share threshold in the future guidelines with reference to the local circumstances after consultation with relevant stakeholders. It was further noted that market share was but one of the</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>indicators for assessing market power and it would be necessary to take into account other relevant factors, such as entry barriers, before determining whether an undertaking possessed a substantial degree of market power.</p> <p>Notwithstanding the Administration's explanation, the Chairman expressed concern that if a market share threshold of 20% or 30% was adopted by the Commission in future, many undertakings in Hong Kong might be caught breaching the second conduct rule.</p>	
014837 – 015632	Chairman Ms Miriam LAU Administration	<p>Ms Miriam LAU urged the Administration to define clearly the terms of "market share" and "market power" in the Guidelines to facilitate SMEs to understand whether their practices would constitute a breach of the second conduct rule.</p> <p>Ms LAU referred to the Guidelines which stated that if an undertaking could remain profitable while charging prices above competition levels, over a non-transitory period, it could be considered to have market power. She expressed concern that as some players of the service industries would charge a higher price for better services, they might fall prey to the Bill.</p> <p>The Administration explained that the second conduct rule aimed at prohibiting undertakings from abusing their substantial degree of market power with the object or effect of preventing, restricting or distorting competition in Hong Kong. Although different market share percentages in the range of 40% to 60% were adopted by other jurisdictions, the Administration considered it more appropriate for the Commission to indicate a market share threshold in the future guidelines having regard to the local circumstances and after consulting the relevant stakeholders.</p> <p>Nevertheless, the Chairman urged the Administration to consider adopting a higher market share threshold and specifying it in the future guidelines despite the fact that market share alone would not determine whether an undertaking had a substantial degree of market power.</p>	
015633 – 015856	Chairman Mr CHAN Kin-por Mr Ronny TONG	<p>Mr CHAN Kin-por echoed the views of the Chairman and urged the Administration to consider setting the market share threshold similar to that of Singapore at 60% and set it out in the future guidelines for the reference of the business sector.</p> <p>Mr Ronny TONG pointed out that the Commission might give due consideration to local circumstances in setting out the market share threshold and that the future guidelines would only serve reference purpose.</p>	

Time marker	Speaker	Subject(s)	Action required
015857 – 015925	Chairman	Meeting arrangements	

Council Business Division 1
Legislative Council Secretariat
13 October 2011