

立法會
Legislative Council

LC Paper No. CB(1)295/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of twentieth meeting on
Tuesday, 26 July 2011, at 2:30 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)
Hon Albert HO Chun-yan
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 Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Kwok-hing, MH
Hon CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon Starry LEE Wai-king, JP
Hon CHAN Hak-kan
Hon Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
Hon Mrs Regina IP LAU Suk-yeet, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Tanya CHAN
- Members absent** : Hon Ronny TONG Ka-wah, SC (Deputy Chairman)
Hon LEE Cheuk-yan
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yeet, GBS, JP
Hon Emily LAU Wai-hing, JP

Hon Vincent FANG Kang, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Dr Hon LAM Tai-fai, BBS, JP
Dr Hon LEUNG Ka-lau
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon WONG Yuk-man

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 & Industry)

Mr Michael LAM Siu-chung
Senior Assistant Law Draftsman
Department of Justice

Ms Phyllis POON Hon-ying
Senior Government Counsel
Department of Justice

Miss Ada CHEN Kit-yi
Senior Assistant Law Officer (Civil Law) (Acting)
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)2801/10-11 -- Minutes of meeting held on 31 May 2011)

The minutes of the meeting held on 31 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)2730/10-11(02) -- Administration's paper on Overseas Case Law Examples of Anti-competitive Agreement/Conduct

LC Paper No. CB(1)2730/10-11(01) -- List of follow-up actions arising from the discussion at the meeting on 5 July 2011

LC Paper No. CB(1)2796/10-11(01) -- Administration's response to CB(1) 2730/10-11(01)

LC Paper No. CB(1)2796/10-11(02) -- Administration's paper on the interpretation and usage of "shadow director" in other Hong Kong ordinances

LC Paper No. CB(1)2796/10-11(03) -- Letter from Hon Mrs Regina IP

LAU Suk-yee enclosing two articles entitled "The Antitrust Emperor's Clothes" and "The Myth of Competition Law" (English version only)

Clause-by-clause examination

(LC Paper No. CB(1)320/10-11(04) -- Marked-up copy of the Bill prepared by the Legal Service Division)

Submissions received since last meeting

(LC Paper No. CB(1)2718/10-11(01) -- Submission from Hong Kong General Chamber of Commerce dated 8 July 2011 (English version only)

LC Paper No. CB(1)2796/10-11(04) -- Submission from Civic Party (Chinese version only)

LC Paper No. CB(1)2749/10-11(01) -- Submission from Community Development Initiative (*Chinese version issued on 15 July 2011, English version attached*)

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) advise the number of small and medium enterprises (SMEs) which were respondents of competition cases found not substantiated by the competition authority in Singapore in the past few years;
- (b) provide a breakdown on the types of substantiated competition cases involving SMEs under the list in the appendix to CB(1)2796/10-11(01);

- (c) provide statistics on the competition cases substantiated by the Canadian Competition Bureau before amendments were made to the competition law in 2009;
- (d) provide information on the annual legal fees incurred by undertakings for compliance with the competition law as estimated by some experts in the United Kingdom (UK);
- (e) re-consider exempting all types of vertical agreements from the application of the first conduct rule while empowering the future Competition Commission (the Commission) to regulate those vertical agreements having an appreciable adverse impact on competition as and when necessary;
- (f) concerning the right of appeal –
 - (i) re-consider lowering the requirement for leave to appeal against any decision, determination or order of the Competition Tribunal (the Tribunal); and
 - (ii) provide information on the requirement for leave to appeal in other competition jurisdictions, e.g. Singapore, the European Union and the UK;
- (g) provide information on the existing reciprocal arrangements of enforcement of judgments between the Mainland/Taiwan and Hong Kong;
- (h) in relation to clause 2 of the Bill, consider amending the expression "the directors of the company" in the definition of "shadow director" to read as "a majority of the directors of the company";
- (i) in relation to clause 9 of the Bill concerning application for decision by the Commission –
 - (i) consider specifying the time limit within which the Commission must make a decision, and inform the applicant of its decision and the reasons for it in writing;
 - (ii) advise whether other jurisdictions would specify the time limit within which their competition authorities must make a decision on applications for exclusion or exemption from their competition law; and

- (iii) consider revising the Chinese text of subclause (2)(c);
 - (j) given that words and expressions in the singular include the plural under section 7(2) of the Interpretation and General Clauses Ordinance (Cap. 1), advise whether two persons who jointly gave directions or instructions to a majority of the directors of the company would be considered as shadow directors of the company; and
 - (k) in relation to clause 11 of the Bill concerning decision by the Commission, consider requiring the Commission to inform those who had made representations to the Commission of its decision.
4. Referring to the proposed schedule of meetings tabled at the meeting, the Chairman advised members that the next meeting of the Bills Committee would be held on 11 October 2011, from 8:30 am to 11:30 am.

(post-meeting note: At the instruction of the Chairman, the schedule of meetings of the Bills Committee from October to December 2011 was subsequently issued to members on 1 August 2011 vide LC Paper No. CB(1)2850/10-11.)

III Any other business

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

Council Business Division 1
Legislative Council Secretariat
9 November 2011

**Proceedings of the twentieth meeting of
Bills Committee on Competition Bill
on Tuesday, 26 July 2011, at 2:30 pm
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000144 – 000228	Chairman	Opening remarks by the Chairman. Confirmation of minutes of the meeting on 31 May 2011 (CB(1)2801/10-11).	
000229 – 001240	Chairman Administration	The Administration outlined its response to members' views and concerns raised at the meetings of the Bills Committee on 21 June and 5 July 2011 respectively (CB(1)2631/10-11(02) and CB(1)2796/10-11(01)).	
001241 – 001634	Chairman Mr CHAN Kin-por Administration	Referring to the statistics on overseas competition cases involving small and medium enterprises (SMEs) as set out in the appendix to CB(1)2796/10-11(01), Mr CHAN Kin-por expressed concern that SMEs would likely be the target of enforcement and the potentially high legal fees would create costly compliance burden for SMEs. To help understand the cost burden of legal proceedings on SMEs, the Administration was requested to advise the number of SMEs which were respondents of competition cases found not substantiated by the competition authority in Singapore in the past few years.	The Administration to provide information as requested in paragraph 3(a) of the minutes.
001635 – 002402	Chairman Mr CHAN Kam-lam Administration	Echoing the views of Mr CHAN Kin-por, Mr CHAN Kam-lam asked the Administration to provide a breakdown on the types of substantiated competition cases involving SMEs under the list in the appendix to CB(1)2796/10-11(01). Referring to paragraph 5 of CB(1)2796/10-11(01), Mr CHAN enquired about whether the Administration would follow the arrangement of the Canadian Competition Bureau to adopt a market share threshold of 35% in determining whether there was an abuse of a dominant position in a market. The Administration advised that the market share threshold of 35% was set out in the enforcement guidelines issued by the Canadian Competition Bureau to facilitate public understanding of the likely manner the authority would enforce the competition law. In the view of the Canadian Competition Bureau, if a firm had a market share of less than 35%, it would normally not give rise to concerns of abuse of dominance, and hence investigation would not be conducted. However, the threshold was indicative only and the Canadian Competition Bureau could take enforcement action against any anti-competitive conduct even if the undertaking concerned possessed a market share of less than 35%.	The Administration to provide information as requested in paragraph 3(b) and (c) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>Having regard to Hong Kong's relatively small-scale economy, the Administration said that the market share threshold for the second conduct rule in Hong Kong would probably fall within the range between 30% and 40%, subject to local market circumstances and detailed competition analysis to be carried out by the future Competition Commission (the Commission). The Administration added that similar to the Canadian approach, the draft Guidelines on Market Definition prepared earlier by the Administration had set out some principles for defining the boundary of a market, including the concept of "substitution" for the relevant product under investigation.</p> <p>To facilitate better understanding of the Canadian competition law model, Mr CHAN requested the Administration to provide statistics on the competition cases substantiated by the Canadian Competition Bureau before amendments were made to the Canadian competition law in 2009.</p>	
002403 – 003051	Chairman Mrs Regina IP Administration	<p>Referring to the enquiry of the Lion Rock Institute to the Administration regarding compliance cost, Mrs Regina IP made a similar enquiry about the cost of compliance with the competition law of Singapore vis-à-vis the Bill, which should include not only the funding allocation to local competition authorities but also the legal costs incurred by the business sector. The Administration responded that there was no such information available and the competition reports published by other overseas jurisdictions mainly focused on the positive impact of the implementation of competition law on their societies and economies.</p> <p>Mrs IP did not subscribe to the explanation and urged the Administration to undertake a cost analysis on the establishment of the Commission, anticipated number of cases to be handled and manpower required, etc. so as to provide a more complete picture of the future implementation of the Bill.</p> <p>The Administration explained that the impact assessment reports issued by other overseas jurisdictions such as the United Kingdom (UK) were based on facts and survey findings conducted after the implementation of their competition law. As these analyses were made having regard to the specific local situation and socio-economic conditions of the jurisdiction under study, it might not be appropriate to make reference to, or direct comparison of, the overall compliance cost of different economies. It was further noted that these reports did not contain information on individual companies' compliance costs, which should not be significant if undertakings did not</p>	

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		engage in any anti-competitive activity.	
003052 – 004036	Chairman Administration	<p>Referring to the conference organized by the Hong Kong General Chamber of Commerce on competition law earlier, the Chairman requested the Administration to provide information on the annual legal fees incurred by undertakings for compliance with the competition law as estimated by some experts in the UK.</p> <p>The Chairman further expressed concern that it might not be desirable to model the Bill on some parts of different pieces of competition law implemented in other overseas jurisdictions as this might undermine the integrity of the Bill. The Administration explained that in drafting the Bill, it had mainly made reference to the competition law of the European Union (EU), the UK and Singapore. At Members' request, the Administration had provided supplementary information on the Canadian competition law model for reference.</p> <p>In respect of the territorial application of the first conduct rule, the Administration advised that in the UK, apart from its domestic competition law regulating agreement which was or was intended to be implemented in the UK, the competition regime of EU applied in parallel. Similar to the scope of territorial application of the general prohibitions under the Singapore Competition Act, the Bill provided that agreements or conduct made outside Hong Kong would be caught if they had the object or effect of preventing, restricting or distorting competition in Hong Kong.</p> <p>While vertical agreement would normally yield pro-competition benefits, the Administration noted that some vertical agreements might give rise to competition concerns. To ensure effective regulation of all anti-competitive agreements, the Administration considered it appropriate for the Commission to look into the local circumstances and consider issuing a block exemption order to exempt certain categories of vertical agreements from the application of the first conduct rule, similar to the practices adopted by competition authorities in EU and the UK.</p> <p>Notwithstanding the Administration's explanation, the Chairman shared the worries of the business sector and urged the Administration to re-consider exempting all types of vertical agreements from the application of the first conduct rule while empowering the Commission to regulate those vertical agreements having an appreciable adverse impact on competition as and when necessary.</p>	The Administration to provide information or take action as requested in paragraph 3(d) and (e) of the minutes.
004037 – 004633	Chairman Mr Albert HO	Mr Albert HO said that the Legislative Council (LegCo) had scrutinized and enacted different pieces of regulatory	

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	Administration	<p>legislation, e.g. the Securities and Futures Ordinance (Cap. 571), in the past years. The enactment of every piece of regulatory legislation would inevitably affect relevant industries or sectors and create compliance burden on them.</p> <p>Sharing similar views of Mrs Regina IP about the compliance cost arising from the Bill, Mr HO suggested the Administration to study the regulatory impact of the Bill on business operation and estimate the number of undertakings which might breach the new law. The Administration responded that it would be very difficult to conduct such regulatory impact assessment before the implementation of Bill, as it would be impossible to predict whether and to what extent the conduct of undertakings might be adjusted following the introduction of the competition law, and the compliance costs involved.</p>	
004634 – 005442	Chairman Dr Margaret NG Administration	<p>Dr Margaret NG considered it unfair to criticize law-practising members that they supported the Bill because the enactment of the Bill could lead to more litigation and make the legal profession a lucrative business. She stressed that Bills Committee members were conscientious in scrutinizing bills to facilitate compliance of the public. She asked the Administration how it would help enhance public understanding of the Bill. In this regard, the Administration said that the Bill was relatively new to Hong Kong people. Hence, the Bill would be implemented in phases to allow sufficient time for the Commission to carry out publicity and public education and prepare the regulatory guidelines before the competition rules came into force, thereby enhancing public awareness of and facilitating compliance with the new requirements.</p>	
005443 – 010016	Chairman Mr CHAN Kin-por Administration	<p>Noting the complexity of the Bill, Mr CHAN Kin-por expressed concern that the Bill would drive up the operating cost of SMEs which would likely seek assistance from legal experts to ensure their compliance with the new law.</p> <p>Referring to the submission from the Civic Party (CB(1)2796/10-11(04)), Mr CHAN held the view that the Administration should give due consideration to the local context such that the new law would focus on prohibiting hardcore anti-competitive conduct and let go other less serious infringements.</p> <p>Noting the worries of some of the members about the potentially high compliance cost arising from the Bill, the Administration responded that since competition law was in place in many major economies in the world, Hong Kong companies doing business with partners elsewhere would already have to comply with the competition law</p>	

Time marker	Speaker	Subject(s)	Action required
		abroad and the implementation of the Bill in Hong Kong should not incur much costs on them. As regards members' major concerns over the Bill, the Administration would give a response in the fourth quarter of 2011.	
010017 – 010509	Chairman Mr CHAN Kam-lam Administration	<p>Mr CHAN Kam-lam referred to paragraph 9 of CB(1)2631/10-11(02) and enquired about how undertakings abusing its market power in allocation of resources would be dealt with under the Bill. The Administration explained that in determining whether or not there was a breach of the second conduct rule, it would be necessary to show that the undertaking in question had a substantial degree of market power and that the undertaking had abused such power.</p> <p>As regards the example cited by Dr LEUNG Ka-lau in relation to the allocation of resources by a private hospital to affiliated specialists, the Administration said that more information on the market share of the hospital concerned and the reasons for the allocation would be required to assess, based on the facts and circumstances of each individual case, whether the conduct of the hospital concerned was likely to amount to an abuse of a substantial degree of market power under the second conduct rule.</p>	
010510 – 011157	Chairman Dr Margaret NG Administration Assistant Legal Adviser (ALA)	<p>Dr Margaret NG highlighted that the stance of the Civic Party on the Bill was similar to that of the Consumer Council, in particular in curbing anti-competitive practices to protect consumers' benefits. While the Civic Party considered it acceptable to make suitable amendments to the Bill to enhance its effectiveness, it would not support a total compromise with the concerns of the business community at the expense of the deterrent effect of the Bill.</p> <p>Referring to the operation of the Equal Opportunities Commission and the Securities and Futures Commission, Dr NG asked the Administration whether it was a normal practice to use guidelines to facilitate public compliance with different ordinances. The Administration said that under the Bill, the Commission was required to issue guidelines to indicate the manner in which the Commission expected to interpret and give effect to the proposed conduct rules after consultation with relevant stakeholders.</p> <p>By citing the Disability Discrimination Ordinance (Cap. 487) (the Ordinance) as an example, ALA supplemented that the Code of Practice issued under the Ordinance had to be submitted to the LegCo for scrutiny before coming into effect. However, the guidelines to be drawn up by the Commission would not be subject to the scrutiny of the LegCo. Nevertheless, members would have sight of the guidelines if consultation with the Panel on Economic Development was conducted.</p>	
011158 –	Chairman	Ir Dr Raymond HO commented that the recent tendering	

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011458	Ir Dr Raymond HO Administration	practice of the Government in awarding single contract did not promote competition but encouraged monopolies within the construction industry. The Administration took note of the observation and the relevant Government departments would review the practice.	
011459 – 012131	Chairman Prof Patrick LAU Administration	<p>In response to the enquiry of Prof Patrick LAU about the way forward of the Bill especially in the aspects of the stand-alone private rights of action, pecuniary penalties and exemption of public bodies, the Administration reiterated that it would respond to these concerns in the fourth quarter of 2011. The Administration said that with reference to paragraph 10 of CB(1)2631/10-11(02), setting out the specific conditions or requirements in a tender document usually did not give rise to competition concerns.</p> <p>Referring to the submission from the Community Development Initiative (CB(1)2749/10-11(01)), Prof LAU enquired about the issue of exemption of Government departments and statutory bodies from the application of the proposed conduct rules. The Administration advised that there were different provisions in the Bill concerning exclusion and exemption. For example, clause 31 of the Bill provided that the Chief Executive in Council might grant exemption to certain agreement or conduct on public policy grounds. Undertakings could also self-assess their agreements or conduct in accordance with the general exclusion from the proposed conduct rules provided in Schedule 1 to the Bill. The Commission might also make a decision, in response to an application, as to whether or not an agreement or conduct would be excluded or exempted from the proposed conduct rules.</p>	
012132– 012253	Chairman Mr CHAN Kin-por	Mr CHAN Kin-por emphasized that the clarity of the Bill was of utmost importance. If the Bill was not drafted in clear terms, it would create costly compliance burden for SMEs.	
012254 – 012915	Chairman Administration Dr Margaret NG	<p>With regard to the concerns of the Chairman about the right of appeal, the Administration considered that being a special court within the Judiciary, the decision of the proposed Competition Tribunal (the Tribunal) should be respected and an appeal against its decision should only be permitted with leave if it 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). Nevertheless, the Administration undertook to review the requirement for leave to appeal against any decision, determination or order of the Tribunal.</p> <p>Echoing the views of the Chairman, Dr Margaret NG said that competition law was a new area of law that most</p>	The Administration to provide information or take action as requested in paragraph 3(f)(i) and (ii) of the minutes.

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		<p>industry sectors in Hong Kong were not familiar with, and hence the Administration should consider lowering the requirement for leave to appeal especially when there was not any abuse of the appeal mechanism. It was believed that a decision of a court of law on a competition case would facilitate public understanding of the interpretation of the proposed conduct rules.</p> <p>The Chairman also requested the Administration to provide information on the requirement for leave to appeal in other competition jurisdictions, e.g. Singapore, EU and the UK.</p>	
012916 – 013903		Break	
013904 – 014210	Chairman Dr Margaret NG ALA Administration	Discussion on the phrase "there is some other reason in the interests of justice why the appeal should be heard" in clause 153(3)(6) of the Bill.	
014211 – 014512	Chairman Mr Albert HO Administration ALA	<p>In response to the enquiry of Mr Albert HO concerning international co-operation in enforcement of judgment, the Administration explained that the reciprocity in enforcement currently in force with other overseas jurisdictions was not based on any international agreement signed with these jurisdictions but was based on their domestic legislation providing for reciprocal enforcement of judgments and was therefore subject to the relevant legislation in respective jurisdictions. Nevertheless, co-operation on competition matters on a bilateral basis with different jurisdictions could be developed after the passage of the Bill and the establishment of the Commission.</p> <p>At the request of Mr HO, the Administration would provide information on the existing reciprocal arrangements of enforcement of judgments between the Mainland/Taiwan and Hong Kong.</p> <p>ALA supplemented that reciprocal enforcement of judgments with the Mainland was provided in the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597).</p>	The Administration to provide information as requested in paragraph 3(g) of the minutes.
014513 – 014722	Chairman Administration	<p>Briefing by the Administration on the definition of "shadow director" (CB(1)2796/10-11(02)).</p> <p>It was noted that the Administration proposed to amend the expression "the directors of the company" in the definition of "shadow director" in clause 2 of the Bill to read "the directors or a majority of the directors of the company".</p>	
014723 – 015229	Chairman Mr CHAN Kam-lam Administration	Noting the definition of "shadow director" in clause 2 of the Bill, Mr CHAN Kam-lam considered the meaning of "accustomed to act" in the definition unclear. In response, the Administration explained that by defining "shadow	

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		<p>director", the Bill would enable the future Commission to identify the person, though not occupying the position of director or apparently involved in the management of a company, had nevertheless had significant influence over the directors of the company. The court would study the facts of individual case to see if the directors were accustomed to act in accordance with the directions or instructions of that person before holding him/her responsible for any contravention of the competition rules made by the company. The Administration gave the example that a person in a parent company would be regarded as a "shadow director" of its subsidiary if a majority of directors in the subsidiary was accustomed to act in accordance with his/her directions or instructions. The same definition and interpretation of "shadow director" was adopted in the Companies Ordinance (Cap. 32).</p>	
015230 – 020321	Chairman Ms Audrey EU Administration	<p>In response to the enquiry of Ms Audrey EU, the Administration explained that the proposed amendment to the expression "the directors of the company" in the definition of "shadow director" in clause 2 of the Bill was made in line with the Companies Ordinance (Cap. 32) and other relevant case law in the UK so that a person that could influence all directors or a majority of directors of a company would be regarded as a shadow director and be held responsible for contravening the competition rules, if any.</p> <p>Given that words and expressions in the singular include the plural under section 7(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the Administration was requested to advise whether two persons who jointly gave directions or instructions to a majority of the directors of the company would be considered as shadow directors of the company.</p>	The Administration to provide information as requested in paragraph 3(j) of the minutes.
020322 – 020454	Chairman Mr Albert HO Administration	<p>On the definition of "shadow director", Mr Albert HO considered it sufficient and more concise to amend the expression "the directors of the company" to read as "a majority of the directors of the company". He also enquired whether a professional adviser to the company board would be regarded as a shadow director. In reply, the Administration clarified that the interpretation of the term "shadow directors" in clause 2 of the Bill provided that persons giving advice in a professional capacity to the company board would not be regarded as "shadow directors" of the company.</p>	The Administration to take action as requested in paragraph 3(h) of the minutes.
020455 – 020806	Chairman ALA Administration	<p><u>Continuation of clause-by-clause examination</u></p> <p><u>Clause 8 – Territorial application of first conduct rule</u></p> <p>In response to the observation of ALA that there might be some discrepancies between the Chinese and English texts</p>	

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		<p>of clause 8(d) of the Bill, the Administration explained that the word "均" in the phrase "均是在香港境外" would not distort the meaning of the word "或" in the phrase "任何業務實體或業務實體組織". The word "均" would help indicate that the first conduct rule applied to an undertaking or an association of undertakings even if they were outside Hong Kong.</p>	
020807 – 022512	<p>Chairman ALA Administration Ms Audrey EU Mr CHAN Kam-lam</p>	<p><u>Clause 9 – Application for decision</u></p> <p>In relation to clause 9(2)(c) of the Bill which stated that the Commission was only required to consider an application if it was possible to make a decision on the basis of the information provided, ALA enquired whether it was necessary to state in the Bill the types of information that were required to be provided by the undertaking making the application and the power of the Commission to request any further information from the undertaking. The Administration responded that as the information to be provided would be specific to the decision being sought, it was considered more appropriate to leave the Commission and the undertakings concerned with the flexibility to deal with these matters on a case-by-case basis.</p> <p>With regard to the proposal of the Law Society of Hong Kong to revise clause 9 and replace "on the basis of the information provided" by "on the available information on the record", the Administration considered that the onus of providing information relevant to the application should rest with the undertaking. It would be more appropriate for the undertaking concerned to furnish the Commission with information that the undertaking considered necessary and relevant for the Commission to make a decision.</p> <p>Discussion on the need to set out in the Bill a time limit for the Commission to make a decision on an application. Ms Audrey EU suggested that the Commission should be required to make a decision on the application within three to four months and if necessary, the time limit could be extended for two further months. The Chairman requested the Administration to –</p> <p>(a) consider specifying the time limit within which the Commission must make a decision, and inform the applicant of its decision and the reasons for it in writing; and</p> <p>(b) advise whether other jurisdictions would specify the time limit within which their competition authorities must make a decision on applications for exclusion or exemption from their competition law.</p> <p>Mr CHAN Kam-lam also requested the Administration to consider improving the Chinese text of subclause (2)(c) of</p>	<p>The Administration to provide information or take action as requested in paragraph 3(i)(i), (ii) and (iii) of the minutes.</p>

Time marker	Speaker	Subject(s)	Action required
		the Bill.	
022511 – 023301	Chairman Mr CHAN Kam-lam Administration	<p><u>Clause 10 – Consideration of application</u></p> <p>Mr CHAN Kam-lam was concerned that the Commission must consider and publish any representations about the application that were made to it. He considered that the Commission's independence in making the decision for the application might be undermined if the public was invited to make representation. He also enquired as to whether a representation to be made to the Commission about an application would be conducted in a closed-door meeting so as to keep commercially sensitive information confidential.</p> <p>The Administration responded that clause 10 required the Commission to publish notice of the application in a manner it considered appropriate for bringing the matter to the attention of those the Commission considered likely to be affected by its decision. The Administration further advised that the meaning of "confidential information" was set out in clauses 122 and 123 which required the Commission to establish and maintain adequate procedural safeguards to prevent unauthorized disclosure of confidential information.</p>	
023302 – 023611	Chairman ALA Administration	<p><u>Clause 11 – Decision by Commission</u></p> <p>In response to ALA's enquiry, the Administration undertook to consider requiring the Commission to inform the persons who had made representations to the Commission of its decision so that the persons would be in a position to decide whether or not to apply to the Tribunal for a review of the decision made by the Commission.</p>	The Administration to take action as requested in paragraph 3(k) of the minutes.
023612 – 024350	Chairman ALA Administration	<p><u>Clause 12 – Effect of decision</u></p> <p>To avoid doubt that the undertaking would also be immune from any action under the future Ordinance that was applicable to the merger rule, the Administration undertook to amend clause 12(1) to the effect that the immunity referred therein applied only to the extent of the first conduct rule or Part 2 of the Bill.</p> <p>Members noted that clause 12(1) provided that if the Commission decided to exclude or exempt an agreement from the application of the first conduct rule, each undertaking specified in the decision was immune from any "action" under this Ordinance with regard to that agreement, and that "action" in the subclause referred to "litigation" as in the Chinese text. ALA enquired whether the undertakings would be subject to enforcement actions other than litigation. The Administration advised that the immunity would protect the undertaking from legal</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>proceedings being instituted against it on the basis of that agreement for infringement of the first conduct rule or Part 2 of the Bill. If exclusions or exemptions applied to certain agreements or conduct, it would also be unlikely for the Commission to issue an infringement notice with regard to the agreement in question, unless the relevant undertaking had not complied with the conditions or limitations subject to which exclusion or exemption was to have effect. Nevertheless, the undertaking would still be subject to investigation in respect of its compliance with the conditions or limitations, or of another agreement if the Commission had reasonable cause to believe that in respect of that other agreement, the undertaking was involved in contraventions of the competition rules.</p>	
024351 – 024635	Chairman Mr Albert HO Administration	<p><u>Clause 13 – Non-compliance with condition or limitation</u></p> <p>With regard to the enquiry of Mr Albert HO, the Administration explained that if an undertaking failed or ceased to comply with the conditions or limitations subject to which a decision was to have effect, the immunity with regard to the agreement given to the undertaking ceased to apply. The Commission might consider bringing it before the Tribunal if the undertaking breached any competition rules of the Bill.</p>	
024636 – 025718	Chairman Mr Albert HO Mr CHAN Kam-lam Administration	<p><u>Clause 14 – Rescission of decision</u></p> <p>On Mr Albert HO's enquiry about the publication of the Commission's decision, the Administration advised that under clause 34 of the Bill, the Commission had to establish and maintain a register of decisions and block exemption orders, including rescissions of decisions under clause 14. However, the Commission might omit information identified as confidential from any entry made in the register and disclose this fact on the register.</p> <p>Noting the arrangement that the date specified in the notice of rescission might be earlier than the date on which the notice was given, Mr CHAN Kam-lam expressed concern about the retrospective effect of the rescission on undertakings. The Administration explained that if the Commission rescinded a decision because the information on which it based its decision was incomplete, false or misleading in a material particular, the immunity should not have been given in the first place and the undertakings concerned had been in fact engaging in anti-competitive practice for a period of time. Hence, they should be subject to application of the proposed conduct rules retrospectively.</p> <p>In reply to Mr CHAN's further concern, the Administration advised that clause 171 of the Bill provided that a person would commit an offence if he or she provided in any representation made to the Commission any information</p>	

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		which was false or misleading in a material particular. However, such criminal proceedings would not be brought to the Tribunal but other courts of law with criminal jurisdiction for adjudication.	
025718 – 025805	Chairman	Meeting arrangements	

Council Business Division 1
Legislative Council Secretariat
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