

立法會
Legislative Council

LC Paper No. CB(1)2131/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of the twenty-ninth meeting held on
Monday, 16 January 2012, 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)
Dr Hon Margaret NG
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Dr Hon LAM Tai-fai, BBS, JP
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-yea, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Tanya CHAN
Hon WONG Yuk-man

Members absent : Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP

Hon LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Hon CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-ye, GBS, JP
Hon Starry LEE Wai-king, JP
Hon CHAN Hak-kan
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

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)824/11-12 — Minutes of meeting held on
25 October 2011)

The minutes of the meeting held on 25 October 2011 were confirmed.

II Meeting with the Administration

(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)725/11-12(01) — List of follow-up actions arising
from the discussion at the
meeting on 20 December 2011

LC Paper No. CB(1)823/11-12(01) — Administration's response to
CB(1)643/11-12(02) and
CB(1)725/11-12(01)

LC Paper No. CB(1)823/11-12(02) — List of follow-up actions arising
from the discussion at the
meeting on 3 January 2012

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)

2. 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, clause 83 and Part 6)
- LC Paper No. CB(1)1034/10-11(05) — Administration's response to CB(1)320/10-11(03) (paragraphs 11, 13 and 14))

3. The Bills Committee examined clauses 81 to 91, including the proposed Committee Stage amendments to clause 91 in LC Paper No. CB(1)643/11-12(03).

Follow-up actions required of the Administration

Admin. 4. The Bills Committee requested the Administration to provide written responses to the following concerns/requests raised by members –

- (a) a paper on examples of common business practices that would, as well as those that would not, constitute anti-competitive acts, so as to address the concern of small and medium enterprises about inadvertent contravention of the enacted Ordinance;
- (b) information from overseas jurisdictions including Singapore on the deadline, such as that in clause 90(2)(b), for making application for imposing pecuniary penalty on a person who had contravened a competition rule;
- (c) response to the comment of the Law Society of Hong Kong in its submission (LC Paper No. CB(1)1219/10-11(02)) on clause 153 in respect of appeal to the Court of Appeal; and
- (d) Drafting issues

Clause 50 – Powers conferred by warrant

- (i) by making reference to section 191(1) of the Securities

and Futures Ordinance (Cap. 571), amend clause 50(1) and/or (2) to clearly provide that a warrant issued under clause 48 should specify the persons whom an authorized officer might call upon to assist in entering and searching premises for documents that might be relevant to an investigation by the Commission; and

Schedule 2 – Commitments

- (ii) amend clause 64 and section 1 of Schedule 2 to ensure that the procedural requirements for acceptance and variation of commitments would also apply to the substitution of commitments, so as to achieve consistency with clause 61(1), which provided that the Commission might accept from the person who had made a commitment a variation of the commitment, or a commitment in substitution for it.

5. The Chairman reminded members that the next meeting of the Bills Committee would be held on 31 January 2012 from 2:30 pm to 5:30 pm.

III Any other business

6. There being no other business, the meeting ended at 6:25 pm.

Council Business Division 1
Legislative Council Secretariat
7 June 2012

**Proceedings of the twenty-ninth meeting of
the Bills Committee on Competition Bill
on Monday, 16 January 2012, 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			
000536 – 000613	Chairman	Confirmation of minutes of meeting on 25 October 2011 (LC Paper No. CB(1)824/11-12)	
Agenda Item II – Meeting with the Administration			
000614 – 001655	Chairman Administration	Briefing by the Administration on its response to the lists of follow-up actions arising from the discussion at the meetings on 6 and 20 December 2011 (LC Paper No. CB(1)823/11-12(01))	
<i>Discussion on the Administration's response to the lists of follow-up actions arising from the discussion at the meetings on 6 and 20 December 2011 (LC Paper No. CB(1)823/11-12(01))</i>			
001656 – 002329	Chairman Mr Jeffrey LAM Administration	<p>In response to Mr Jeffrey LAM, the Administration advised that –</p> <ul style="list-style-type: none"> (a) according to clause 126(1), when the Competition Commission (the Commission) intended to disclose confidential information under lawful authority for purposes such as performance of its functions under the Bill, it would give notice to the person who provided the information, and any person likely to be affected by the proposed disclosure, and would consider any representations that were made about the proposed disclosure; (b) if after discussing the above proposed disclosure with the Commission the person who provided the information concerned could not achieve a consensus with the Commission on the disclosure, he could seek judicial review, pending the conclusion of which the disclosure would not be made; and (c) after its investigation and before bringing proceedings to the Competition Tribunal (the Tribunal), the Commission might issue an infringement notice to the person allegedly contravening the conduct rule involving serious anti-competitive conduct, requiring the person to take or refrain from taking certain actions to address the Commission's concerns, in exchange for the Commission's commitment to cease its investigation and/or not to institute or continue with proceedings 	

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		against the person.	
002330 – 003939	Chairman Assistant Legal Adviser 2 (ALA2) Administration Ms Emily LAU	<p>ALA2 drew members' attention to the Administration's responses to members' concerns about clauses 50(2) and 61(1) (paragraphs 4 and 9 of LC Paper No. CB(1)823/11-12(01)).</p> <p>After discussion, the Administration agreed to amend clause 64 and section 1 of Schedule 2 to ensure that the procedural requirements for acceptance and variation of commitments would also apply to the substitution of commitments, so as to achieve consistency with clause 61(1), which provided that the Commission might accept from the person who had made a commitment a variation of the commitment, or a commitment in substitution for it.</p> <p>Members also requested the Administration to, by making reference to section 191(1) of the Securities and Futures Ordinance (Cap. 571), amend clause 50(1) and/or 50(2) to clearly provide that a warrant issued under clause 48 should specify the persons whom an authorized officer might call upon to assist in entering and searching premises for documents that might be relevant to an investigation by the Commission, instead of allowing the authorized officer to call upon just any person whom the officer considered necessary to assist in performing the function. In arriving at the above decision, members had examined the following –</p> <ul style="list-style-type: none"> (a) similar provisions in other Hong Kong laws; (b) the fact that the Commission was not a Government department and hence should be subject to greater regulation when exercising its powers; and (c) the consideration that the type and extent of assistance required would vary in each search operation. Specifying the types of persons to whom an authorized officer might call upon under clause 50 would restrain the Commission's ability in seeking as necessary the assistance of persons who were not public officers, such as members/staff of the relevant undertaking(s), building security, third-party specialists (e.g. IT experts), service (e.g. transport or labour) providers, so as to ensure it could carry out investigation effectively. 	<p>The Administration to take action as requested in paragraph 4(d)(ii)</p> <p>The Administration to take action as requested in paragraph 4(d)(i)</p>
<i>Clause-by-clause examination of the Bill</i>			
003940 – 005335	Chairman Administration ALA2 Mr WONG Ting-kwong Ms Emily LAU	<p><u>Examination of clauses 81 and 82</u></p> <p>In response to the Chairman on clause 82, the Administration explained that the threshold for granting leave for a review of a reviewable determination was lower than that for judicial review, considering that in the latter</p>	

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		<p>case, leave would be granted only when there was a reasonable prospect of success, whereas in the former case, leave might also be granted if there was some other reason in the interests of justice why the review should be heard.</p> <p>ALA2 recalled that in relation to clause 153 on appeal to Court of Appeal (CA), , the Administration was requested at a meeting of the Bills Committee to consider not imposing a leave requirement; or consider imposing the same leave requirement as that for an appeal from the Court of First Instance to CA, i.e., leave should normally be granted unless the appeal had "no reasonable prospects of success", and not a higher requirement as currently provided, i.e. "the appeal has a reasonable prospect of success". In ALA2's view, if the Administration acceded to the above request, the threshold under clause 82 should correspondingly be adjusted as well. Mr WONG Ting-kwong indicated support for his view.</p> <p>The Administration responded that –</p> <ul style="list-style-type: none"> (a) the focus of the discussion then was whether there should be a leave requirement rather than the factors that should be taken into account when deciding whether to grant leave; and (b) the respective thresholds under clause 82 and clause 153 should be examined separately considering that the former applied to a review by the Tribunal of a reviewable determination of the Commission, which was essentially an administrative decision, whereas the latter applied to an appeal to CA against a decision, determination or order of the Tribunal, which was a judicial decision. <p>ALA2 made the following points –</p> <ul style="list-style-type: none"> (a) The Law Society of Hong Kong (LS) had made comments similar to the above request of members on clause 153 in its submission (LC Paper No. CB(1)1219/10-11(02)); and (b) as currently drafted, the thresholds under clauses 82 and 153 were in fact very similar. <p>The Administration gave the following response –</p> <ul style="list-style-type: none"> (a) LS had not made any comment on clause 82. The Administration would respond in writing to LS's comment on clause 153 in due course; and (b) instead of aligning clause 82 with clause 153, the Administration had made reference to the threshold for judicial review when working out the threshold 	<p>The Administration to take action as requested in paragraph 4(c)</p>

Time marker	Speaker	Subject(s)	Action required
		<p>under clause 82, noting that review of the Commission's decisions was in fact similar to judicial review of the administrative decisions by the Court of First Instance.</p>	
005336 – 010248	<p>Chairman Administration Ms Emily LAU Mr WONG Ting-kwong</p>	<p><u>Examination of clauses 83 and 84</u></p> <p>In response to the Chairman on clause 84, the Administration explained that –</p> <p>(a) clause 84 generally codified a common law practice providing for the arrangements similar to that under clause 84, under which the Tribunal might, before or after the determination of an application for review made under clause 82, either of its own motion or on application, refer any question of law arising in the review to CA for determination by way of case stated; and</p> <p>(b) clause 84 would not give rise to additional legal costs because, as explained in (a) above, the procedure could be taken regardless of whether there were express provisions in this regard. Moreover, the option was available to either party to the review as well as to the Tribunal.</p> <p>Mr WONG Ting-kwong considered it undesirable for the Tribunal, which would be specially established as a superior court of record to hear and adjudicate competition cases upon enactment of the Ordinance, to refer a review made under clause 82 to CA.</p> <p>The Administration explained that the review would still be handled by the Tribunal although it would seek advice from CA on questions of law arising therein. In particular, the determination of the relevant application for review would still be made by the Tribunal.</p>	
010249 – 010555	<p>Chairman Administration ALA2</p>	<p><u>Examination of clauses 85 to 87</u></p> <p>In response to the Chairman, ALA2 commented that the three-year limit for applying for a review of a reviewable determination under clause 86(3) was different from those for applications for appeals or judicial review.</p>	
010556 – 011722	<p>Chairman Mr Jeffrey LAM Administration</p>	<p><u>Examination of clauses 88 and 89</u></p> <p>Mr Jeffrey LAM expressed concern about the scope of persons involved in contravention of competition rule under clause 89, which in his view was too wide, and asked –</p> <p>(a) whether it would be a contravention of the enacted Ordinance if purchasers joined hands to purchase a</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>certain product in bulk in return for a discount, or to collectively negotiate with the supplier for a better price; and</p> <p>(b) whether the Administration would issue relevant guidelines to provide greater certainty to address concerns about inadvertent contravention of the enacted Ordinance.</p> <p>The Administration gave the following response –</p> <p>(a) joint purchase as described above would at most be regarded as a non-serious anti-competitive conduct. With the introduction of the warning notice, the undertaking(s) concerned could easily avoid enforcement action by simply ceasing the contravening conduct. As such, the warning notice could already address the business sector's concern about inadvertent contravention; and</p> <p>(b) the Commission would issue regulatory guidelines to provide general guidance and reference on acts that might contravene the enacted Ordinance.</p> <p>Mr LAM disagreed that the practice he highlighted above should be regarded as contravention though not serious. In his view, the regulatory guidelines should be issued early to allow time for the business sector to examine, discuss and agree with the Administration on the acts that would be classified as contravening acts.</p> <p>The Administration advised that –</p> <p>(a) joint purchase would in general not constitute contravention unless the group of undertakings so formed had a substantial degree of market power and abused such power. It would be a matter of fact to determine whether such a case would constitute a contravention;</p> <p>(b) the Bill would require the Commission to issue relevant guidelines after consultation with the stakeholders; and</p> <p>(c) as explained above, the warning notice could help protect undertakings from inadvertent contravention of the law.</p>	
011723 – 013321	<p>Chairman Mr WONG Ting-kwong Administration Ms Emily LAU</p>	<p>Mr WONG Ting-kwong expressed concern that –</p> <p>(a) despite the warning notice, the concerns about inadvertent contravention might still linger to discourage innovative business practices;</p>	

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		<p>(b) complaints might be lodged against a supplier who provided discounts to bulk purchasers, or purchasers with whom the supplier had developed amicable relationships over the years; and</p> <p>(c) confidential bulk purchase agreements might need to be made open after enactment of the Ordinance.</p> <p>The Administration explained that –</p> <p>(a) the supplier was free to offer different discounts to purchasers according to the purchase quantity, the purchasers' track records, or the supplier's relationships with them. Provision of discount was considered a legitimate commercial decision, and would not normally constitute contravention;</p> <p>(b) only when the supplier concerned was the sole supplier of the relevant product, and that the purchasing party of the joint purchasing agreement exercised its substantial buying power to foreclose the market to the exclusion of existing or potential competitors would the relevant agreement cause competition concern because consumers might suffer as a result. Under the circumstances, both parties to the agreement might become contravening undertakings; and</p> <p>(c) provisions in the Bill regarding disclosure of information could help preserve the confidentiality of confidential agreements where necessary even during the investigation by the Commission. Unauthorized disclosure might constitute an offence liable to imprisonment and/or fines.</p> <p>Ms Emily LAU and the Chairman opined that to address members' concerns above, the Administration should gear up public education on the Bill.</p>	
013322 – 013951	Chairman Mr Abraham SHEK Administration Ms Emily LAU	<p>Mr Abraham SHEK –</p> <p>(a) stressed the need for the Bill to provide greater certainty to address concerns of small and medium enterprises (SMEs) about inadvertent contravention of the enacted Ordinance, considering that the terms of purchase contracts were normally not straightforward, and that SMEs did not have the financial means to seek legal advice; and</p> <p>(b) pointed out that confidential agreements might be disclosed with lawful authority during an investigation where justified.</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration responded that –</p> <p>(a) it would be difficult to specify in the Bill whether individual business practices would contravene the law given the dynamic and changing business environment; and</p> <p>(b) SMEs would not possess a substantial degree of market power for abuse in contravention of the second conduct rule. As to the concerns about inadvertent contravention of the first conduct rule, the warning notice should help address such concerns as the notice would specify the contravening act and the remedial actions to be taken to address such concerns.</p> <p>The Chairman urged the Administration to ensure that the regulatory guidelines to be issued by the Commission would be detailed and clear to provide greater certainty to SMEs. Ms Emily LAU shared his view, and added that the Administration should draw lessons from the confusing introduction of the statutory minimum wage, and provide before enactment of the Ordinance a paper on examples of common business practices that would, as well as those that would not, constitute anti-competitive acts. In doing so, particular attention should be paid to the situations highlighted by members above.</p>	<p>The Administration to take action as requested in paragraph 4(a)</p>
<p>013952 – 014315</p>	<p>Chairman Administration ALA2</p>	<p><u>Examination of clauses 90 and 91</u></p> <p>The Chairman pointed out that, considering that no pecuniary penalties should be imposed on individuals, two deputations had proposed the following amendments to the Bill (LC Papers Nos. CB(1)622/10-11(08) and CB(1)1042/10-11(01)) –</p> <p>(a) the word "person" in clause 90(1) should be amended to "undertaking"; and</p> <p>(b) the expression "a person" in clause 91(1) should be amended to "an undertaking".</p> <p>The Administration explained that the word "person" as used in the Bill would include an undertaking as well. Likewise, the word "undertaking" would also include a natural person engaged in economic activity. ALA2 confirmed this point by referring members to clause 2.</p>	
<p>014316 – 014639</p>	<p>Chairman Mr WONG Ting-kwong Administration Mrs Regina IP</p>	<p>Mr WONG Ting-kwong referred to clause 90(2)(b), and asked why the Commission should take as long as five years to apply to the Tribunal for imposing pecuniary penalty on a person who had contravened a competition rule.</p>	

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		<p>The Administration explained that –</p> <ul style="list-style-type: none"> (a) five years had been set as the deadline for making the above application because investigations into anti-competitive act for some cases might take a long time to gather the evidence and analyse the case; and (b) reference had been made to relevant overseas practices before setting the above five-year deadline. Australia also adopted a five-year deadline. <p>Mrs Regina IP enquired about the time normally taken by overseas jurisdictions, particularly Singapore, to conduct the above investigations.</p> <p>The Administration's response –</p> <ul style="list-style-type: none"> (a) the time taken to conduct relevant investigations varied from case to case and could be as long as ten years. Five years was considered an appropriate time bar; and (b) the Administration would conduct research into overseas practices, including that of Singapore, and provide information on the deadlines which overseas jurisdictions respectively imposed on applications for imposing pecuniary penalty. 	<p>The Administration to take action as requested in paragraph 4(b)</p>
014640 – 015148	Chairman Administration Mrs Regina IP Ms Emily LAU	<p><u>Examination of the Administration's proposed Committee Stage amendments to clause 91</u> (LC Paper No. CB(1)643/11-12(03))</p> <p>In response to Mrs Regina IP, the Administration advised that in working out the cap of pecuniary penalty that could be imposed for contravention of competition law, no competition jurisdictions, not even Singapore, used the turnover which the relevant undertaking had derived from the product or the service concerned alone as the basis. Instead, the cap would be based on the total turnover of the undertaking.</p> <p>Ms Emily LAU opined that the pecuniary penalty cap had already been lowered and should be acceptable to all.</p>	
015149 – 015528	Chairman Ms Emily LAU Administration	<p>Meeting arrangements</p> <p>Ms Emily LAU stressed the need to complete the scrutiny of the Bill before the assumption of office of the fourth-term Chief Executive and his/her governing team on 1 July 2012, so as to enable the motion to resume Second Reading debate on the Bill to be moved by the incumbent Secretary for Commerce and Economic Development.</p> <p>The Chairman said that the progress of the Bills</p>	

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		Committee's work would hinge on whether the list of statutory bodies to be exempted from the Bill could be made available and agreed upon early.	

Council Business Division 1
Legislative Council Secretariat
7 June 2012