

立法會
Legislative Council

LC Paper No. CB(1)516/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of the twenty-first meeting held on
Tuesday, 11 October 2011, at 8:30 am
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
Hon Fred LI Wah-ming, SBS, JP
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, 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 Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, BBS, JP
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 Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
Dr Hon LEUNG Ka-lau
Hon Mrs Regina IP LAU Suk-yee, GBS, JP
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
Dr Hon Margaret NG
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon CHIM Pui-chung
Hon CHAN Hak-kan
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon WONG Yuk-man

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 : Mrs Constance LI
Assistant Secretary General 1

Mr Timothy TSO
Assistant Legal Adviser 2

Ms Sarah YUEN
Senior Council Secretary (1)6

Ms Michelle NIEN
Legislative Assistant (1)6

Members noted the letter from Mr WONG Kwok-hing tabled at the meeting informing the Chairman of his wish to withdraw membership.

I Confirmation of minutes

(LC Paper No. CB(1)3059/10-11 — Minutes of meeting held on 21 June 2011)

2. The minutes of the meeting held on 21 June 2011 were confirmed.

II Meeting with the Administration

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

LC Paper No. CB(1)3079/10-11(02) — List of follow-up actions arising from the discussion at the meeting on 26 July 2011

LC Paper No. CB(1)3079/10-11(03) — Administration's response to CB(1)3079/10-11(02)

LC Paper No. CB(1)2618/10-11(01) — Administration's paper on Guidelines on the Second Conduct Rule

LC Paper No. CB(1)2420/10-11(03) — Administration's paper on Guidelines on Market Definition

LC Paper No. CB(1)2336/10-11(01) — Administration's paper on Guidelines on the First Conduct Rule

LC Paper No. CB(1)2869/10-11(01) — Submission from The Real Estate Developers Association of Hong Kong)

3. The Bills Committee deliberated (Index of proceedings attached at

Appendix).

Clause-by-clause examination of the Bill

- (LC Paper No. CB(3)885/09-10 — The Bill
LC Paper No. CB(1)320/10-11(04) — Marked-up copy of the Bill prepared by the Legal Service Division
LC Paper No. CB(1)2283/10-11(04) — Summary of views expressed by deputations on major prohibitions, exclusion and exemption of the Bill, and the Administration's response
LC Paper No. CB(1)320/10-11(03) — Assistant Legal Adviser's letter dated 26 October 2010 to the Administration (clauses 6, 9, 11, 21, 24, 26 and 33 and Schedules 1 and 7)
LC Paper No. CB(1)1034/10-11(05) — Administration's response to CB(1)320/10-11(03) (paragraphs 5-12 and 17-20))

4. The Bills Committee examined clauses 14 to 21 of the Bill.

Follow-up actions required of the Administration

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

- (a) provide a copy of the Administration's response to The Lion Rock Institute's request for information on the cost of compliance with the competition law;
- (b) in consultation with the Legal Aid Department, provide information regarding whether individuals/small and medium enterprises (SMEs) could apply for legal aid to institute legal actions against anti-competitive conduct or defend themselves against allegations of such conduct;
- (c) provide as soon as practicable, preferably before the next meeting of the Bills Committee on 25 October 2011, a paper on the new proposals recently worked out by the Administration to address the Bills Committee's concerns regarding five aspects of the Bill (related, namely, to regulatory guidelines, right of private action, the pecuniary penalty cap, "de minimis"

arrangements and the merger rule), as recently reported in the press;

- (d) in conjunction with the legal adviser of the Bills Committee, examine and provide a paper on how requests for review and revocation of block exemption orders could be made through a simple procedure, such as by filing an application to the Competition Tribunal (the Tribunal), without having to resort to judicial review which would usually incur high legal costs;
- (e) provide a paper on examples of block exemption orders issued overseas, such as in the European Union (EU), the United Kingdom (UK), Singapore, etc;
- (f) in recognition of SMEs' concern that the first conduct rule as currently drafted might cover vertical agreements, consider and report back on the Chairman's proposal to ensure that the Competition Commission (the Commission) would, upon its establishment, issue a block exemption order for vertical agreements upfront, and would revoke the order only after it had conducted a study in this regard;
- (g) in relation to clauses 16 and 34 of the Bill concerning procedures regarding block exemption orders, and register of decisions and block exemption orders, respectively –
 - (i) consider and report back at the next meeting of the Bills Committee on some members' view that, instead of allowing the Commission to "publish notice of the proposed block exemption order" and make the above register available for inspection "in any manner it considers appropriate", the Administration should specify in the above clauses that the Commission should make use of the latest technology available, in particular the Internet, to publish the electronic copy of the notice and maintain the register, so that the proposed block exemption order could be brought to the attention of those likely to be affected by it in a more timely, transparent and easily accessible manner; and
 - (ii) include a paragraph in the paper which the Administration would provide for the next meeting of the Bills Committee to confirm the policy intention that the Commission should make use of the latest technology available, in particular the Internet, to publish the electronic copy of the notice of

the proposed block exemption order; and

- (h) in relation to clause 21 of the Bill concerning abuse of a substantial degree of market power, provide a paper to respond to –
 - (i) the Chairman's and some deputations' view that the concept of "dominant position" was preferable to "substantial degree of market power" as it had a clearer meaning and was widely used in other jurisdictions; and
 - (ii) some members' view on the need to clearly set out in the Bill the criteria for assessing whether an undertaking had a substantial degree of market power, and for determining whether a conduct might constitute abuse of market power by involving "predatory behaviour towards competitors" or "limiting production, markets or technical development to the prejudice of consumers".

6. The Chairman reminded members that the next meeting of the Bills Committee would be held on 25 October 2011 at 4:30 pm.

III Any other business

7. There being no other business, the meeting ended at 11:15 am.

Council Business Division 1
Legislative Council Secretariat
5 December 2011

**Proceedings of the twenty-first meeting of
the Bills Committee on Competition Bill
on Tuesday, 11 October 2011, at 8:30 am
in Conference Room 1 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda Item I – Confirmation of minutes			
000346 – 000450	Chairman	Confirmation of minutes of meeting on 21 June 2011 (LC Paper No. CB(1)3059/10-11).	
Agenda Item II – Meeting with the Administration			
000451 – 001039	Chairman Administration	Briefing by the Administration on its response to the follow-up actions arising from the discussion at the meeting on 26 July 2011 (LC Paper No. CB(1)3079/10-11(03)).	
<i>Discussion on the Administration's response to the list of follow-up actions arising from the discussion at the meeting on 26 July 2011 (LC Paper No. CB(1)3079/10-11(03))</i>			
001040 – 001909	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM's call to positively address the concerns of small and medium enterprises (SMEs) about the Bill.</p> <p>The Administration's response –</p> <p>(a) the objective of the Bill was to tackle anti-competitive conduct engaged in by undertakings, large and small. It would be inappropriate to exempt SMEs from regulation of the Bill because SMEs, like large enterprises, could also be involved in anti-competitive activities. However, overseas experience suggested that the number of substantiated anti-competitive cases involving SMEs was relatively small;</p> <p>(b) the Administration would put forward a package of amendments to the Bill (the new proposals) to address major concerns of the stakeholders, in particular the SMEs, in the fourth quarter of 2011; and</p> <p>(c) the costs for SMEs to comply with the enacted Bill would not be high so long as SMEs did not engage, or would cease engaging, in anti-competitive conduct. The Competition Commission (the Commission) would also maintain a register of decisions which would help promote public understanding about the Commission's interpretation of the law.</p> <p>The Administration's explanation in response to Mr LAM was that if a company which had no directors was found to be in breach of the competition law, the Competition Tribunal (the Tribunal) could make a disqualification order against the proprietor of the undertaking if he/she was involved in the management of the company.</p>	

Time marker	Speaker	Subject(s)	Action required
001910 – 002253	Chairman Mrs Regina IP Administration	<p>Mrs Regina IP's concern/enquiry –</p> <ul style="list-style-type: none"> (a) the costs of complying with the enacted Bill might be high; (b) whether individuals/SMEs could apply for legal aid to institute legal actions against anti-competitive conduct or defend themselves against allegations of such conduct; and (c) the Administration should provide to members a copy of its response to The Lion Rock Institute's request for information on compliance costs. <p>The Administration's response was that some costs of implementing the competition law were inevitable but overseas experience indicated that an effective competition regime could benefit the society as a whole. The compliance cost for individual undertakings might not necessarily be high because the Commission had different enforcement options to address competition concerns depending on the nature and severity of the contravention. For example, instead of bringing proceedings in the Tribunal, the Commission might issue an infringement notice to the undertaking in return for a commitment of the undertaking concerned to take or refrain from taking certain action.</p>	<p>The Administration to provide information as requested in paragraph 5(a).</p>
002254 – 002942	Chairman Mr WONG Ting-kwong Administration	<p>Mr WONG Ting-kwong's view –</p> <ul style="list-style-type: none"> (a) the anti-competitive activities in which SMEs might be involved were hardly significant enough to create an appreciable adverse effect on competition in a market; (b) "de minimis" arrangements should be made to handle the anti-competitive activities of SMEs unless they were serious anti-competitive conduct such as price fixing and bid rigging; and (c) hence the Administration should incorporate details of "de minimis" arrangements in the Bill instead of deferring to the future Commission to set out the arrangements in the regulatory guidelines during the transitional period. <p>The Administration's response was that the new proposals would address the major concerns of the SMEs.</p>	
002943 – 003437	Chairman Mr CHAN Kin-por Administration	<p>Mr CHAN Kin-por's view –</p> <ul style="list-style-type: none"> (a) SMEs' compliance costs might not be as low as the Administration estimated because SMEs would constantly incur costs for seeking legal advice on 	

Time marker	Speaker	Subject(s)	Action required
		<p>whether their commercial activities or agreements were anti-competitive; and</p> <p>(b) hence a study on compliance costs was necessary.</p> <p>The Administration's response –</p> <p>(a) compliance costs would not be significant so long as the undertakings did not engage in anti-competitive conduct and there was no need to seek legal advice on each and every agreement or activity;</p> <p>(b) the Commission would issue regulatory guidelines and conduct public education programmes before the general prohibitions came into force to enhance public understanding about the requirements of the law and allow businesses sufficient time to make necessary adjustments; and</p> <p>(c) in the event that an agreement raised a question of an exclusion or exemption under the Bill for which clarification in existing case law or decisions of the Commission was unavailable, the parties concerned could apply to the Commission for a decision to remove the uncertainty about the application of the law to a specific agreement or conduct.</p> <p>Mr CHAN's indication of disagreement with the Administration's response above, pointing out that the introduction of a new legislation always gave rise to the need for legal advice on minimizing the risk of breaching the law inadvertently, and that guidelines could only provide general guidance and reference.</p> <p>The Administration's response –</p> <p>(a) the new proposals would cover issues relating to the "de minimis" arrangements, clarity of the law, the cap on pecuniary penalty, right of private action, merger control, etc.; and</p> <p>(b) the Administration would continue to engage the SMEs in the process of finalizing the Bill.</p>	
003438 – 003609	Chairman Assistant Legal Adviser 2 (ALA2)	<p>ALA2's confirmation in response to the Chairman –</p> <p>(a) the Administration's proposal to amend the expression "the directors of the company" in the definition of "shadow director" in clause 2 to read as "all the directors, or a majority of the directors, of the company", though slightly different from the expression used in other Hong Kong ordinances, was in order; and</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>(b) the above proposed amendment only sought to fine-tune the earlier proposal to amend the expression "the directors of the company" to read as "the directors or a majority of the directors of the company", which had been made after reviewing the definition and interpretation of "shadow director" in other Hong Kong ordinances and the relevant case law in the UK.</p>	
003610 – 004552	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM's view that competition law could not help prevent the debt crisis currently faced by many European countries whilst it might create opportunities for abuse of legal proceedings to the detriment of SMEs.</p> <p>The Administration's response –</p> <p>(a) overseas experience suggested that competition law could benefit the overall economy. Over 100 countries, including many of Hong Kong's trading partners, already had competition laws in place; and</p> <p>(b) the Administration would soon announce the new proposals which would help enhance clarity of the law and address SMEs' concerns.</p> <p>Discussion on whether individuals could apply for legal aid to institute legal actions against anti-competitive conduct and if so, the impact on SMEs' compliance costs.</p> <p>The Administration's response –</p> <p>(a) it would provide information regarding whether individuals/SMEs could apply for legal aid to institute legal actions against anti-competitive conduct or defend themselves against allegations of such conduct;</p> <p>(b) individuals could make a claim in respect of contravention under the Bill either indirectly through lodging a complaint to the Commission, or directly by bringing private actions; and</p> <p>(c) the right of representative action was not provided under the Bill.</p>	The Administration to provide information as requested in paragraph 5(b).
004553 – 005327	Chairman Ms Miriam LAU Administration	<p>Ms Miriam LAU's emphasis on the need to address in a positive and timely manner SMEs' concerns about the Bill, in particular those about compliance costs, to effectively take forward the Bill.</p> <p>The Administration's response was that to address SMEs' concerns, the new proposals to be announced in the fourth quarter of 2011 would cover, inter alia, clarity of the law and the "de minimis" arrangements.</p>	The Administration to provide information as

Time marker	Speaker	Subject(s)	Action required
			requested in paragraph 5(c).
005328 – 005856	Chairman Mr Albert HO Administration	<p>Mr Albert HO's views –</p> <ul style="list-style-type: none"> (a) it was inevitable that costs would be incurred for complying with different new laws introduced from time to time for the benefit of the society; (b) the costs of complying with the enacted Bill would, however, not be high because the Commission, trade associations and professional bodies would contribute to help stakeholders understand the Bill; (c) there was great difficulty in working out the costs of complying with the Bill because they would vary widely from one case to another; (d) the concern about the potential abuse of legal proceedings arising from Bill was unwarranted because there was great difficulty in securing legal aid for instituting legal actions against anti-competitive conduct, and in lodging a judicial review; and (e) there was a need for the Bill to set out details of the "de minimis" arrangements. 	
005857 – 010048	Chairman Mrs Regina IP Mr WONG Ting-kwong	<p>Mr WONG Ting-kwong's view/concern –</p> <ul style="list-style-type: none"> (a) the Bill might lead to abuse of the process of the court; and (b) the Bill should set out relevant "de minimis" arrangements. 	
010049 – 010511	Chairman Ms Emily LAU Administration	<p>Ms Emily LAU's emphasis on the need to expedite scrutiny of the Bill by making active efforts to achieve consensus on major concerns early, so as to enable the resumption of the Second Reading debate on the Bill in March/April 2012 for its enactment within the current legislative term.</p> <p>The Administration confirmed its plan to press ahead with the enactment of the Bill within this legislative session.</p>	
010512 – 011236	Chairman ALA2 Ms Emily LAU Administration	<p>ALA2's drawing members' attention to the Administration's view in paragraph 15 of LC Paper No. CB(1)3079/10-11(03) –</p> <ul style="list-style-type: none"> (a) the suggestion of creating a statutory obligation upon the Commission to inform all who made representations on an application for decision was unnecessarily burdensome; and (b) it was appropriate to retain the current arrangements 	

Time marker	Speaker	Subject(s)	Action required
		<p>proposed under clauses 11 and 34, namely, that the Commission would make the register of decisions and block exemption orders available for inspection by any person at the offices of the Commission during ordinary business hours and in any other manner it considered appropriate.</p> <p>ALA2's suggestion for members' consideration about the need to more clearly specify the time and manner in which the register should be made available, having regard to the requirement that an application for the review of a reviewable determination had to be made within 30 days after the day on which the determination was made.</p> <p>Discussion on the adequacy of the above arrangement, and the Administration's response –</p> <ul style="list-style-type: none"> (a) this was only the minimum requirement and the Commission as a statutory body would discharge its functions in a reasonable and transparent manner; (b) the Commission should be given flexibility to decide on the exact manner of discharging its duties in respect of publication of decisions administratively; and (c) interested parties would also likely follow the Commission's work closely. <p>Ms Emily LAU's and the Chairman's view that the Commission should publicize its new developments, such as its latest decisions, on its website in a timely manner.</p>	
011237 – 012047	Chairman Mrs Regina IP Administration	<p>Mrs Regina IP's referral to the Administration's paper on Guidelines on the Second Conduct Rule (LC Paper No. CB(1)2618/10-11(01)), and enquiry on whether the Bill could help tackle such abuse of market power as that in Tin Shui Wai, where the Link REIT managed seven out of the eight markets there by, resulting in exceptionally high rents of stalls and hence high prices of goods.</p> <p>The Administration's response was that more in-depth analysis on the above quoted situation would be required to ascertain the causes attributable to the market situation, which might include the imbalance in supply and demand, presence of any exclusionary behaviour of market players, entry barriers, or a combination of these. The future Commission would have the investigative powers to gather information and look into these issues.</p>	
<i>Break from 012048 to 013312</i>			
<i>Clause-by-clause examination of the Bill</i>			
013313 – 013616	Chairman Administration	<u>Examination of clause 15 – Block exemption orders</u>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration's explanation in response to the Chairman was that block exemption orders issued by overseas competition authorities mainly covered research and development agreements, vertical agreements, technology transfer agreements, liner shipping agreements, etc.</p>	
013617 – 014432	<p>Chairman Mr CHAN Kam-lam Administration Ms Emily LAU</p>	<p>The Administration's reply to Mr CHAN Kam-lam's enquiries –</p> <ul style="list-style-type: none"> (a) the Commission might, either of its own volition or on application by an undertaking or an association of undertakings, issue a block exemption order; and (b) an excluded agreement should be an agreement excluded as a result of section 1 of Schedule 1, namely, that it was an agreement enhancing overall economic efficiency. <p>The Administration's explanation was that according to overseas experience, certain liner shipping agreements, which in the view of Mr CHAN and the Chairman might involve price fixing and hence lessen competition, would be exempted on the grounds of enhancing overall economic efficiency. In addition, the requirement to review block exemption orders could ensure that block exemption would remain justified having regard to the prevailing circumstances.</p> <p>The Chairman's view on the need to provide a channel for handling objections to the issue of a block exemption order for an agreement.</p> <p>The Administration's explanation was that such a need could be met by clause 16, which required the Commission to publish notice of the proposed block exemption order to bring it to the attention of those likely to be affected, and to consider representations about the proposed order.</p> <p>The Administration's explanation in response to the Chairman was that a party aggrieved by an exemption order could seek judicial review, and the Chairman's view that as judicial review would usually incur high legal costs, requests for review and revocation of block exemption orders should be made through a simple procedure, such as by filing an application to the Tribunal.</p>	
014433 – 014603	<p>Chairman Ms Emily LAU Administration</p>	<p>Ms Emily LAU's view on the need for the Administration to provide examples of block exemption orders issued by overseas competition authorities, such as in European Union, the United Kingdom, Singapore, etc.</p> <p>The Administration's undertaking to, in conjunction with ALA2, examine and provide a paper on how requests for</p>	<p>The Administration to provide information as requested in paragraphs 5(d) and (e).</p>

Time marker	Speaker	Subject(s)	Action required
		review and revocation of block exemption orders could be made through a simple procedure.	
014604 – 015037	Chairman Mr Ronny TONG Administration Ms Emily LAU	<p>The Administration's reply to Mr Ronny TONG's enquiries –</p> <ul style="list-style-type: none"> (a) members' concerns about block exemption orders could be addressed, to a certain extent, by clauses 19 and 20 regarding review, and variation or revocation, respectively, of block exemption orders; (b) vertical agreements were in most countries covered by block exemption orders; and (c) the Administration would appoint suitable members to the Commission and provide it with adequate resources for its effective operation to help establish its credibility. <p>The Chairman's view that in recognition of SMEs' concern that the first conduct rule as currently drafted might cover vertical agreements, the Administration should ensure that the Commission would, upon its establishment, issue a block exemption order for vertical agreements upfront, and would revoke the order only after it had conducted a study in this regard.</p> <p>The Administration agreed to report back on the Chairman's proposal.</p>	The Administration to provide information as requested in paragraph 5(f).
015038 – 015552	Chairman Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM's call upon the Administration to, as in Singapore, set out in the Bill that block exemption would be granted to vertical agreements under certain circumstances.</p> <p>The Administration's response was that under a phased approach to implementing the Bill, the general prohibitions would come into force after the Commission published the relevant regulatory guidelines during the transitional period, allowing the community to familiarise with the requirements of the law. It would also be more desirable to allow the Commission time, after the enactment of the Bill, to study the local market circumstances and consult the relevant sectors before deciding on whether to grant block exemption to certain vertical agreements.</p> <p>Mr LAM's view that special treatment should be given to vertical agreements that apparently enhanced overall economic efficiency.</p> <p>The Administration's response –</p> <ul style="list-style-type: none"> (a) Singapore was the only jurisdiction that exempted vertical agreements outright from the competition 	

Time marker	Speaker	Subject(s)	Action required
		<p>law;</p> <p>(b) other major competition regimes such as the EU and UK granted exemption to specified categories of vertical agreements through block exemption orders; and</p> <p>(c) it was more appropriate for Hong Kong to follow the international best practices of considering the need for block exemption to vertical agreements after the implementation of the competition law.</p> <p>The Chairman's view that his above proposal to issue a block exemption order for vertical agreements upfront might help strike a balance.</p> <p>Mr LAM's view that Hong Kong should make reference to jurisdictions which were similar to Hong Kong, such as Singapore, instead of to other overseas jurisdictions.</p>	
015553 – 015854	Chairman Mr CHAN Kam-lam Administration	<p><u>Examination of clause 16 – Procedures regarding block exemption orders</u></p> <p>Mr CHAN Kam-lam's view that block exemption orders could not help address SMEs' concerns about the Bill because of the difficulty in meeting the relevant criteria set out in Schedule 1.</p> <p>The Administration's response –</p> <p>(a) under clause 16, the attention of those likely to be affected would be brought to the proposed block exemption order whether it be issued of the Commission's own volition or on application by an undertaking; and</p> <p>(b) the Commission would consider any representations about the proposed order that were made to it.</p>	
015855 – 020237	Chairman Administration	<p><u>Examination of clauses 17 to 19</u></p>	
020238 – 022046	Chairman Ms Emily LAU Administration Mr James TO Mr LEUNG Kwok-hung	<p><u>Examination of clause 20 – Variation or revocation of block exemption order</u></p> <p>The view of Ms Emily LAU, Mr James TO and Mr LEUNG Kwok-hung –</p> <p>(a) the register of decisions and block exemption orders should be made available round the clock in ways which could advance with time and technology; and</p> <p>(b) thus, the Bill should require the register to be accessible on the Internet, rather than "at the offices</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>of the Commission during ordinary business hours" as stated in clause 34(3).</p> <p>The Administration's explanation –</p> <p>(a) in order to provide the Commission with the flexibility to keep up with the latest technological developments, it would be appropriate to allow the Commission to maintain the register "in any manner it considers appropriate" as provided in clause 34(3);</p> <p>(b) the Commission should be entrusted to perform its statutory role with reasonableness and necessary flexibility; and</p> <p>(c) the Internet technology might become obsolete one day.</p> <p>Mr LEUNG's view that, to preserve the required flexibility as claimed above, clause 34 might instead specify the need to make use of the latest technology.</p> <p>In response to Ms LAU's enquiry, the Administration explained that its policy intention was that the Commission should make use of the latest technology available, in particular the Internet, to maintain the register to ensure its user-friendliness and transparency.</p> <p>The Chairman's view that instead of specifying the use of the Internet in the Bill, it might suffice for the Administration to include a paragraph in the paper which it would provide for the next meeting of the Bills Committee to confirm the above policy intention.</p>	<p>The Administration to provide information as requested in paragraph 5(g)(i).</p> <p>The Administration to provide information as requested in paragraph 5(g)(ii).</p>
022047 – 024600	<p>Chairman ALA2 Administration Mr CHAN Kam-lam Mr Ronny TONG</p>	<p><u>Examination of clause 21 – Abuse of market power</u></p> <p>ALA2's recapitulation of his comments on clause 21 (LC Paper No. CB(1)320/10-11(03)), namely, the adoption of the test of "substantial degree of market power" vis-à-vis the test of "dominant position" and stating in the Bill some of the relevant matters to be taken into account in considering whether an undertaking had a substantial degree of market power.</p> <p>Administration's explanation that to constitute "dominant position", the market share of the undertaking concerned would need to exceed a set percentage, which in overseas jurisdictions was mostly 50% to 60% and even 70%. However, in a small economy in Hong Kong, the conduct of a firm with a significant market share, albeit short of the 50% presumption for "dominance", could have a major effect on competition. The Administration therefore considered the appropriate threshold for Hong Kong</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>should be "substantial degree of market power".</p> <p>Chairman's concern/proposal –</p> <p>(a) if the widely used term "dominant position" was not adopted in the Bill, there might be difficulty in identifying overseas case law from which Hong Kong could draw reference when implementing the Bill; and</p> <p>(b) when deciding whether an undertaking had a "dominant position", a lower threshold, such as a market share of, say, 40%, should be adopted and regard should be given to other relevant factors as well.</p> <p>The Administration's explanation was that in deciding whether there was "dominant position", the Tribunal would make reference to overseas case law where the threshold was high and might not be appropriate in the Hong Kong context.</p> <p>The Chairman's and Mr CHAN Kam-lam's view on the need for the Administration to seriously consider adopting the more clearly defined and widely used concept of "dominant position" in response to the views of major stakeholders and The Law Society of Hong Kong.</p> <p>The Administration's response was that the "de minimis" arrangements, to be set out under the new proposals, would help provide more certainty to businesses and address SMEs' concerns over the adoption of the threshold "substantial degree of market power".</p> <p>Mr CHAN's view on the need to clearly set out the criteria for determining whether a conduct might constitute abuse of market power by involving "predatory behaviour towards competitors" or "limiting production, markets or technical development to the prejudice of consumers".</p> <p>Mr TONG's view that to address SMEs' concerns about adoption of the concept "substantial degree of market power", so as to expedite scrutiny of the Bill, it might be advisable to clearly set out in the Bill the criteria for assessing whether an undertaking had a substantial degree of market power.</p>	<p>The Administration to provide information as requested in paragraph 5(h)(i).</p> <p>The Administration to provide information as requested in paragraph 5(h)(ii).</p>