

立法會
Legislative Council

LC Paper No. CB(1)2443/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of the 33rd meeting held on
Monday, 19 March 2012, at 2:30 pm
in Conference Room 3 of the Legislative Council Complex**

Members present : Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Dr Hon Margaret NG
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, 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 CHAN Kin-por, JP
Hon WONG Kwok-kin, BBS
Hon Mrs Regina IP LAU Suk-yee, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Alan LEONG Kah-kit, SC
Hon Tanya CHAN
Hon WONG Yuk-man

Members absent : Hon Ronny TONG Ka-wah, SC (Deputy Chairman)
Hon Albert HO Chun-yan
Dr Hon Philip WONG Yu-hong, GBS
Hon Abraham SHEK Lai-him, SBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon Starry LEE Wai-king, JP
Hon CHAN Hak-kan
Hon Paul CHAN Mo-po, MH, JP
Dr Hon LEUNG Ka-lau
Hon LEUNG Kwok-hung

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 and
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)922/11-12(02) —List of follow-up actions arising from the discussion at the meeting on 16 January 2012
- LC Paper No. CB(1)1031/11-12(01) —List of follow-up actions arising from the discussion at the meeting on 31 January 2012
- LC Paper No. CB(1)1287/11-12(01) —Administration's response to follow-up questions arising from the meetings on 16 and 31 January 2012
- LC Paper No. CB(1)1124/11-12(01) —List of follow-up actions arising from the discussion at the meeting on 14 February 2012
- LC Paper No. CB(1)1287/11-12(02) —List of follow-up actions arising from the discussion at the meeting on 28 February 2012
- LC Paper No. CB(1)1324/11-12(01) —Administration's response to follow-up questions arising from the meetings on 14 and 28 February 2012
- LC Paper No. CB(1)1202/11-12(02) —Submission from Hong Kong Small and Medium Enterprises Association
- LC Paper No. CB(1)1324/11-12(02) —Hong Kong Trade Development Council's response to the accusation made in paragraph 3 of the submission from Hong Kong Small and Medium Enterprises Association (tabled at the meeting on 28 February 2012 and subsequently issued vide LC Paper No. CB(1) 1202/11-12(02))
- LC Paper No. CB(1)1324/11-12(03) —Administration's paper on amendments arising from the establishment of the Communications Authority
- LC Paper No. CB(1)1031/11-12(02) —Administration's paper on exemption arrangements for statutory bodies under the Competition Bill
- LC Paper No. CB(1)320/10-11(02) —Administration's information

paper on overview of major components of the Competition Bill (paragraphs 25 to 30 on exemption)

LC Paper No. CB(1)1523/10-11(02) —Administration's response to follow-up questions arising from the meeting on 22 February 2011 (paragraphs 12 to 14 on exemption)

LC Paper No. CB(1)1348/10-11(01) —Submission from Global Sources) *(tabled at the meeting and subsequently issued via email on 19 March 2012)*

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

2. The Chairman declared interests as recorded in the Register of Members' Interests. He reminded members to declare their interests if they had any association with the statutory bodies proposed to be exempted under the Bill and notify the Clerk to the Bills Committee in case they subsequently found any omission in their declaration. Mr Jeffrey LAM also declared that he was member of certain statutory bodies proposed to be exempted from the regulation of the Bill.

Clause-by-clause examination of the Bill

(LC Paper No. CB(1)1324/11-12(04) —Marked-up copy of major amendments to Part 12 and Schedules 8 and 9 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 (paragraph on clause 5)

LC Paper No. CB(1)1034/10-11(05) —Administration's response to CB(1)320/10-11(03) (paragraph 4)

LC Paper No. CB(1)1357/10-11(01) —Marked-up copy of major amendments to Schedule 8 *(tabled at the meeting and*

subsequently issued on 20 March 2012) prepared by the Legal Service Division)

3. The Bills Committee examined clauses 3 to 5, 175 and 176, and Schedules 8 and 9, including the draft Committee Stage amendments (CSAs) to them proposed by the Administration.

Follow-up actions required of the Administration

Admin.

4. The Bills Committee requested the Administration to take the following actions –

Clause 5

- (a) consider amending clause 5 in response to the following views expressed at the meeting:
 - (i) Dr Margaret NG's view that it was inappropriate to classify Hong Kong's courts, such as the Court of Final Appeal, as statutory bodies, and as such the Bill should expressly state that it would not apply to the Judiciary, instead of exempting courts as statutory bodies;
 - (ii) Dr Margaret NG's view that to ensure that statutory bodies and private undertakings would be fairly treated in the same way, the criterion set out in clause 31 for granting the latter's conduct exemption on public policy grounds, namely, that "there are exceptional and compelling reasons of public policy for doing so", should also apply to the exemption of statutory bodies and be incorporated in clause 5; and
 - (iii) the legal adviser's view that there was a need to more clearly stipulate the Chief Executive in Council's power under clause 5(1)(b) to, by regulation, disapply the provisions referred to in clause 3(1). For example, by setting out the above highlighted criterion in clause 31 for making this kind of regulation, as well as the kinds of situations that would be contemplated for invoking this power (with reference to the Administration's reply so stated in paragraph 4 of LC Paper No. CB(1)1034/10-11(05));

Clause 176

- (b) refine the expression "before that date" in clause 176(5)(b) to clarify which of the two dates mentioned in clause 176(5) this expression referred to; and

Schedule 9

- (c) introduce the following amendments to Schedule 9:
 - (i) as the English version of the phrase "在生效日期前已發生" in section 3(2)(a) and the phrase "在生效日期前已作出" in section 3(3)(a) was the same, amend the Chinese version of either section 3(2)(a) or section 3(3)(a) to achieve consistency between these two provisions;
 - (ii) as the English version of the phrase "在生效日期前已發生" in section 4(2)(a) and the phrase "在生效日期前已作出" in section 4(3)(a) was the same, amend the Chinese version of either section 4(2)(a) or section 4(3)(a) to achieve consistency between these two provisions;
 - (iii) as the English version of the phrase "制定" in section 4(2)(b) and the phrase "訂立" at the end of section 4(2) was similar, amend the Chinese version of either section 4(2)(b) or section 4(2) to achieve consistency between these two provisions;
 - (iv) as the English version of the phrase "制定" in section 4(3)(b) and the phrase "訂立" at the end of section 4(3) was similar, amend the Chinese version of either section 4(3)(b) or section 4(3) to achieve consistency between these two provisions; and
 - (v) amend the phrase "而《原有條例》的條文就該調查而適用" in the Chinese text of section 4(3) to "而《原有條例》的條文就該調查而繼續適用", so as to more accurately reflect the meaning of its English version "the provisions of that pre-amended Ordinance continue to apply".

5. The Chairman reminded members that the next meeting of the Bills Committee would be held on 27 March 2012 from 2:30 pm to 5:30 pm. Noting that the proposed CSAs to Part 7 of the Bill on private actions might not be ready beforehand, members agreed that examination of the clauses under Part 7 should

continue when the above CSAs were available.

(Post-meeting note: As proposed by the Administration and agreed by the Chairman, the meeting originally scheduled for 27 March 2012 was subsequently cancelled, and the next meeting of the Bills Committee would be held on Monday, 2 April 2012, at 2:30 pm.)

II Any other business

6. There being no other business, the meeting ended at 4:05 pm.

Council Business Division 1
Legislative Council Secretariat
9 August 2012

**Proceedings of the 33rd meeting of
the Bills Committee on Competition Bill
on Monday, 19 March 2012, at 2:30 pm
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda Item I – Meeting with the Administration			
000957 – 001217	Chairman	<p>Opening Remarks</p> <p>The Chairman declared interests as recorded in the Register of Members' Interests and drew members' attention to Hong Kong Trade Development Council's response (LC Paper No. CB(1)1324/11-12(02)) to the accusation made in paragraph 3 of the submission from Hong Kong Small and Medium Enterprises Association (LC Paper No. CB(1)1202/11-12(02)).</p>	
Briefing by the Administration			
001218 – 001749	Chairman Administration	<p>Briefing by the Administration on –</p> <p>(a) its response to follow-up questions arising from the meetings on 16 and 31 January 2012 (LC Paper No. CB(1)1287/11-12(01)) as well as the meetings on 14 and 28 February 2012 (LC Paper No. CB(1)1324/11-12(01)); and</p> <p>(b) its paper on amendments arising from the establishment of the Communications Authority (LC Paper No. CB(1)1324/11-12(03)).</p>	
Clause-by-clause examination of the Bill			
001750 – 002839	Chairman Administration Assistant Legal Adviser 2 (ALA2) Ms Audrey EU	<p><u>Examination of clauses 3 to 5</u></p> <p>ALA2 highlighted his comment on clause 5 in his letter dated 26 October 2010 to the Administration and the Administration's response thereto (LC Papers Nos. CB(1)320/10-11(03) and CB(1) 1034/10-11(05)), and drew members' attention to consider the need to more clearly stipulate the Chief Executive (CE) in Council's power under clause 5(1)(b) to, by regulation, disapply the provisions referred to in clause 3(1). For example, by setting out the criteria for making the regulation, as well as indicating the kind of situations that would be contemplated for invoking this power.</p> <p>The Administration responded that unlike statutory bodies with very specific statutory functions, non-statutory bodies were of varying nature and different modes of operation, hence the need to provide flexibility in the Bill to cater for all possible circumstances under which non-statutory entities might warrant exemption. Moreover, the regulation concerned would be subject to negative vetting by the Legislative Council (LegCo).</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>Ms Audrey EU shared ALA2's view on the need for setting out the criteria for making the above kind of regulation, and enquired about the contemplated criteria in this regard. She also expressed the following views –</p> <ul style="list-style-type: none"> (a) the criterion in clause 31 should also be incorporated in clause 5(1)(b); (b) there was a need to ensure that exemption of either conduct or entities would be fairly considered according to similar criteria; and (c) the criterion in clause 31 was sufficiently broad to provide the required flexibility. <p>The Administration responded that in considering making regulation to exempt certain persons or specified activities, CE in Council would consider whether there were exceptional and compelling reasons of public policy for doing so, similar to the case of clause 31 on exempting certain agreements or conduct.</p>	
002840 – 004353	Chairman Dr Margaret NG Administration ALA2	<p>Dr Margaret NG expressed the following views –</p> <ul style="list-style-type: none"> (a) the claimed flexibility required would not be compromised by the setting out of criteria according to which CE in Council should grant exemption because, as in other legislations, flexibility could always be exercised under special circumstances as long as such would not deviate from the guiding principles of the provisions concerned; (b) instead of drafting clause 5 in its present form to exempt all statutory bodies unless they fell under the circumstances stated in clauses 5(2)(a) to 5(2)(d), to ensure fairness the clause should be redrafted in such a way as to stipulate that all statutory bodies would be similarly regulated as non-statutory bodies unless there were exceptional and compelling reasons; and (c) it was inappropriate and absurd to classify Hong Kong's courts, such as the Court of Final Appeal, as statutory bodies. <p>The Administration made the following response –</p> <ul style="list-style-type: none"> (a) unlike statutory bodies where their services or activities were usually regulated by the ordinances by or under which they were established or constituted, the types and functions of non-statutory bodies could vary widely. While the criteria in clause 31 might be relevant in making a regulation under clause 5(1)(b), it would be difficult to provide a set of general criteria in the provision for application in all 	

Time marker	Speaker	Subject(s)	Action required
		<p>possible scenarios. Hence, clause 5(1)(b) had been drafted in such a way as to provide the necessary flexibility to cater for different circumstances;</p> <p>(b) all non-statutory bodies, including undertakings, were also provided with different exemption arrangements under the Bill; and</p> <p>(c) "statutory body" was defined in clause 2 for the purpose of the Bill as there were no similar definitions in other Hong Kong laws or overseas jurisdictions except Singapore.</p> <p>Noting from the Administration's response (c) above that the definition of "statutory body" had been specifically worked out for the purpose of the Bill, Dr NG proposed that the Bill should expressly state that the Bill would not apply to the Judiciary, instead of exempting courts as statutory bodies.</p> <p>The Chairman highlighted Mr Ronny TONG's earlier comment that although the Judiciary might not conduct business activities, they might still engage in economic activities such as engagement of services or procurement, and hence could potentially engage in anti-competitive acts.</p> <p>Dr NG opined that the above likelihood was highly remote, and that procurement activities of the Judiciary might in fact be conducted centrally by the administrative departments.</p> <p>ALA2 indicated that from a drafting point of view, it was technically possible to exclude courts from the definition of statutory bodies, the reiterated the need to more clearly stipulate CE in Council's power under clause 5(1)(b) to, by regulation, disapply the provisions referred to in clause 3(1). For example, by setting out the above highlighted criterion in clause 31 for making this kind of regulation, as well as the kind of situations that would be contemplated for invoking this power (with reference to the Administration's reply so stated in paragraph 4 of LC Paper No. CB(1) 1034/10-11(05)).</p> <p>At the Chairman's request, the Administration agreed to consider members' views on clause 5. In this regard, Dr NG urged the Administration to also note that the degree of supervision which LegCo could exercise over the making of subsidiary legislation, i.e., the power to amend (which included repeal or vary) subsidiary legislation hinged on the primary legislation under which it was made. Since the empowering provision would set the relevant parameters for the subsidiary legislation, in particular the person who was empowered to make the subsidiary</p>	<p>The Administration to take action as requested in paragraph 4(a)</p>

Time marker	Speaker	Subject(s)	Action required
		<p>legislation and the boundaries of his discretion, there was a need to incorporate the criteria for granting exemption in clause 5 in view that it was the empowering provision of the regulation on exemption to be made under it. If not, there would be no control over the entities that would be exempted, and the Bill could be used to exempt entities as necessary to serve political purposes.</p>	
004354 – 004707	Chairman Mr Jeffrey LAM Administration	<p>In response to Mr Jeffrey LAM, the Administration said that statutory bodies were to be exempted by virtue of clause 3 of the Bill unless a regulation was made to apply the competition rules and the enforcement provisions to specified statutory bodies. Such regulation would be made after the enactment of the Bill and would have to undergo the necessary vetting process for subsidiary legislation. Before making such a regulation, the Administration would consult the relevant stakeholders.</p> <p>Mr LAM declared that he was member of certain statutory bodies on the proposed list of exempted bodies, and enquired how objections relating to the list would be handled, whether the list would be revised where justified and if so, whether the revised list would be provided to the Bills Committee for information.</p> <p>The Administration gave the following response –</p> <p>(a) handling of different views on the exemption arrangements would be an ongoing process and would continue even after enactment of the Ordinance; and</p> <p>(b) the list of non-exempted statutory bodies was only a proposal and CE in Council would have to be satisfied, before making the regulation under clause 5(1)(a), that the criteria in clause 5(2) had been met .</p>	
004708 – 005225	Chairman Administration ALA2	<p><u>Examination of clauses 175 and 176 as well as the Administration's proposed Committee Stage amendments (CSAs) to them</u></p> <p>In response to ALA2, the Administration agreed to refine the expression "before that date" in clause 176(5)(b) to clarify which of the two dates mentioned in clause 176(5) this expression referred to.</p>	The Administration to take action as requested in paragraph 4(b)
005226 – 010730	Chairman Administration ALA2	<p><u>Examination of sections 1 to 14 of Schedule 8 as well as the Administration's proposed CSAs to them</u></p> <p>In response to ALA2, the Administration briefed members on the new section 7Q on "exploitative conduct" proposed to be added to the Telecommunications Ordinance (Cap. 106) by virtue of section 14 of Schedule 8, and explained</p>	

Time marker	Speaker	Subject(s)	Action required
		the difference between the new section 7Q and the existing section 7L to be so substituted, as well as the reasons for the substitution.	
010731 – 011850	Chairman Administration	<u>Examination of sections 15 to 38 of Schedule 8 as well as the Administration's proposed CSAs to them, including the new section 39</u>	
011851– 013205	Chairman Administration ALA2	<p><u>Examination of Schedule 9 as well as the Administration's proposed CSAs to it</u></p> <p>In response to ALA2, the Administration agreed to introduce the following amendments to Schedule 9 -</p> <p>(a) as the English version of the phrase "在生效日期前已發生" in section 3(2)(a) and the phrase "在生效日期前已作出" in section 3(3)(a) was the same, amend the Chinese version of either section 3(2)(a) or section 3(3)(a) to achieve consistency between these two provisions;</p> <p>(b) as the English version of the phrase "在生效日期前已發生" in section 4(2)(a) and the phrase "在生效日期前已作出" in section 4(3)(a) was the same, amend the Chinese version of either section 4(2)(a) or section 4(3)(a) to achieve consistency between these two provisions;</p> <p>(c) as the English version of the phrase "制定" in section 4(2)(b) and the phrase "訂立" at the end of section 4(2) was similar, amend the Chinese version of either section 4(2)(b) or section 4(2) to achieve consistency between these two provisions;</p> <p>(d) as the English version of the phrase "制定" in section 4(3)(b) and the phrase "訂立" at the end of section 4(3) was similar, amend the Chinese version of either section 4(3)(b) or section 4(3) to achieve consistency between these two provisions; and</p> <p>(e) amend the phrase "而《原有條例》的條文就該調查而適用" in the Chinese text of section 4(3) to "而《原有條例》的條文就該調查而繼續適用", so as to more accurately reflect the meaning of its English version "the provisions of that pre-amended Ordinance continue to apply".</p>	The Administration to take action as requested in paragraph 4(c)
013206 – 013252	Chairman Administration	Meeting arrangements	