

立法會
Legislative Council

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by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of the 27th meeting held on
Tuesday, 20 December 2011, at 4:30 pm
in Conference Room 1 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 CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yee, GBS, JP
Hon Emily LAU Wai-hing, 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
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon Starry LEE Wai-king, JP
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Hak-kan
Hon Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
Dr Hon LEUNG Ka-lau
Hon WONG Kwok-kin, BBS
Hon Paul TSE Wai-chun, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung

Hon Tanya CHAN

Members absent : Hon LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, SBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon WONG Yuk-man

Public Officers attending : Agenda item I

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

Mr David Alan GROVER
Senior Government Counsel
Department of Justice

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

I Meeting with the Administration

- (LC Paper No. CB(1)518/11-12(02) — List of follow-up actions arising from the discussion at the meeting on 22 November 2011
- LC Paper No. CB(1)643/11-12(01) — Administration's response to CB(1)518/11-12(02)
- LC Paper No. CB(1)643/11-12(02) — List of follow-up actions arising from the discussion at the meeting on 6 December 2011
- LC Paper No. CB(1)320/10-11(02) — Administration's information paper on overview of major components of the Competition Bill (paragraphs 34 to 39 on enforcement)
- 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) (pages 4 and 5 of Appendix D)
- LC Paper No. CB(1)91/11-12(01) — Administration's paper on responses to concerns on the Competition Bill)

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

Clause-by-clause examination

- (LC Paper No. CB(1)643/11-12(03) — Marked-up copy of major amendments to parts 4 to 6 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)320/10-11(03) — Assistant Legal Adviser's letter dated 26 October 2010 to the Administration (on clause 79, Part 6 and clause 83)
- LC Paper No. CB(1)1034/10-11(05) — Administration's response to CB(1)320/10-11(03) (paragraphs 11, 13 and 14))

2. The Bills Committee examined clauses 59 to 77 of the Bill.

Follow-up actions required of the Administration

3. The Bills Committee requested the Administration to provide written responses to the following concerns/requests raised by members –
- (a) According to paragraph 5.19 of the extract from the template guidelines on the first conduct rule (Appendix to LC Paper No. CB(1)643/11-12(01)), "mere approval by the Government of the activities carried out by the undertaking will not suffice" to constitute entrustment. Since both "entrustment" and "approval" would require the compliance of certain procedures before taking effect, members found difficulty in understanding why one act would constitute "entrustment" and the other would not. The Administration was requested to clarify the difference between "entrustment" and "approval".
 - (b) In relation to clause 60 on withdrawal of acceptance of commitment –
 - (i) consider whether the threshold of "reasonable grounds for suspecting" provided in sub-clauses (1)(b) and (1)(c) for the withdrawal was too low and, in recognition of the serious consequences of the withdrawal, consider making the withdrawal a reviewable determination under clause 81; and
 - (ii) explain why a different threshold of "reasonable grounds for believing" was used in sub-clause (1)(a).
 - (c) The Administration was requested to, with reference to the responsibilities of directors of different types and in different situations provided under the Companies Bill currently under scrutiny, advise the criteria for deciding whether a director of the parent company of an undertaking which had contravened the Competition Ordinance (upon enactment) would be held directly responsible for such contravention.
 - (d) Compare and ensure the consistency of the definition of "bid-rigging" in the proposed new clause 2(2) with that in the Prevention of Bribery Ordinance (Cap. 201).
 - (e) According to clause 75(2), nothing in clause 74 prevents the Competition Commission (the Commission) "from bringing proceedings in the Competition Tribunal, where it has reasonable grounds for suspecting that the person who has made the commitment

has failed to comply with one or more of the requirements of the infringement notice". The Administration was requested to consider whether the above threshold was too low and should be changed to "reasonable grounds for believing", and whether the relevant determination should be made a reviewable determination under clause 81.

(f) Drafting issues

- (i) consider deleting the note presently used to supplement the definition of "serious anti-competitive conduct" newly proposed to be added to clause 2, as this was the only note provided in the Bill;
- (ii) change the simplified form of the character "争" in the phrase "嚴重反競爭行為" in the Chinese text of the proposed new clause 2(2) to its traditional form;
- (iii) amend clause 63(3) to ensure that the Commission would make use of the latest technology available (in particular the Internet) to make available for inspection the register of commitments made under Part 4;
- (iv) the Commission might still bring proceedings against a person who did not make a commitment to comply with the requirements of an infringement notice although he had stopped the alleged contravention. Some members had expressed the concern that, by stating that the person was not obliged to make the commitment, clause 67 might be misleading. The Administration was requested to consider amending the clause to properly alert the person to the above consequence and hence the need to make the commitment;
- (v) consider amending clause 72 on withdrawal of infringement notice in the light of members' views:
 - Ms Miriam LAU considered it unfair that the Commission might at any time before the expiry of the compliance period withdraw the infringement notice. She suggested setting out clearly the circumstances under which this action would be taken.
 - Mr LEUNG Kwok-hung considered it necessary to give the Commission the above power to enable it to flexibly take

actions as necessary when new evidence had emerged.

- (vi) amend clause 77 on publication of infringement notices to ensure that the Commission would make use of the latest technology available (in particular the Internet) to publish the electronic copy of infringement notices; and
- (vii) according to clause 64, Schedule 2 had effect regarding the procedural requirements for the acceptance, withdrawal of acceptance, and variation and release of commitments. While "commitments" could be varied, substituted and released under clause 61, neither clause 64 nor Schedule 2 seemed to apply to the substitution of commitments. The Administration was requested to examine whether clause 64 and/or Schedule 2 should be amended to achieve consistency with clause 61.

4. The Chairman reminded members that the next meeting of the Bills Committee would be held on 3 January 2012 at 2:30 pm.

II Any other business

5. There being no other business, the meeting ended at 6:30 pm.

Council Business Division 1
Legislative Council Secretariat
3 May 2012

**Proceedings of the 27th meeting of
the Bills Committee on Competition Bill
on Tuesday, 20 December 2011, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda Item I – Meeting with the Administration			
000240 – 000953	Chairman Administration	Briefing by the Administration on its response to the list of follow-up actions arising from the discussion at the meeting on 22 November 2011 (LC Paper No. CB(1)643/11-12(01))	
<i>Discussion on the Administration's response to the list of follow-up actions arising from the discussion at the meeting on 22 November 2011 (LC Paper No. CB(1)643/11-12(01))</i>			
000954 – 001454	Chairman Administration Assistant Legal Adviser 2 (ALA2)	<p>In response to the Chairman, the Administration advised that member(s) of the Competition Commission (the Commission) who disclosed confidential information inside the safe harbour mentioned in paragraph 4 of LC Paper No. CB(1)643/11-12(01) would commit a criminal offence liable to imprisonment or fines as set out in Part 8 of the Bill on disclosure of information (clause 127(3)).</p> <p>The Administration provided the following explanation in response to ALA2's enquiries –</p> <p>(a) 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 of Schedule 1 (paragraph 7 of and Appendix to LC Paper No. CB(1)643/11-12(01)); and</p> <p>(b) although the act of entrustment might not necessarily be made by way of legislative measures but "can also be done through an act of the Government" as stated in paragraph 5.19 of the appendix, to qualify for exclusion from the conduct rules, the services concerned had to satisfy certain criteria, such as whether they were widely available and not restricted to a certain class of customers, and that the conduct rule would obstruct the performance of the particular tasks without the exclusion, etc.</p>	
001455 – 001830	Chairman Mr CHAN Kam-lam Administration ALA2	Mr CHAN Kam-lam referred to paragraph 5.19 of the above Appendix, and asked why "mere approval by the Government of the activities carried out by the undertaking will not suffice" to constitute entrustment. Pointing out that both "entrustment" and "approval" would require the compliance of certain procedures before taking effect, he found it difficult to understand why one act would constitute "entrustment" and the other would not. Both he and ALA2 considered it necessary for the Administration to clarify the difference between "entrustment" and	The Administration to take action as requested in paragraph 3(a)

Time marker	Speaker	Subject(s)	Action required
		"approval".	
Clause-by-clause examination of the Bill			
001831– 002838	Chairman Administration ALA2	<p><u>Examination of clauses 59 to 61</u></p> <p>ALA2 questioned why the threshold for withdrawal of acceptance of commitment provided in clauses 60(1)(b) and 60(1)(c) was "reasonable grounds for suspecting", while that provided in clause 60(1)(a) was "reasonable grounds for believing".</p> <p>The Administration explained that a higher threshold was provided in clause 60(1)(a) because the situation stated therein for triggering the withdrawal might go beyond the control of the person who made the commitment. The same differential treatment was adopted in the competition law of the United Kingdom.</p>	The Administration to take action as requested in paragraph 3(b)(ii)
002839 – 004256	Chairman Mr Albert HO Administration Mr Jeffrey LAM	<p>Mr Albert HO opined that in recognition of the serious consequences of withdrawal of acceptance of commitment under clause 60, a higher threshold than "reasonable grounds for suspecting", such as "reasonable grounds for finding", should be used, especially as the undertaking(s) concerned might have already made certain business decisions on the basis of the commitment.</p> <p>The Administration made the following response –</p> <p>(a) the current threshold was considered reasonable and fair because both the Commission and the person who made the commitment could withdraw the acceptance of a commitment. Moreover, proceedings in the Competition Tribunal (the Tribunal) could only be brought with respect to any alleged contravention of the relevant competition rule that had occurred after the date specified in the relevant withdrawal notice, unless the information on which the Commission had based its decision to accept the commitment was incomplete, false or misleading; and</p> <p>(b) according to clause 60(3), if an acceptance of commitment was withdrawn, the Commission might bring proceedings in the Tribunal. Under the circumstances, the Commission would need to prove to the Tribunal that the relevant withdrawal decision was justified, e.g. there were reasonable grounds for believing that a contravention had occurred. The undertaking concerned might seek judicial review against the Commission's decision.</p> <p>Highlighting the high threshold for instituting a judicial review, Mr HO requested the Administration to consider making the withdrawal a reviewable determination under clause 81.</p>	The Administration to take action as requested in

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		<p>In response to Mr Jeffrey LAM's questions on clause 61, the Administration explained that –</p> <p>(a) a decision relating to the variation of a commitment or a release of a person from a commitment was a reviewable determination before the Tribunal; and</p> <p>(b) the Commission would only vary or substitute a commitment in response to the person who had made it.</p>	paragraph 3(b)(i)
004257 – 004628	Chairman Administration	<p><u>Examination of clauses 62 to 64</u></p> <p>In response to the Chairman, the Administration advised that commercially sensitive information would be handled in accordance with Part 8 of the Bill, and that the information concerned would be omitted from the entry made in the register of commitments with the omission disclosed on the register (clause 63).</p>	
004629 – 005139	Chairman Mr Albert HO Administration ALA2	<p>Mr Albert HO enquired how the Administration could ensure that an undertaking would honour the commitment made by its representative.</p> <p>The Administration explained that the relevant policy intention was that the commitment should be made by the undertaking. The "person" referred to in the relevant clauses would cover the undertaking. The Commission would verify the authority of the person who signed the commitment on behalf of the undertaking. ALA2 added that if the person signed the commitment on behalf of the undertaking with proper authority, the commitment would be binding on the undertaking concerned.</p> <p>In response to Mr HO, the Administration advised that whether a commitment signed by the director of a holding company would be binding on its subsidiaries would depend on the facts of each case.</p>	
005140 – 005919	Chairman Mr Jeffrey LAM Administration ALA2	<p>In response to the Chairman, the Administration explained that as provided in the Bill, the parent company of an undertaking contravening the enacted Ordinance might also be held responsible for the contravention depending on the facts of each case.</p> <p>Mr Jeffrey LAM called upon the Administration to make reference to the responsibilities of directors of different types and in different situations provided under the Companies Bill currently under scrutiny, and advise the criteria for deciding whether a director of the parent company of an undertaking which had contravened the Competition Ordinance (upon enactment) would be held directly responsible for such contravention.</p>	The Administration to take action as requested in paragraph 3(c)

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		<p>ALA2 pointed out that according to clause 64, Schedule 2 had effect regarding the procedural requirements for the acceptance, withdrawal of acceptance, and variation and release of commitments. However, while "commitments" could be varied, substituted and released under clause 61, neither clause 64 nor Schedule 2 seemed to apply to the substitution of commitments. The Administration was requested to examine whether clause 64 and/or Schedule 2 should be amended to achieve consistency with clause 61.</p> <p>The Administration advised that it would amend clause 63(3) to ensure that the Commission would make use of the latest technology available (in particular the Internet) to make available for inspection the register of commitments made under Part 4.</p>	<p>The Administration to take action as requested in paragraph 3(f)(vii)</p> <p>The Administration to take action as requested in paragraph 3(f)(iii)</p>
005920 – 011857	Deputy Chairman Chairman Administration Ms Emily LAU ALA2 Mr Ronny TONG	<p><u>Examination of clauses 65 and 66</u></p> <p>The Deputy Chairman assumed the Chair for a short while during this period.</p> <p>In response to Ms Emily LAU, the Administration explained the rationale behind its earlier proposal to remove the payment requirement of a sum not exceeding HK\$ 10 million under an infringement notice. The Administration also confirmed that issue of the infringement notice was not an arrangement commonly found in overseas jurisdictions. The notice was proposed for Hong Kong as an alternative enforcement option, under a judicial enforcement model, to address competition concerns without resorting to legal proceedings before the Tribunal.</p> <p>Regarding the major amendments to parts 4 to 6 provided by the Administration (LC Paper No. CB(1)643/11-12(03)), and the Committee Stage amendments to clauses 2 and 66, ALA2 and members raised some questions. The Administration advised that –</p> <p>(a) the note presently used to supplement the definition of "serious anti-competitive conduct" newly proposed to be added to clause 2 sought to help readers understand the provision and did not have legislative effect. The Administration would consider Members' suggestion of deleting this note;</p> <p>(b) the simplified form of the character "争" in the phrase "嚴重反競爭行為" in the Chinese text of the proposed new clause 2(2) will be changed to its traditional form; and</p> <p>(c) the definition of "bid-rigging" had been introduced to enhance clarity of the term and was modeled on the</p>	<p>The Administration to take action as requested in paragraph 3(f)(i)</p> <p>The Administration to take action as requested in paragraph 3(f)(ii)</p> <p>The Administration</p>

Time marker	Speaker	Subject(s)	Action required
		<p>competition law of Canada. The Administration also agreed to compare and ensure the consistency of this definition of "bid-rigging" with that in the Prevention of Bribery Ordinance (Cap. 201).</p>	<p>to take action as requested in paragraph 3(d)</p>
<p>011858 – 012850</p>	<p>Chairman Administration Mr CHAN Kam-lam Ms Miriam LAU</p>	<p><u>Examination of clauses 67 and 68</u></p> <p>As the Commission might still bring proceedings against a person who did not make a commitment to comply with the requirements of an infringement notice although he had stopped the alleged contravention, Mr CHAN Kam-lam and Ms Miriam LAM expressed concern that, by stating that the person was not obliged to make the commitment, clause 67 might be misleading. The Administration was requested to consider amending the clause to properly alert the person to the above consequence and hence the need to make the commitment.</p>	<p>The Administration to take action as requested in paragraph 3(f)(iv)</p>
<p>012851 – 013222</p>	<p>Chairman Administration ALA2</p>	<p><u>Examination of clause 69 – notice of proposal to issue infringement notice</u></p> <p>In response to ALA2, the Administration explained that the period to be specified in the notice for making representations under clause 69(2)(c) (not less than 15 days) was shorter than that under clauses 10(3) and 25(3) (at least 30 days) because there was a need to minimize the time which the Commission would take to bring proceedings against an undertaking where necessary in recognition that –</p> <ul style="list-style-type: none"> (a) at the time of proposing the issue of the infringement notice, the Commission would have collected sufficient evidence to establish reasonable grounds for believing that a contravention had occurred and could have brought the case before the Tribunal; (b) 15 days was only the minimum period the Commission might state in the notice and longer periods could be specified where necessary; (c) another 28 days would be allowed for the undertaking concerned to notify the Commission whether or not it proposed to comply with the requirements of the infringement notice; and (d) a further compliance period would also be allowed for the undertaking proposing to comply with the terms of the infringement notice to make a commitment with the Commission. 	
<p>013223 – 014504</p>	<p>Chairman Ms Miriam LAU Administration Mr LEUNG</p>	<p><u>Examination of clauses 70 to 72</u></p> <p>Pointing out that the issue of an infringement notice should be a well contemplated move, Ms Miriam LAU considered</p>	

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	Kwok-hung	<p>it unfair and undesirable that according to clause 72, the Commission might at any time before the expiry of the compliance period withdraw the infringement notice.</p> <p>The Administration explained that the arrangement was not unfair because both the Commission and the undertaking concerned had the right to withdraw the infringement notice. Moreover, the arrangement was necessary to enable the Commission to consider legal actions if there were new evidence. Mr LEUNG Kwok-hung indicated agreement with the Administration.</p> <p>Ms LAU was not convinced that the above arrangement was fair considering that the undertaking's right to withdraw the infringement notice could hardly be compared with that enjoyed by the Commission as a regulatory body. She and the Chairman opined that the above highlighted flexibility should instead be provided by clearly setting out in clause 72 the circumstances under which the withdrawal action could be taken.</p> <p>At the Chairman's request, the Administration agreed to consider amending clause 72 in the light of members' views above.</p>	The Administration to take action as requested in paragraph 3(f)(v)
014505 – 015122	Chairman Administration Mr CHAN Kam-lam ALA2	<p><u>Examination of clauses 73 to 75</u></p> <p>In response to Mr CHAN Kam-lam, the Administration confirmed that the infringement notice could not be withdrawn after the person concerned had made a commitment to comply with the requirements of the notice, unless there were reasonable grounds for suspecting that the person concerned had failed to comply with the infringement notice.</p> <p>ALA2 drew members' attention to clause 75(2), according to which nothing in clause 74 "prevents the Commission from bringing proceedings in the Tribunal, where it has reasonable grounds for suspecting that the person who has made the commitment has failed to comply with one or more of the requirements of the infringement notice".</p> <p>The Administration explained that notwithstanding clause 75(2), the Commission would still need to establish reasonable grounds for believing that a contravention had occurred when bringing a proceeding before the Tribunal for imposition of remedies against the person who had failed to comply with the commitment. At members' request, the Administration agreed to –</p> <p>(a) consider whether the above threshold of "reasonable</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>grounds for suspecting" was too low and should be changed to "reasonable grounds for believing"; and</p> <p>(b) consider whether the above determination to bring proceedings should be made a reviewable determination under clause 81.</p>	<p>The Administration to take action as requested in paragraph 3(e)</p>
015123 – 015225	Chairman Administration	<p><u>Examination of clauses 76 and 77</u></p> <p>The Administration advised that clause 77 concerning the publication of infringement notices would be amended to ensure that the Commission would make use of the latest technology available (in particular the Internet) to publish the electronic copy of infringement notices.</p>	<p>The Administration to take action as requested in paragraph 3(f)(vi)</p>
015226 – 015315	Chairman	Meeting arrangements	