

立法會
Legislative Council

LC Paper No. CB(1)1566/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of the twenty-fifth meeting held on
Tuesday, 22 November 2011, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

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
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 WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
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 Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Tanya CHAN

Hon WONG Yuk-man

Members absent : Hon LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Paul TSE Wai-chun, JP

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

Mr David Alan GROVER
Senior Government Counsel
Department of Justice

Mr Alvin LI Wing-kong, JP
Assistant Commissioner for Census and Statistics

Clerk in attendance : Mr Derek LO
Chief Council Secretary (1)6

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Sarah YUEN
Senior Council Secretary (1)6

Action

I Confirmation of minutes

(LC Paper No. CB(1)295/11-12 — Minutes of meeting held on 26 July 2011)

The minutes of the meeting held on 26 July 2011 were confirmed.

II Meeting with the Administration

(LC Paper No. CB(1)257/11-12(03) — List of follow-up actions arising from the discussion at the meeting on 25 October 2011

LC Paper No. CB(1)389/11-12(01) — Hon Jeffrey LAM Kin-fung's letter dated 25 October 2011

LC Paper No. CB(1)389/11-12(02) — Administration's response to CB(1)257/11-12(03) and CB(1)389/11-12(01)

LC Paper No. CB(1)389/11-12(03) — List of follow-up actions arising from the discussion at the meeting on 8 November 2011

LC Paper No. CB(1)91/11-12(01) — Administration's paper on responses to concerns on the Competition Bill

LC Paper No. CB(1)3079/10-11(01) — List of outstanding issues that require action/consideration by the Administration

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)2336/10-11(01) — Administration's paper on Guidelines on the First Conduct Rule

LC Paper No. CB(1)440/11-12(01) — Hon Jeffrey LAM Kin-fung's letter

LC Paper No. CB(1)440/11-12(02) — Hon Mrs Regina IP's letter dated 22 November 2011)

2. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

3. As at previous meetings of the Bills Committee, some members continued to question the basis for working out the recently proposed threshold of HK\$ 11 million for exclusion from the application of the second conduct rule (the de minimis threshold), and urged the Administration to adjust the threshold upwards. In particular, Mr WONG Ting-kwong proposed the use of the highest level of annual business turnover of small and medium enterprises (SMEs) derived from the Annual Survey of Economic Activities conducted by Census and Statistics Department as the de minimis threshold. Members also made various proposals on how to enhance certainty in assessing the degree of market power, such as by listing out the relevant factors in the Bill, or adopting a market share threshold as proposed by Economic Synergy.

Clause-by-clause examination of the Bill

- (LC Paper No. CB(1)405/11-12(01) — Marked-up copy of major amendments to clause 2 and Schedule 1 provided by the Administration
- LC Paper No. CB(3)885/09-10 — The Bill
- LC Paper No. CB(1)320/10-11(04) — Marked-up copy of the Bill prepared by the Legal Service Division
- 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)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))

4. The Bills Committee examined the following clauses of the Bill –

- (a) clauses 34 to 36;
- (b) Schedule 1 and the proposed Committee Stage amendments thereto;

- (c) clauses 162 and 163; and
- (d) sections 1 to 11 of Schedule 7.

Follow-up actions required of the Administration

5. The Bills Committee requested the Administration to provide written responses to the following concerns/requests –

- (a) regarding the recently proposed threshold of HK\$ 11 million for exclusion from the application of the second conduct rule under the proposed de minimis arrangements –
 - (i) consider the call to adjust the above exclusion threshold upwards;
 - (ii) provide justifications for using the average annual business turnover of SMEs from 2005 to 2009 as the proposed exclusion threshold considering that the companies in the data from which the figure was derived included data of shell companies and "one-man" companies; and
 - (iii) consider using the highest level of SME annual business turnover derived from the Annual Survey of Economic Activities conducted by Census and Statistics Department as the exclusion threshold;
- (b) consider the proposal to address concerns about the uncertainty of adopting the threshold of "substantial degree of market power" by adopting instead the threshold of a market share of, say, 25% to 30%, to decide whether an undertaking had a "dominant position";
- (c) provide a paper to explain what types of "confidential information" might be omitted from an entry made in the register of decisions and block exemption orders, as stated in clause 34(2);
- (d) check whether fees similar to those under clause 163 were also charged by the Office of the Telecommunications Authority (OFTA) in enforcing competition rules under the Telecommunications Ordinance (Cap. 106);
- (e) check whether the 30-day time limit for commencement of investigation of merger under section 7 of Schedule 7 was comparable to similar deadlines imposed in other jurisdictions;

- (f) in consultation with the bureau/department responsible for the Securities and Futures (Amendment) Bill 2011 presently under scrutiny, examine how to address the concern that a listed company planning to merge with other company/companies might be unable to comply with the requirement upon listed companies to disclose such price sensitive information as the planned merger, since the listed company would not be able to ascertain whether the merger would eventually be carried out pending the completion of the Competition Commission (the Commission)'s investigation on whether the merger would substantially lessen competition;

Drafting issues

- (g) clause 35 (guidelines)
 - (i) consider introducing amendments to clause 35 to clarify the Commission's legal basis to issue regulatory guidelines and the consultation process, and to specify that the guidelines were not subsidiary legislation but were admissible as evidence in legal proceedings involving the guidelines; and
 - (ii) introduce amendments to clause 35(5) to ensure that the Commission would make use of the latest technology available, in particular the Internet, to publish the electronic copy of all guidelines issued under clause 35 and of all amendments made to them;
- (h) Schedule 1 (general exclusions from conduct rules)
 - (i) consider the view that section 1 should be refined to ensure that apart from "agreements enhancing overall economic efficiency", agreements benefitting consumers or not making consumers worse off would also be excluded from the first conduct rule;
 - (ii) clarify, with examples, the scope of "entrusted by the Government" and "services of general economic interest" which would be excluded from the conduct rules by virtue of section 3, and to consider and report back on the view that the section should be refined to clearly reflect the legislative intent;
 - (iii) refine the new section 4(1) to clarify that the first conduct rule would only not apply to "the relevant part of" the agreement that "results in, or if carried out would result in, a merger";

- (iv) as suggested by the legal adviser to the Bills Committee and Mr Ronny TONG, clearly explain in the new section 5 how to work out the annual turnover of an undertaking, in particular that of a newly established undertaking having been in operation for less than one year, and provide a paper on relevant examples; and
 - (v) refine the new section 5 to address concerns about the unfairness that might arise if an undertaking deliberately committed an anti-competitive act at the beginning of its financial year, or after having operated for only a few months, so as to ensure its annual turnover would not exceed the exclusion threshold; and
- (i) Schedule 7
- (i) amend the phrase "自動經濟實體" in the Chinese text of section 3(4) to reflect the phrase "autonomous economic entity" in the English text of this section;
 - (ii) amend the Chinese heading of section 6 to reflect that the matters stated therein were matters that "may be" and not "shall be" taken into account in determining whether competition had been or might be substantially lessened;
 - (iii) amend the phrase "下一屆會期" in the Chinese text of sections 10(3) and 10(5) to "下一會期"; and
 - (iv) amend the phrase "carries out a merger (已作出有關合併)" in section 11(1)(a). In so doing, the Administration may wish to make reference to the wording of clause 9(1) of the Bill.

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

III Any other business

7. There being no other business, the meeting ended at 7:30 pm.

**Proceedings of the twenty-fifth meeting of
the Bills Committee on Competition Bill
on Tuesday, 22 November 2011, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda Item I – Confirmation of minutes			
000632 – 000708	Chairman	Confirmation of minutes of meeting on 26 July 2011 (LC Paper No. CB(1)295/11-12)	
Agenda Item II – Meeting with the Administration			
000709 – 001514	Chairman Administration	Briefing by the Administration on its response to the list of follow-up actions arising from the discussion at the meeting on 25 October 2011 and Mr Jeffrey LAM's letter dated 25 October 2011 (LC Paper No. CB(1)389/11-12(02))	
<i>Discussion on the Administration's response to the list of follow-up actions arising from the discussion at the meeting on 25 October 2011 and Mr Jeffrey LAM's letter dated 25 October 2011 (LC Paper No. CB(1)389/11-12(02))</i>			
001515 – 003114	Chairman Administration Mrs Regina IP	<p>The Chairman's views –</p> <p>(a) the "conduct of minor significance" approach adopted by the United Kingdom (UK) was acceptable because, under the approach the conduct of an undertaking with a turnover not exceeding GBP 50 million was considered to be conduct of minor significance, and such undertaking was immune from financial penalties;</p> <p>(b) since the concept of "substantial degree of market power" was unclear, the recently proposed threshold of HK\$11 million for exclusion from the application of the second conduct rule (de minimis threshold) should be adjusted upwards; and</p> <p>(c) the statistics as set out in Appendix B to LC Paper No. CB(1)389/11-12(02) for deriving the above proposed de minimis threshold were unconvincing and unacceptable, and more details should be provided. In particular, the statistics should not cover "micro enterprises".</p> <p>The Administration's responses –</p> <p>(a) Hong Kong's economy was different from that of the UK, and the UK approach for "conduct of minor significance" might not be applicable to Hong Kong. For instance, the UK provided immunities from financial penalties only and the UK Office of Fair Trading might still take other enforcement actions</p>	<p>The Administration to provide information as requested in paragraph 5(a)(i)</p> <p>The Administration to provide information as requested in paragraph 5(a)(ii)</p>

Time marker	Speaker	Subject(s)	Action required
		<p>and withdraw the immunity from financial penalties if, after investigation, it considered that certain conduct would likely infringe the competition law. On the other hand, the proposed de minimis arrangements for Hong Kong were to provide immunities from all enforcement actions for agreements or conduct of undertakings the turnover of which did not exceed the threshold;</p> <p>(b) while the Administration was open to suggestions to adjust the de minimis threshold upwards, any proposals should be supported by objective data; and</p> <p>(c) the companies from which the above statistics had been collected were SMEs as defined by the Trade and Industry Department.</p> <p>Mrs Regina IP indicated agreement with the Chairman on (b) and (c) above, pointing out that the Administration's explanation of "substantial degree of market power" in different papers was contradictory and confusing, and made the following points –</p> <p>(a) breakdown of the statistics concerned by staff establishment was meaningless because staff establishment might not have any bearing on the turnover level. Consideration should be given to adopting the median level of business turnover instead of the average turnover as the de minimis threshold; and</p> <p>(b) considering the Administration's earlier proposed amendments to the Bill which would diminish its effect, the substantial operating costs of the Commission, and the commercial sector's concerns about inadvertent contravention of the enacted Bill, it might not be desirable to take forward the Bill.</p> <p>The Administration's responses –</p> <p>(a) if the median business turnover was adopted, the de minimis threshold would be only about HK\$1 million because the number of one-man companies had made up one-third of the total number of companies from which the above statistics had been collected. In fact, most of the companies surveyed had an establishment of fewer than 10 staff. As such, the Administration had adopted the average figure, which was higher than the median, although statistically the latter would be more representative of the total; and</p> <p>(b) the de minimis threshold was proposed to provide greater certainty to SMEs to address their concerns</p>	

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		about inadvertent contravention of the second conduct rule.	
003115 – 004111	Chairman Mr WONG Yuk-man Administration	<p>Mr WONG Yuk-man's views –</p> <ul style="list-style-type: none"> (a) applying the same de minimis threshold to all sectors was illogical though convenient because it failed to take into consideration the characteristics of different economic sectors. To ensure flexibility for the Commission, Economic Synergy's proposal to also impose a market share threshold might be preferable; (b) alternatively, the Administration might adopt a presumption approach under which, as in section 47 on presumption of possession and knowledge of dangerous drug of the Dangerous Drugs Ordinance (Cap. 134), all enterprises the annual business turnover of which exceeded the de minimis threshold would be presumed not eligible for exclusion unless the contrary was proved by the undertaking concerned. Whether the presumption would be rebutted would be a matter for the Competition Tribunal (the Tribunal) to decide taking into account all relevant factors; (c) in addition, unless the Administration intended to protect large consortia from the Bill and target the Bill at SMEs, the Administration should be more willing to consider other proposals on the de minimis arrangements made by SMEs, in particular the proposal to adopt the more clearly defined and widely used presumption of 50% to 60% of market share for "dominance" instead of the unclear test of "substantial degree of market power"; and (d) the spirit of the Bill should be to ensure a level playing field by targeting large consortia, tackling monopoly, and protecting consumers. <p>The Administration's responses –</p> <ul style="list-style-type: none"> (a) both the test of "substantial degree of market power" and the test of "dominant position" were to be applied to the facts of each case. The Administration's proposal to adopt the former test was based on the need and circumstances of Hong Kong in order to effectively tackle abusive conduct of undertakings which did not dominate the market but nonetheless possessed substantial market power and were capable of affecting competition in the local market; (b) while case law and jurisprudence in overseas jurisdictions suggested that to constitute a "dominant position", the undertaking concerned would usually 	

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		<p>possess a market share of at least 50%, other factors had to be examined as well, including market shares of the competitors, the ease of entry into the market, etc.; and</p> <p>(c) in a small economy like Hong Kong, the conduct of a firm with a significant market share, albeit short of the 50% presumption for "dominance", could have a major effect on competition. If the threshold was set at 50%, the enacted Competition Ordinance would be unable to tackle anti-competitive acts by large consortia whose market share fell short of 50%. The adoption of the test of "substantial degree of market power" was therefore preferred for the greater flexibility in enforcement it could provide.</p>	
004112 – 004715	Chairman Ms Miriam LAU Administration	<p>Ms Miriam LAU highlighted the major views expressed by deputations at the meeting of the Bills Committee on 15 November 2011 and, recalling the earlier positive response of the Secretary for Commerce and Economic Development (SCED) to the deputations' view on the need to adjust upwards the proposed de minimis threshold, expressed regret at the Administration's above negative response to proposals on the threshold.</p> <p>The Administration's responses –</p> <p>(a) the Administration was open to any suggestions on adjustment of the proposed de minimis threshold provided that they were justified;</p> <p>(b) other options to the proposed de minimis arrangements included the UK approach (which limited immunities to financial penalties and retained the power to withdraw the immunities), adjustments to the thresholds, or no de minimis arrangements at all; and</p> <p>(c) the de minimis threshold would be able to cover 85% of SMEs.</p>	
004716 – 010904	Chairman Mr WONG Ting-kwong Administration Mr Ronny TONG Mrs Regina IP Assistant Legal Adviser 2 (ALA2)	<p>Mr WONG Ting-kwong expressed regret about the Administration's response above, and asked it to consider using the highest level of SME annual business turnover derived from the Annual Survey of Economic Activities conducted by Census and Statistics Department as the de minimis threshold, so as to target large consortia instead of SMEs to address the latter's concerns, thereby expediting scrutiny of the Bill.</p> <p>The Administration explained that the turnover level adopted as the de minimis threshold represented a fair picture of the total but agreed to consider members' suggestions.</p>	The Administration to provide information as

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		<p>Mr Ronny TONG drew members' attention to the fact that HK\$11 million was the threshold proposed for "exclusion" from the application of the second conduct rule. As such, SMEs would not need the threshold's protection if they did not engage in anti-competitive conduct. He cautioned that the public and consumers would not accept further concessions on the Bill, and pointed out that not all SMEs agreed with Mr WONG Ting-kwong on the need for a higher threshold.</p> <p>Mr WONG expressed regret at Mr TONG's views above. The Chairman added that an undertaking with an annual business turnover below HK\$11 million could hardly abuse its market power to affect competition. As such, the Administration should consider adjusting the proposed de minimis threshold upwards, or the proposal to address concerns about the uncertainty of adopting the threshold of "substantial degree of market power" by adopting instead a market share threshold of, say, 25% to 30%, to decide whether an undertaking had a substantial degree of market power.</p> <p>Mrs Regina IP opined that the above proposal to adopt a market share threshold might not help because, as stated in earlier papers from the Administration, factors other than market share had to be considered in determining whether there was a "substantial degree of market power". Such uncertainties might entail legal actions and hence high compliance costs causing SMEs concerns.</p> <p>The Administration made the following points –</p> <ul style="list-style-type: none"> (a) as competition law was principle-based and the Bill had adopted a general prohibitions approach, what constituted abusive conduct would be a matter of fact with reference to case law and jurisprudence established over time. Notwithstanding, since competition laws had been in operation in overseas jurisdictions for many years, there was plenty of overseas case law from which Hong Kong might draw reference; (b) the concept of "substantial degree of market power" should not be viewed as a mere description of market share as there were other factors for assessing the degree of market power such as the ease of entry into the market. Following international best practice, these relevant factors would be elaborated in greater detail in the regulatory guidelines rather than the law; and (c) the future Tribunal would be the adjudicative body to determine whether certain conduct contravened the competition rule to ensure consistent interpretation of 	<p>requested in paragraph 5(a)(iii)</p> <p>The Administration to provide information as requested in paragraph 5(b)</p>

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		<p>the law.</p> <p>ALA2 asked the Administration to explain why factors for assessing the degree of market power could not be listed out as in the following examples –</p> <p>(a) section 7L of the Telecommunications Ordinance (TO) (Cap. 106) and section 14 of the Broadcasting Ordinance (Cap. 562), where the factors for considering whether an undertaking was dominant were listed; and</p> <p>(b) section 6 of Schedule 7, where the matters to be considered in determining whether a merger would substantially lessen competition were listed.</p> <p>The Administration emphasized that those factors were not meant to be exhaustive, but nonetheless agreed to give consideration as to whether further elaboration might be added to the conduct rules and would revert.</p> <p>In response to the Chairman, the Administration explained that the market share threshold for determining market power, if any, was usually set out in the regulatory guidelines in overseas jurisdictions. Specifying a market share percentage in the Bill would restrain the abilities of the future competition authorities in enforcing the law.</p>	<p>The Administration to report back as requested</p>
<i>Clause-by-clause examination of the Bill</i>			
010905 – 011238	Chairman Administration Mrs Regina IP	<p><u>Examination of clause 34 – Register of decisions and block exemption orders</u></p> <p>In response to Mrs Regina IP, the Administration advised that it would provide a paper on examples of block exemption orders issued by overseas competition authorities. It was also the Administration's intent that fees would not be charged for making the register of block exemption orders available for inspection through, for example, the Internet.</p>	
011239 – 011518	Chairman Ms Emily LAU Administration	<p>In response to Ms Emily LAU, the Administration made the following points –</p> <p>(a) "confidential information" that might be omitted from an entry made in the register of decisions and block exemption orders, as stated in clause 34(2), had the same meaning as clause 122 and might include personal particulars and commercially sensitive information, etc.;</p> <p>(b) "private affairs" in clause 122(1)(a)(i) might concern personal particulars such as the marital status, age, etc.; and</p>	

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		(c) the Administration would explain in greater detail the meaning of confidential information when the Bills Committee examined clause 122.	The Administration to provide information as requested in paragraph 5(c)
011519 – 012222	Chairman Administration Ms Miriam LAU Ms Emily LAU	<p><u>Examination of clause 35 – Guidelines</u></p> <p>The Administration advised that it would introduce amendments to clause 35 to clarify the legal status of the regulatory guidelines to be issued by the Commission which were not subsidiary legislation but were admissible as evidence in legal proceedings involving the guidelines. It would also introduce amendments to specify that the Commission must consult the Legislative Council (LegCo) when drawing up the guidelines.</p> <p>In response to Ms Miriam LAU, the Administration advised that –</p> <p>(a) although the Commission would consult LegCo when formulating the regulatory guidelines, the guidelines would not have legislative effect; and</p> <p>(b) by virtue of clause 1(2), the Bill might be implemented by phases, with the Commission and the Tribunal established first to prepare, for example, the regulatory guidelines. Having evaluated the readiness of the community in complying with the law, SCED would then appoint a day on which the competition rules would come into operation by notice published in the Gazette, which was subsidiary legislation subject to negative vetting by LegCo.</p> <p>In response to Ms Emily LAU, the Administration undertook to introduce amendments to clause 35(5) to ensure that the Commission would make use of the latest technology available, in particular the Internet, to publish the electronic copy of all guidelines issued under clause 35 and of all amendments made to them.</p>	<p>The Administration to provide information as requested in paragraph 5(g)(i)</p> <p>The Administration to provide information as requested in paragraph 5(g)(ii)</p>
012223 – 012935	Chairman Dr Margaret NG Administration	<p><u>Examination of clause 36 – Amendment of Schedule 1</u></p> <p>Pointing out that Schedule 1 should not be lightly amended as it served to set out the principles for general exclusions from conduct rules, Dr Margaret NG questioned why the Chief Executive in Council might need to amend it.</p> <p>The Administration explained that as two of the three principles set out in Schedule 1 were related to benefits to the economy, the Chief Executive in Council might need to amend Schedule 1 taking account of the latest economic development. The Administration would also provide</p>	

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		some examples of overseas case law applying the general exclusions in due course.	
012936 – 014012	Chairman Mr LEUNG Kwok-hung Administration ALA2	<p><u>Examination of section 1 of Schedule 1 – Agreements enhancing overall economic efficiency</u></p> <p>Mr LEUNG Kwok-hung expressed the view that section 1 should be refined to ensure that apart from "agreements enhancing overall economic efficiency", agreements benefitting consumers or not making consumers worse off would also be excluded from the first conduct rule, considering that agreements that appeared to have the effect of enhancing overall economic efficiency might in the long run harm consumers.</p> <p>The Administration said that overseas experience suggested that benefits to consumers would be analysed in the course of determining whether certain agreements had the effect of enhancing overall economic efficiency. Nevertheless, the Administration would consider members' suggestions further.</p> <p>Mr LEUNG opined that the additional factor he proposed above could serve as an objective principle to facilitate assessment on exclusions, and enforcement where necessary. Moreover, consumers as widely interpreted as users of the products or services concerned would in fact be directly affected by an agreement.</p> <p>In response to ALA2, the Administration confirmed that Schedule 1 would need to be amended to give effect to the recently proposed de minimis threshold.</p>	The Administration to provide information as requested in paragraph 5(h)(i)
<i>Break from 014013 to 014600</i>			
014601 – 015625	Chairman Administration Ms Emily LAU ALA2 Mr Ronny TONG	<p><u>Examination of sections 2 and 3 of Schedule 1</u></p> <p>In response to Ms Emily LAU, the Administration said overseas case law suggested that services of general economic interest should be provided in all cases, irrespective of whether there was incentive for the private sector to provide or not. The Administration would provide some examples of "services of general economic interest" at the next meeting for members' reference.</p> <p>In response to ALA2, the Administration explained what was meant by "entrusted by the Government", and "services of general economic interest" which would be excluded from the conduct rules by virtue of section 3, and agreed to clarify, with examples, the scope of the above.</p> <p>Mr Ronny TONG opined that social interest instead of economic interest should be the major consideration when deciding whether to exclude a service from the conduct rules.</p>	The Administration to provide information as requested in paragraph 5(h)(ii)

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration explained that section 3 had been modeled on relevant provisions in the European Union (EU) and according to case law section 3 as presently drafted could be interpreted to exclude cultural, social, health and education services of general social interest from the conduct rules.</p> <p>Mr TONG opined that instead of counting on Hong Kong judges to refer to EU case law when interpreting section 3 as explained above, the section should be refined to clearly reflect the above legislative intent.</p>	<p>The Administration to provide information as requested in paragraph 5(h)(ii)</p>
015626 – 020226	<p>Chairman Administration Ms Emily LAU ALA2 Mr Ronny TONG</p>	<p><u>Examination of the new section 4 of Schedule 1</u> (LC Paper No. CB(1)405/11-12(01))</p> <p>In response to ALA2, the Administration agreed to consider whether it was necessary to refine the new section 4(1) to clarify that the first conduct rule would only not apply to "the relevant part of" the agreement that "results in, or if carried out would result in, a merger".</p>	<p>The Administration to provide information as requested in paragraph 5(h)(iii)</p>
020227 – 021615	<p>Chairman Administration ALA2 Mr Ronny TONG</p>	<p><u>Examination of the new sections 5 and 6 of Schedule 1</u></p> <p>In response to ALA2, the Administration explained how to calculate the annual turnover of an undertaking, in particular that of a newly established undertaking having been in operation for less than one year, and agreed to, as suggested by ALA2 and Mr Ronny TONG, clearly explain the above scenario in a paper.</p> <p>Mr TONG and ALA2 expressed concern about the unfairness that might arise if an undertaking deliberately committed an anti-competitive act at the beginning of its financial year, or after having operated for only a few months, so as to ensure its annual turnover would not exceed the exclusion threshold, and then ceased operation before its annual turnover exceeded the threshold.</p> <p>The Administration explained that it was highly unlikely that a newly established undertaking would possess a substantial degree of market power for abuse and to foreclose competition. That said, the Administration agreed to consider whether the new section 5 would need to be refined to address the above concerns.</p>	<p>The Administration to provide information as requested in paragraph 5(h)(iv)</p> <p>The Administration to provide information as requested in paragraph 5(h)(v)</p>
021616 – 021859	<p>Chairman Administration Mr Ronny TONG</p>	<p><u>Examination of clauses 162 and 163</u></p> <p>In response to Mr Ronny TONG, the Administration agreed to provide information on fees charged by the Office of the Telecommunications Authority (OFTA) in enforcing competition rules under the Telecommunications</p>	<p>The Administration to provide information as</p>

Time marker	Speaker	Subject(s)	Action required
		Ordinance (Cap. 106).	requested in paragraph 5(d)
021900–022900	Chairman Mrs Regina IP Administration ALA2 Mr Ronny TONG	<p><u>Examination of sections 1 to 4 of Schedule 7</u></p> <p>Mrs Regina IP enquired about the policy for regulating cross-sector merger, and about the need to regulate mergers other than those involving telecommunications carrier licensees.</p> <p>The Administration said that following a review by the Competition Policy Review Committee, it was the Government's stated policy that merger control would not be applied across sectors, but confined to the existing merger regulation in the telecommunications sector. The Administration would review the need for cross-sector merger regime in due course. The merger rule in Schedule 7 to the Bill as presently drafted could be readily adapted for the cross-sector regulation.</p> <p>ALA2 highlighted the need to amend the phrase "自動經濟實體" in the Chinese text of section 3(4) to reflect the phrase "autonomous economic entity" in the English text of this section.</p> <p>In response to Mrs IP, the Administration reported that since 2004, OFTA had considered 13 merger cases concerning the telecommunications carrier licensees, of which nine were found not to give rise to competition concerns while consent was given to the other four cases which did not have the effect of substantially lessening competition in the market.</p>	The Administration to take action as requested in paragraph 5(i)(i)
022901 – 023221	Chairman Administration ALA2	<p><u>Examination of sections 5 and 6 of Schedule 7</u></p> <p>In response to ALA2, the Administration undertook to amend the Chinese heading of section 6 to reflect that the matters stated therein were matters that "may be" and not "shall be" taken into account in determining whether competition had been or might be substantially lessened.</p>	The Administration to take action as requested in paragraph 5(i)(ii)
023222 – 023836	Chairman Administration Mr CHAN Kam-lam Mr Ronny TONG Mrs Regina IP	<p><u>Examination of section 7 of Schedule 7</u></p> <p>Mr CHAN Kam-lam questioned why under section 7, the Commission would commence an investigation on whether a merger would substantially lessen competition within 30 days after the day on which the Commission first became aware of the merger, instead of before the merger.</p> <p>The Administration explained that there was no mandatory notification requirement for undertakings to seek approval before a merger took place. Nonetheless, under sections 11 to 13 of Schedule 7, the undertakings involved in a merger could apply to the competition authorities for a</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>decision as to whether or not the merger would lessen competition before carrying out the merger.</p> <p>Mr CHAN expressed concern about the uncertainties that might arise if not all undertakings planning to merge were obliged to apply for the above decision beforehand.</p> <p>The Administration explained that section 6 of Schedule 7 provided a non-exhaustive list of criteria which were relevant for determining whether a merger would have the effect of substantially lessening competition. This would facilitate the undertakings concerned to assess the competition impact of the merger proposal. Alternatively, the undertakings could apply to the competition authorities for the decision before carrying out the merger. As the merger control regime had been in place for some time, undertakings in the telecommunications sector would already be familiar with the relevant rules and the competition analysis involved.</p> <p>In response to Mr Ronny TONG, the Administration said that most undertakings carrying out mergers would notify the authorities beforehand for want of certainty.</p> <p>Mrs Regina IP questioned the above affirmation, pointing out that mergers were commercially sensitive moves, and that the corporate counsel of the undertakings concerned could already advise them on whether the mergers would substantially lesson competition without seeking the relevant decision from the Administration beforehand. In response to Mrs IP, the Administration agreed to advise in a separate paper whether the 30-day time limit for commencement of investigation of merger under section 7 was comparable to similar deadlines imposed in other jurisdictions.</p>	<p>The Administration to provide information as requested in paragraph 5(e)</p>
023837 – 024139	Chairman Administration Mrs Regina IP	<p><u>Examination of section 8 of Schedule 7</u></p> <p>Noting that section 8(1) of Schedule 7 provided that the merger rule would not apply to a merger if the economic efficiencies that arose or might arise from the merger outweighed the adverse effects caused by any lessening of competition in Hong Kong, Mrs Regina IP opined that considering the complexity of the above principle, not only legal professionals but also economists would need to be engaged to decide whether exclusions should be granted. To ascertain feasibility of this principle, she enquired about precedents of such exclusions and whether investigations would still be conducted under the circumstances.</p> <p>The Administration responded that section 8 was similar to grounds for exclusion from merger rule adopted in overseas jurisdictions such as the UK and Singapore to facilitate self assessment by undertakings as to whether</p>	

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		<p>their merger could be excluded from the merger rule. Undertakings concerned could rely on exclusion in section 8 as a defence if the Commission considered that the relevant merger had contravened the merger rule.</p>	
024140 – 024235	<p>Chairman Mr CHAN Kam-lam Administration</p>	<p>In response to Mr CHAN Kam-lam on the need to ensure planned mergers would be kept confidential in recognition of their commercial sensitivity, the Administration explained that safeguards for preserving confidentiality of information, including those relating to a prospective merger under investigation by the Commission, had been provided under Part 8 of the Bill.</p>	
024236 – 025346	<p>Chairman Administration ALA2 Mrs Regina IP Mr Ronny TONG Mr CHAN Kam-lam</p>	<p><u>Examination of sections 9 to 11 of Schedule 7</u></p> <p>In response to ALA2, the Administration explained that the use of "he or she" in the English version of section 9(1) to refer to the Chief Executive in Council was in order because the Chief Executive in Council here referred to the Chief Executive himself/herself only, although in making the relevant exemption decision he/she would consult the Executive Council. The use of a gender-neutral way to draft laws was in fact a common practice adopted worldwide and in new laws of Hong Kong although, according to the Interpretation and General Clauses Ordinance (Cap. 1), words and expressions importing the masculine gender included the feminine and neuter genders.</p> <p>Mr CHAN Kam-lam expressed concern that a listed company planning to merge with other company/companies might be unable to comply with the requirement upon listed companies to disclose such price sensitive information as the planned merger, since the listed company would not be able to ascertain whether the merger would eventually be carried out pending the completion of the investigation.</p> <p>The Administration agreed to, in consultation with the bureau/department responsible for the Securities and Futures (Amendment) Bill 2011 presently under scrutiny, examine how to address the above concern.</p> <p>In response to ALA2, the Administration confirmed that the phrase "下一屆會期" in the Chinese text of sections 10(3) and 10(5) would be amended to "下一會期".</p> <p>In response to ALA2, the Administration agreed to amend the phrase "carries out a merger (已作出有關合併)" in section 11(1)(a) by referring to the wording of clause 9(1).</p>	<p>The Administration to provide information as requested in paragraph 5(f)</p> <p>The Administration to take action as requested in paragraph 5(i)(iii)</p> <p>The Administration to take action as</p>

Time marker	Speaker	Subject(s)	Action required
			requested in paragraph 5(i)(iv)
025347 – 025458	Chairman Mr Ronny TONG Ms Emily LAU Administration	Meeting Arrangements	

Council Business Division 1
Legislative Council Secretariat
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