

立法會
Legislative Council

LC Paper No. CB(1)1504/10-11
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of seventh meeting on
Tuesday, 25 January 2011, at 4:30 pm
in the Chamber of the Legislative Council Building**

Members present : Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)
Hon Ronny TONG Ka-wah, SC (Deputy 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 CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, SBS, 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 Hak-kan
Hon Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
Hon CHEUNG Kwok-che
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-yeet, GBS, JP
Hon Paul TSE Wai-chun
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Tanya CHAN

Members absent : Hon Albert HO Chun-yan
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yee, GBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon Starry LEE Wai-king, JP
Dr Hon LEUNG Ka-lau
Dr Hon Samson TAM Wai-ho, JP
Hon WONG Yuk-man

Public Officers attending : Agenda item II

Mr Gregory SO Kam-leung, JP
Under Secretary for Commerce and Economic
Development

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 : Ms Debbie YAU
Chief Council Secretary (1)6

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Mr Ken WOO
Council Secretary (1)2

Action

I Confirmation of minutes

(LC Paper No. CB(1)1134/10-11 -- Minutes of meeting held on
20 December 2010)

The minutes of the meeting held on 20 December 2010 was confirmed.

II Meeting with the Administration

Matters arising from last meeting

(LC Paper No. -- List of follow-up actions arising
CB(1)1133/10-11(01) from the discussion at the
meeting on 17 January 2011

LC Paper No. CB(1)1133/10-11(02) -- Hon LEUNG Kwok-hung's
letter dated 17 January 2011

LC Paper No. CB(1)1133/10-11(03) -- Hon Mrs Regina IP LAU
Suk-yee's letter dated
18 January 2011

LC Paper No. CB(1)1133/10-11(04) -- Administration's response to
CB(1)1133/10-11(01) to (03))

Object, Commencement and Interpretation of the Bill

(LC Paper No. -- Summary of views expressed
CB(1)1034/10-11(04) by deputations on the object,
commencement and
interpretation 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 (clause 2)

LC	Paper	No. -- Administration's response to
CB(1)1034/10-11(05)		CB(1)320/10-11(03)
		(paragraphs 2 and3))

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

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

- (a) the pros and cons in granting exemption to small and medium enterprises from the Bill;
- (b) in relation to clause 6(2)(b) that it would be an infringement of the first conduct rule if agreements, concerted practices and decisions are entered into/made to limit or control technical development, advise whether parties involving in technological innovation and hence obtaining patent, which may result in the exclusion of other players in the provision of the relevant product/service, would be in breach of the competition rule;
- (c) an evaluation of the role and powers of the Competition Commission to avoid concentration of too much power on it; and
- (d) to provide concrete examples on contravention of the proposed competition rules.

4. The Chairman reminded members that the next meeting of the Bills Committee would be held on 15 February 2011 at 4:30 pm.

III Any other business

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

**Proceedings of the seventh meeting of
Bills Committee on Competition Bill
on Tuesday, 25 January 2011, at 4:30 pm
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000350 – 000427	Chairman	(a) Opening remarks by the Chairman. (b) Confirmation of minutes of the meeting on 20 December 2010 (LC Paper No. CB(1)1134/10-11)).	
000428 – 000832	Chairman Administration	The Administration outlined its response to members' views and concerns raised at the meeting of the Bills Committee on 17 January 2011 (LC Paper No. CB(1)1133/10-11(04)).	
000833 – 001450	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffery LAM pointed out that the maximum pecuniary penalty imposed by the European Union (EU) was 10% of global turnover in the preceding business year, but that for the Bill was 10% of global turnover for each year in which the contravention had continued which, in his view, was far more stringent than that in many other competition jurisdictions. Noting that the Administration was still in the process of reviewing the maximum pecuniary penalty imposed by the competition laws in each of The Group of Twenty (G-20) economies, Mr LAM urged the Administration to take into account the grave concerns of the business sector, in particular the small and medium enterprises (SMEs), and re-consider the maximum pecuniary penalty, as failure to rectify this might result in a drain of investments from Hong Kong to its competitors, say, Singapore.</p> <p>The Administration highlighted that some jurisdictions, including the United Kingdom which linked the maximum pecuniary penalties that could be imposed by competition authorities to the turnover of the infringing undertaking's global operation in determining the pecuniary penalties, also provided for criminal sanctions for directors and company officials for cartel behaviour. The Administration considered it appropriate and fair to impose pecuniary penalty for each and every year that the infringement had occurred in order to ensure sufficient deterrent effect. To better explain the reasons for the proposed provisions in the Bill, it would continue to brief the public, especially SME associations, on the details of the Bill.</p>	
001451 – 002112	Chairman Mr LEUNG Kwok-hung Administration	Mr LEUNG Kwok-hung noted that an increasing number of deputations had requested to include "enhancing economic efficiency for the benefit of consumers" as one of the objects of the Bill. If the Administration did not include such an express phrase in the Bill, he would consider proposing a Committee Stage Amendment to that	

Time marker	Speaker	Subject(s)	Action required
		<p>effect during the resumption of Second Reading debate of the Bill. He also reiterated that exclusion from the Bill could be granted on the grounds of economic efficiency.</p> <p>The Administration responded that –</p> <ul style="list-style-type: none"> (a) as the stated objective of the Administration's competition policy was "to enhance economic efficiency and the free flow of trade through promoting sustainable competition, thereby bringing benefits to both the business sector and consumers", enhancing consumer welfare would undoubtedly be one of the outcomes of the Bill; (b) exclusion on economic benefit grounds could be granted where the gain from economic efficiency was greater than the anti-competitive harm. In EU, the economic benefit was assessed in terms of cost saving and enhanced quality of product or service; and (c) Mr LEUNG's suggestion on stipulating the quoted phrase in (a) above as a new function of the proposed Competition Commission (the Commission) under clause 129 would be considered during the clause-by-clause examination stage of the related subject component. 	
002113 – 003043	Chairman Mr WONG Ting-kwong Administration	<p>Mr WONG Ting-kwong opined that consumers would ultimately be the victims if SMEs, which accounted for a considerable percentage of enterprises in Hong Kong, were eliminated by the private action provided under the Bill by large consortia which could as a result abuse its dominant market power. Under the circumstances, the Bill would in effect limit the choice of consumers but have no way to address the monopolistic operations thus created, be they vertical or horizontal. As such, Mr WONG urged the Administration to focus on prohibition against existing abuse of market power in the auto-fuel, supermarket, airline service and certain property management sectors.</p> <p>The Administration assured members that the Bill sought to prevent the abuse of market power by large consortia with a view to creating a level-playing field conducive to the survival of SMEs. The proposed first and second conduct rules in the Bill were similar to provisions in Mainland's <i>Anti-monopoly Law</i> and competition laws in other jurisdictions and these rules proved to be effective in guarding against anti-competitive practices.</p> <p>The Chairman urged the Administration to address the concerns of SMEs and enhance the clarity of the Bill, such as by providing details of the "de minimis" arrangements.</p>	

Time marker	Speaker	Subject(s)	Action required
003044 – 004122	Chairman Dr LAM Tai-fai Administration	<p>Pointing out that SMEs accounted for 98% of all enterprises in Hong Kong and provided a large number of employment opportunities, Dr LAM Tai-fai criticized the Administration for failing to properly address the concerns expressed by SMEs as they might easily fall foul of the currently drafted Bill. He urged that exemption should be granted to SMEs and requested the Administration to provide information on the pros and cons in doing so. Dr LAM also asked for the reason for not replacing the competition legislation with an anti-monopoly legislation.</p> <p>The Administration advised that –</p> <ul style="list-style-type: none"> (a) it had thoroughly considered all the views received during the two rounds of public consultation held in 2006 and 2008 in drafting the Bill; (b) while SMEs did not possess the market power substantial enough to contravene and hence be caught by the proposed second conduct rule, SMEs engaged in "hard-core" anti-competitive practices should be regulated by law and should not be exempted; and (c) an anti-monopoly legislation might be literally associated with regulating market structure, whereas the Bill was meant to combat the abuse of market power instead of a mere possession of market power. <p>In response to the Administration's indication that the "de minimis" threshold would be set by the Commission in line with international practices at around 20% of total market share, the Chairman urged that the relevant threshold should be made specific in the Bill to allay SMEs' worries.</p>	The Administration to provide information as requested in paragraph 3(a) of the minutes.
004123 – 004526	Chairman Mr Ronny TONG Administration	<p>Citing a case in which a flour supply association had in a couple of years ago engaged in price fixing, Mr Ronny TONG said that Members belonging to the Civic Party were opposed to granting exemptions for SMEs to the detrimental interest of consumers. He considered it undesirable to set out a framework for the "de minimis" arrangement in the Bill as it would limit the flexibility to be exercised by the Commission, for example, the market share threshold should be set with careful consideration of the market involved to facilitate effective enforcement. Mr TONG considered it more effective to allay the concerns of SMEs and to gain their support by not including stand-alone rights of action in the Bill.</p> <p>Sharing Mr TONG's views, the Administration advised that when considering the "de minimis" arrangement, it would strike a balance in ensuring effective enforcement of the Bill while protecting the interest of the business community and consumers. It added that the Bill had</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>provided a commitment mechanism to deal with minor contravention of the competition rules.</p> <p>The Chairman considered it fair for granting SMEs exemption from the proposed second conduct rule for their general lack of market power.</p>	
004527 – 005243	Chairman Mrs Regina IP Administration Mr Ronny TONG	<p>Mrs Regina IP considered it a common practice nowadays for hi-tech companies to join hands in technical development and obtain patent for certain technologies to further their business, which might as a result exclude other industry players in the provision of the relevant product/service, or limit the use of the technologies through licensing. She enquired whether this would be seen as a conduct limiting technical development under clause 6(2) and hence an infringement of clause 6(1), and if yes, she expressed grave concern that the clause would in itself limit technical development and hinder technological advancement.</p> <p>The Administration responded that both the competition and intellectual property laws helped foster innovations. Competition at the research and development level would help develop new products by different industry players and promote competition in the market. Obtaining a patent by itself would not constitute an infringement of the Bill, but the ways of licensing might if anti-competitive conduct was involved.</p> <p>Mr Ronny TONG considered that research and development <i>per se</i> was not an economic activity but the application of their results in the market was. If research and development would be regarded as an infringement of the Bill, Mr TONG considered that exemption should be provided for these activities as emergence of new products in market would bring about competition and economic benefits. In this connection, Mrs Regina IP considered that research and development was upstream economic activity.</p> <p>The Administration referred members to the proposed section 1 of Schedule 1 to the Bill which provided for a general exclusion from the first conduct rule if the gain from economic efficiency was greater than the anti-competitive harm.</p>	The Administration to provide information as requested in paragraph 3(b) of the minutes.
005244 – 005739	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM reiterated the worries of SMEs on the Bill and highlighted the implementation experience of Singapore that since its <i>Competition Act</i> came into force in 2006, all except one cases being found in contravention of the competition rules were related to SMEs.</p> <p>The Administration advised that despite Singapore had found the guidelines on fees issued for medical</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>practitioners and estate agents anti-competitive, the authority concerned had only requested the parties in question to cease using such guidelines. The example illustrated that the commitment mechanism under the Bill would provide a less stringent remedy for minor contravention of the conduct rules.</p>	
005740 – 010240	<p>Chairman Mr WONG Ting-kwong Administration</p>	<p>Mr WONG Ting-kwong relayed the concern of SMEs about the concentration of too much power on the Commission, which would be playing the roles of rule-setting, investigation and enforcement.</p> <p>The Administration referred members to the selected complaints received by the Competition Policy Advisory Group in Appendix I to the Administration's paper (LC Paper No. CB(1)1133/10-11(04)), and stated that the Bill would empower the Commission to undertake investigation into the complaint cases and prohibit anti-competitive conduct, in particular the abuse of market power by large consortia, which would help create a level-playing field conducive to the development of SMEs.</p>	
010241 – 010917	<p>Chairman Mr Paul TSE Administration</p>	<p>Mr Paul TSE was concerned whether the existing requirements stipulated by some public bodies, for example the Code of Conduct issued by the Hong Kong Bar Association (BAR) disallowing its members from advertising and the proposed requirement of the Travel Industry Council of Hong Kong (TICHK) that the fare of a Mainland tour could not be lower than the receiving cost, would contravene the proposed competition rules in the Bill.</p> <p>The Administration explained that, in view of the recent incidents pertinent to "zero/negative fare" tours, it was necessary for TICHK to put in place an effective mechanism to curb market malpractices, such as forced shopping at designated shops. In considering whether a practice would constitute a contravention, it was necessary to examine its object and whether it would carry a "foreclosing" effect under which enterprises would eliminate competitors, e.g. by predatory pricing.</p>	
010918 – 011614	<p>Chairman Dr LAM Tai-fai Administration</p>	<p>Dr LAM Tai-fai asked whether the Administration had assessed the impact of the proposed stand-alone rights of action on SMEs and the measures to be taken to protect SMEs from being harassed. Dr LAM also requested the Administration to evaluate into the role and power of the Commission to avoid concentration of too much power on it and the checks and balance to be put in place.</p> <p>The Administration advised that –</p> <p>(a) it had assured SMEs in different occasions that in dealing with stand-alone actions, the court might</p>	<p>The Administration to provide information as requested in paragraph 3(c) of the minutes.</p>

Time marker	Speaker	Subject(s)	Action required
		<p>refer the alleged contravention to the Commission for investigation, the Commission might intervene in the proceedings and the court would be able to strike out vexatious and frivolous lawsuits at the early stage of litigation. In fact, the concern about stand-alone right of action giving rise to frivolous complaints to the detriment of SMEs was not substantiated by international experience; and</p> <p>(b) different parts of the Bill, if enacted, would be commenced on a staggered approach and the commencement notices would be subsidiary legislation subject to the scrutiny of the Legislative Council. The Commission would prepare its regulatory guidelines during the transitional period between the enactment of the Bill and the coming into force of the major prohibitions, and Members would have sight of the guidelines drawn up by the Commission before examining the commencement notice for the proposed competition rules.</p>	
011615 – 011822	Chairman Mr Ronny TONG	Sharing Mr Paul TSE's concern, Mr Ronny TONG considered that some requirements in the Code of Conduct issued by BAR might restrict competition and need to be amended upon the enactment of the Bill.	
011823 – 012230	Chairman Mr Paul TSE Administration	<p>Mr Paul TSE queried whether his earlier question about TICHK's requirement on tour fare was concerned with price fixing related to the proposed first conduct rule or abuse of market power under the second conduct rule.</p> <p>The Administration advised that each case would need to be considered on its own merits, and reiterated that any anti-competitive conduct that carried a "foreclosing" effect would constitute a contravention under the Bill.</p> <p>Mr Paul TSE sought information on the element of "foreclosing" in the Bill.</p>	
012231 – 012620	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM referred to Singapore's recent ruling that the guidelines on fees issued by the Singapore Medical Association was anti-competitive, and sought the Administration's view on the claim that the said guidelines on fees was provided with a view to improving price transparency and preventing overcharging by general medical practitioners.</p> <p>The Administration advised that as it understood, the Singapore authority did not accept the claim as the guidelines did bring about price convergence. If the case was applied to Hong Kong, the Commission would consider whether the relevant guidelines published would lead to the prevention, restriction or distortion of competition in Hong Kong.</p>	

Time marker	Speaker	Subject(s)	Action required
012621 – 013045	Chairman Dr LAM Tai-fai Administration	<p>Dr LAM Tai-fai followed up his questions on whether assessments had been made in respect of the impact of stand-alone rights of action on SMEs and the concentration of too much power on the Commission. He considered it undesirable for the Bill to model on legislations in other competitive jurisdictions which shared different socio-economic conditions from Hong Kong.</p> <p>In addressing Dr LAM's concerns, the Administration stressed that consumers who suffered loss or damage as a result of a contravention of a conduct rule should have access to justice by way of private action which was a fundamental right that should not be easily denied without good justification. The Administration also advised that, in response to the views on the consultation document published in May 2008 which had proposed to task the Commission with the functions of investigation, enforcement and to a certain extent, adjudication, the Bill now proposed a judicial enforcement model by setting up a Competition Tribunal (the Tribunal) to take up the adjudication function to avoid concentration of too much power in the Commission.</p>	
013046 – 013644	Chairman Mr WONG Ting-kwong Administration	<p>In reply to Mr WONG Ting-kwong's question on whether the setting of prices by The Newspaper Society of Hong Kong and the Tobacco Association of Hong Kong for newspapers and cigarettes respectively were examples of price-fixing, the Administration advised that aligning the price of a widely available product/service could be an outcome of an intense competition. It was not necessary for anti-competitive conduct to have taken place to contribute to such a price convergence.</p> <p>In addressing Mr WONG's concern on whether a newspaper stallholder, who sold newspapers at a lower price than that sold at the next stall, would tantamount to foreclosing, the Administration advised that this was a competitive practice and foreclosing would take place if the newspaper suppliers refused to provide newspapers to the stallholder who sold them at a lower price.</p> <p>Mr WONG expressed further concern that some suppliers had forbidden retailers to sell products below the fixed price. The Administration pointed out that such price maintenance might be prohibited under the Bill but the Tribunal would need to consider the issue on a case-by-case basis.</p>	
013645 – 014057	Chairman Mr Paul TSE Administration	Mr Paul TSE expressed grave concern about the Administration's repeated response to members' specific questions on different issues that they would need to be considered on a case-by-case basis. Mr TSE considered that the Administration should provide concrete examples of contravention of the competition rules as there was a	The Administration to provide information as requested in paragraph 3(d) of the minutes.

Time marker	Speaker	Subject(s)	Action required
		<p>lack of legal certainty on how the competition rules would be interpreted and implemented under the general prohibition approach.</p> <p>The Administration explained that it would make a separate submission on the key elements of the draft guidelines of the major prohibitions of the Bill with a view to, inter alia, providing more examples of anti-competitive conduct that would likely be targeted by the Bill.</p>	
014058 – 014513	Chairman Mr Jeffrey LAM Administration	<p>Discussion on the Singapore's ruling on the guidelines on fees issued by its Medical Association.</p> <p>Mr Jeffery LAM expressed concern about the high legal consultation fees to be incurred by SMEs for compliance with the Bill. He supported adding "enhancing economic efficiency" as one of the objects of the Bill to eliminate unnecessary litigation.</p> <p>The Administration responded that with the extensive public education to be conducted by the Commission during the transitional period before the implementation of the proposed conduct rules, SMEs should be able to acquaint themselves with and make necessary adjustments in accordance with the requirements of the new law, such as by eliminating existing "hard-core" anti-competitive practices. As such, the relevant compliance cost would be kept minimal.</p>	
014514 – 014729	Chairman Mr Paul TSE Administration	<p>Mr Paul TSE reiterated his request for providing concrete examples of contravention of the proposed competition rules after conducting relevant case study.</p> <p>The Chairman urged that the Administration should also provide more relevant examples related to individual subject components of the Bill to be discussed at subsequent meetings of the Bills Committee.</p>	
014730 – 015523	Chairman Administration Assistant Legal Adviser Mr Jeffrey LAM	<p><u>Object, commencement and interpretation of the Bill</u> <u>Continuation of clause-by-clause examination</u></p> <p><u>Clause 2 - Interpretation</u></p> <p>In response to Mr Jeffrey LAM's question, the Administration advised that trade associations and associations registered under the Companies Ordinance (Cap. 32) would be "company", whereas organizations established under respective ordinances would be "statutory body" under the Bill.</p>	
015524 – 015553	Chairman	Meeting arrangements	