

立法會
Legislative Council

LC Paper No. CB(1)920/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of the twenty-third meeting held on
Tuesday, 8 November 2011, 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)
Hon Albert HO Chun-yan Ir
Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yee, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon 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
Hon Starry LEE Wai-king, JP
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Hak-kan
Hon Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
Hon WONG Kwok-kin, BBS
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Tanya CHAN

Hon WONG Yuk-man

Members absent : Hon LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Dr Hon Margaret NG
Dr Hon LEUNG Ka-lau
Hon Mrs Regina IP LAU Suk-yea, GBS, JP
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

Ms Michelle NIEN
Legislative Assistant (1)6

Action

I Confirmation of minutes

(LC Paper No. CB(1)178/11-12 — Minutes of meeting held on 20 July 2011)

The minutes of the meeting held on 20 July 2011 were confirmed.

II Meeting with the Administration

(LC Paper No. CB(1)257/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 11 October 2011

LC Paper No. CB(1)257/11-12(02) — Administration's response to CB(1)257/11-12(01)

LC Paper No. CB(1)257/11-12(03) — List of follow-up actions arising from the discussion at the meeting on 25 October 2011

LC Paper No. CB(1)91/11-12(01) — Administration's paper on responses to concerns on the Competition Bill

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)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)

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

3. Members expressed concerns about the cases recently reported in the

press on small retailers being allegedly forced to sell goods (such as soft drinks and instant noodles) at the retail prices suggested by the suppliers concerned, and urged the Administration to draw reference from case law in overseas jurisdictions to explain whether and if so, which provisions of the Bill could help prevent similar cases. Members also raised a number of hypothetical cases for comments as to whether they constituted anti-competitive acts. The Administration responded that whether the alleged act would constitute contravention would depend on the facts and circumstances of each case, in particular whether the suggested price was obligatory or optional, and whether there would be consequences for non-compliance.

4. Highlighting small and medium enterprises (SMEs)' concerns about the Bill, in particular the uncertainties mentioned above, Mr Jeffrey LAM urged the Administration to drop the concept of "abuse of market power" from the Bill. In response, the Administration emphasized that the recent proposal to adopt HK\$ 11 million, being the average annual business turnover of SMEs, as the threshold for exclusion from the application of the second conduct rule under the proposed de minimis arrangements would help address SMEs' concerns.

5. Many members considered the above proposed de minimis threshold too low and made various suggestions to adjust it upwards. Noting the suggestions, Mr Ronny TONG cautioned that relying heavily on the financial capability of an undertaking for the purpose of determining whether the undertaking had a substantial degree of market power might weaken the power of the Bill in deterring anti-competitive acts committed by SMEs seeking to enlarge their market shares in an emerging market or a geographic market. The Chairman, Ms Miriam LAU and Mr Jeffrey LAM, however, emphasized that the Bill should target at large enterprises only.

Clause-by-clause examination of the Bill

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| (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))

6. The Bills Committee examined clauses 21 to 33 of the Bill.

Follow-up actions required of the Administration

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

- (a) provide a paper, with reference to case law in overseas jurisdictions, to explain whether any provisions in the Bill could help prevent cases recently reported in the press on small retailers being allegedly forced to sell goods (such as soft drinks and instant noodles) at the retail prices suggested by the suppliers concerned;
- (b) study whether in overseas jurisdictions, in particular Singapore, the United Kingdom and the European Union, the issuance, variation or revocation of block exemption orders were subject to review, as proposed in paragraph 2 of the Administration's responses to follow-up questions arising from the meeting on 11 October 2011 (LC Paper No. CB(1)257/11-12(02));
- (c) consider the following improvements proposed by some members to address the concerns of small and medium enterprises (SMEs) about being unjustifiably regarded as having a "substantial degree of market power" under clause 21 –
 - (i) stating a specific percentage, say 30%, of market share as one of the criteria for assessing whether an undertaking had a substantial degree of market power. Alternatively, the Secretary for Commerce and Economic Development might highlight the said percentage in his speech during the Second Reading debate on the Bill;
 - (ii) adjusting upwards the recently proposed threshold of

HK\$11 million for exclusion from the application of the second conduct rule under the proposed de minimis arrangements; and

- (iii) adopting as the exclusion threshold, as SMEs proposed, the financial criteria for a company to list in the Hong Kong Stock Exchange, i.e. having a revenue of at least HK\$500 million for the most recent audited financial year, or profits of at least HK\$20 million recorded in the most recent year;
- (d) in considering the improvements proposed in paragraph (c) above, the Administration should –
- (i) address the concern that the improvements proposed in paragraphs (c)(ii) and (c)(iii) above might weaken the power of the Bill in deterring anti-competitive acts committed by SMEs to enlarge their market shares in an emerging market or a geographic market, and give examples to illustrate such acts; and
 - (ii) give the reasons if the Administration did not consider the improvement proposed in paragraph (c)(iii) above preferable;
- (e) provide case law in overseas jurisdictions on agreements or conduct that would be exempted on public policy grounds under provisions similar to clause 31, and on general exclusions from the conduct rules as a result of provisions similar to Schedule 1;

Drafting issues

- (f) consider moving amendments to the following clauses to ensure consistency in the drafting of similar provisions –
- (i) clauses 7 and 22, by introducing to clause 22 similar Committee Stage amendments which the Administration had earlier undertaken to introduce to clause 7;
 - (ii) the Chinese text of clauses 12(2) and 27(2);
 - (iii) the Chinese text of clauses 14(2) and 29(2); and
 - (iv) the Chinese text of clauses 14(7) and 29(7);

- (g) amend the Chinese text of clause 33(2) to reflect the phrase "by resolution passed" in the English text of this clause with reference to the Chinese text of section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) and section 10(2) of Schedule 7 to the Bill; and
- (h) amend the phrase "在立法會下一屆會期" in the Chinese text of clauses 33(3) and 33(5) to "在立法會下一會期".

8. The Chairman reminded members that the next meeting of the Bills Committee would be held on 15 November 2011 at 2:30 pm to receive public views on the Administration's recently proposed amendments to the Bill.

III Any other business

9. There being no other business, the meeting ended at 7:25 pm.

Council Business Division 1
Legislative Council Secretariat
30 January 2012

**Proceedings of the twenty-third meeting of
the Bills Committee on Competition Bill
on Tuesday, 8 November 2011, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

| Time marker | Speaker | Subject(s) | Action required |
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| Agenda Item I – Confirmation of minutes | | | |
| 000600 – 000635 | Chairman | Confirmation of minutes of meeting on 20 July 2011 (LC Paper No. CB(1)178/11-12) | |
| Agenda Item II – Meeting with the Administration | | | |
| 000636 – 001109 | Chairman Administration | Briefing by the Administration on its response to the list of follow-up actions arising from the discussion at the meeting on 11 October 2011 (LC Paper No. CB(1)257/11-12(02)) | |
| <i>Discussion on the Administration's response to the list of follow-up actions arising from the discussion at the meeting on 11 October 2011 (LC Paper No. CB(1)257/11-12(02))</i> | | | |
| 001110 – 002104 | Chairman Ms Miriam LAU Administration | <p>The Administration's response to Ms Miriam LAU that whether an act would constitute a contravention of the Bill would be determined on the relevant facts and circumstances of each case as follows –</p> <p>(a) where the supplier had suggested the retail price without imposing any conditions, the price recommendation might not constitute a contravention of the Competition Ordinance; and</p> <p>(b) where the supplier suspended or delayed supply of goods to those retailers who did not sell his goods at the suggested retail price, or coerced the retailers to follow the recommended price by threatening refusal to supply, the supplier's conduct might contravene the first or the second Conduct Rule depending on the extent of restrictions and the market power of the supplier concerned.</p> <p>Chairman's and Ms Miriam LAU's view on the need for the Administration to provide a paper, with reference to case law in overseas jurisdictions, to explain whether and if so, which provisions of the Bill, could help prevent the above cases as well as cases recently reported in the press on small retailers being allegedly forced to sell goods (such as soft drinks and instant noodles) ("the recently reported cases") at the retail prices suggested by the suppliers concerned.</p> <p>The Administration advised that if the complaint was substantiated, the Competition Policy Advisory Group could only, under the current administrative regime, urge</p> | The Administration to provide information as requested in paragraph 7(a) |

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| | | the suppliers in question to comply with the competition principles voluntarily by halting the allegedly anti-competitive conduct. | |
| 002105 – 002631 | Chairman Ms Emily LAU Administration | <p>Ms Emily LAU's views on the need to protect consumers by effectively tackling the cases highlighted above, and to clearly explain the types of vertical agreements that might be eligible for block exemption orders.</p> <p>The Administration responded that it would be more appropriate for the future Competition Commission (Commission) to consider whether block exemption orders should be issued for a particular category of vertical agreements in Hong Kong having regard to the local circumstances and the views of the stakeholders after the enactment of the Bill.</p> | |
| 002632 – 003304 | Chairman Mr WONG Yuk-man Administration | <p>Mr WONG Yuk-man's comments on the Administration's earlier reply to questions raised by The Lion Rock Institute (Appendix B to LC Paper No. CB(1)257/11-12(02)) –</p> <ul style="list-style-type: none"> (a) it was undesirable for the Government to spend \$12.8 million to engage an external consultant to provide advice on issues relating to the implementation of competition law in Hong Kong considering that the Consumer Council (CC) had already conducted a similar study before, and that the Bill might be substantially revised after public consultation; (b) the Administration's failure to estimate the total number of man hours that had been devoted to the proposed introduction of the Bill and the number of staff from the Commerce and Economic Development Bureau (CEDB) that currently had responsibilities for this matter was not conducive to compliance with the value-for-money audit; (c) CEDB's response to question 6 of the Institute was commendable; (d) the resources for establishing the Commission and the Competition Tribunal (the Tribunal) should be suitably increased in response to CC's view that, since the Commission would become the sole channel for redress of consumer grievances against anti-competitive behaviour after the removal of the stand-alone right of private action from the Bill, the Commission should be sufficiently funded to enforce the enacted Competition Ordinance; and (e) it was questionable why the funding earmarked for the establishment and initial operation of the Commission and of the Tribunal, at \$45.23 million and \$10 million respectively, were lower than the | |

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| | | <p>relevant estimates, at \$67 million and \$15 million respectively.</p> <p>The Administration's response –</p> <ul style="list-style-type: none"> (a) a consultancy firm with legal professionals and economic experts was engaged to offer advice on the competition law, including case law and experience of overseas competition jurisdictions, in order to facilitate the drafting of the Bill that would suit the local circumstances; (b) besides working on the Bill, staff of CEDB and the Department of Justice had other responsibilities and none of them was working solely on the Bill. Hence, it would be difficult to work out the number of staff/manpower dedicated to the Bill; and (c) the \$45.23 million and \$10 million quoted in (e) above were only the initial set-up costs. The full-year operating costs should be \$67 million and \$15 million for the Commission and for the Tribunal respectively during the transitional period. Thereafter the operating costs would be adjusted in light of the workload arising from the enforcement of the law. The Administration would ensure sufficient resources for the two organizations to perform their functions. | |
| 003305 – 003828 | Chairman Mr Jeffrey LAM Administration | <p>Mr Jeffrey LAM's views on the need to –</p> <ul style="list-style-type: none"> (a) use examples to illustrate what would constitute anti-competitive acts under the Bill, instead of deferring to the future Commission to draw up regulatory guidelines on the interpretation and implementation of the conduct rules during the transitional period; and (b) explain whether the recently reported cases would contravene the enacted Competition Ordinance, considering that consumers still had a wide range of other beverages at different prices to choose from apart from those involved in the said cases. <p>The Administration's response –</p> <ul style="list-style-type: none"> (a) if a retailer enjoying a certain market share threatened to penalize a supplier for supplying goods to the retailer's competitors below a certain price, the conduct might constitute abuse of market power in contravention of the second conduct rule; (b) the vertical agreement whereby a supplier compelled all retailers to sell his goods at the same price might | |

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| | | <p>contravene the first conduct rule because it had the object and effect of fixing the price; and</p> <p>(c) if a supplier only suggested the retail prices for reference and retailers were not obliged to sell his goods at the suggested prices, and there would not be any consequence for non-compliance, then the case might not, according to overseas case law, constitute an anti-competitive act.</p> | |
| 003829 – 004346 | Chairman Mr CHAN Kam-lam Administration | <p>Mr CHAN Kam-lam's enquiries –</p> <p>(a) whether the Bill could prevent a manufacturer from fixing the prices of his products, so that the retailers concerned could not sell the products at lower prices;</p> <p>(b) what action(s) other than issuing a warning notice could be taken if the retailer in the case quoted by the Administration in (a) above would not stop the act concerned; and</p> <p>(c) whether the Bill could handle the recently reported cases.</p> <p>The Administration's response –</p> <p>(a) if the retail prices were fixed or suggested for reference only and the retailers concerned were not obliged to sell the goods at the suggested prices, and there would not be any consequence for non-compliance, then such cases might not constitute anti-competitive acts; and</p> <p>(b) if there were consequences for not complying with the fixed or suggested prices, such as suspension or delay of supply, or limiting supply, the party who fixed or suggested the prices might have committed an anti-competitive act be he the manufacturer or the distributor.</p> | |
| 004347 – 004807 | Chairman Mr LEUNG Kwok-hung Administration | <p>Mr LEUNG Kwok-hung's questions/concern –</p> <p>(a) whether consumers could lodge complaints to the Commission in the cases highlighted by the Administration in (b) above; and</p> <p>(b) lower prices might deliberately be offered to benefit consumers for the purpose of eradicating competition to pave way for significant price increase in future.</p> <p>The Administration's response –</p> <p>(a) consumers could lodge complaints to the Commission in the cases highlighted in (a) above; and</p> | |

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| | | (b) the predatory behaviour towards competitors described in (b) above might constitute an abuse of market power under the second conduct rule. | |
| 004808 – 005839 | Chairman Mr WONG Ting-kwong Administration | <p>Mr WONG Ting-kwong's enquiry of whether the following practices would constitute anti-competitive acts and if so, how they could be handled –</p> <ul style="list-style-type: none"> (a) the existing practices of fixing or suggesting the retail prices of books and alcoholic drinks; (b) the membership scheme; and (c) the refusal of a telecommunications operator, who was also the sole supplier of a certain popular mobile phone model, to supply that phone model to consumers unless they used his service. <p>The Administration's explanation –</p> <ul style="list-style-type: none"> (a) if the retailers concerned were free to decide whether to sell the products concerned at the suggested prices, and that there would not be any consequences for non-compliance, price recommendation per se would not be regarded as anti-competitive; (b) the membership scheme would not raise serious competition concerns if the barriers to entry to the relevant market was low and the market power possessed by the undertaking concerned was not substantial; and (c) whether the practice of the telecommunications operator in (c) above would be regarded as anti-competitive would hinge on whether the mobile phone model concerned was unique and had close substitutes, such that the product would form a market on its own. A market study was required to ascertain the market power of the operator concerned before determining whether the alleged conduct constituted an abuse of the market power. | |
| 005840 – 010535 | Chairman Mr Albert HO Administration | <p>Mr Albert HO's enquiry/concern –</p> <ul style="list-style-type: none"> (a) how the Bill could regulate anti-competitive business conducts engaged by an undertaking which was outside Hong Kong (clause 23); and (b) the lack of criteria for issue of block exemption orders. <p>The Administration's response –</p> <ul style="list-style-type: none"> (a) enforcement actions could be taken against the | |

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| | | <p>subsidiary companies or agents of the overseas undertaking concerned. In fact, in the case where the undertaking was the manufacturer, his local distributors might by the object or effect of preventing, restricting or distorting competition become the contravening party under the Bill; and</p> <p>(b) as specified in clauses 15(1) and 15(5), the criteria for the issue of block exemption orders could be found in Schedule 1.</p> | |
| 010536 – 010855 | Chairman Mr CHAN Kin-por Administration | <p>Mr CHAN Kin-por's enquiry about –</p> <p>(a) whether the provision of a breakdown by sector of insurance claims by the Hong Kong Insurance Practitioners General Union for its members' reference would constitute an anti-competitive act; and</p> <p>(b) whether the Employees' Compensation Insurance Residual Scheme, launched to enable employers of people in high-risk occupations such as scaffolding, to obtain Employees' Compensation Insurance cover with the relevant set of premium benchmark rates worked out for the purpose would contravene the enacted Competition Ordinance for fixing the premium rates concerned.</p> <p>The Administration's response –</p> <p>(a) the case in (a) above would not constitute an anti-competitive act if the information exchanged was sufficiently historical and aggregate; and</p> <p>(b) the case in (b) above might meet certain criteria for the issue of block exemption orders because the agreement concerned was made to provide an essential service to a certain category of people. If the undertaking(s) concerned were uncertain whether the above scheme could meet the criteria, they might apply to the Commission upon its establishment for a decision concerning the exemption.</p> | |
| 010856 – 011955 | Chairman Ms Miriam LAU Administration | <p>Ms Miriam LAU's query of the Administration's proposal to make the Commission's decisions relating to the issue, variation or revocation of block exemption orders one of the reviewable determinations by the Tribunal under clause 81 of the Bill, pointing out that the Commission should have previously examined all factors concerned and that the proposal might give rise to abuse, especially as any person who had a sufficient interest in the determination might apply to the Tribunal for a review under clause 82.</p> <p>The Administration's explanation –</p> | |

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| | | <p>(a) the above proposal had been made in response to Members' suggestion of a formal review process in respect of the Commission's determinations relating to block exemption orders, considering that the orders usually applied to a category of agreements carrying wide implications; and</p> <p>(b) while a party aggrieved by an exemption order might seek a judicial review of the decision, it might provide more certainty to the undertakings if the Bill provided a formal review process.</p> <p>Chairman's view that the above review proposal could in fact strike a balance because the Tribunal could review not only a determination of the Commission to issue an exemption order but also its determination not to issue or vary or revoke the order.</p> <p>The Administration agreed to study and report back on whether in overseas jurisdictions, in particular Singapore, the United Kingdom and the European Union (EU), the issue, variation or revocation of block exemption orders were subject to review, as proposed above.</p> | <p>The Administration to provide information as requested in paragraph 7(b)</p> |
| Break from 011956 to 012730 | | | |
| Clause-by-clause examination of the Bill | | | |
| 012731 – 012910 | Chairman Administration Mr Jeffrey LAM | <p><u>Examination of clause 21 – Abuse of market power</u></p> <p>Mr Jeffrey LAM reiterated the concerns of small and medium enterprises (SMEs) about the adoption of the test of "substantial degree of market power" vis-à-vis the test of "dominant position", and stressed the need to clearly explain the criteria for assessing whether an undertaking had a substantial degree of market power.</p> <p>The Administration's explanation –</p> <p>(a) market share was only one of the factors to be considered when assessing the degree of market power. The analysis concerned would focus on market power and how such ability was used profitably to sustain prices above competitive levels or to restrict output or quality below competitive levels by a firm;</p> <p>(b) to constitute "dominant position", overseas jurisprudence suggested that the undertaking should possess a market share of at least 50%. 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. A case in point was supermarkets as suggested by a survey conducted by</p> | |

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| | | <p>CC. The Administration therefore considered the appropriate threshold for Hong Kong should be "substantial degree of market power"; and</p> <p>(c) SMEs should not be concerned about the second conduct rule which deals with the abuse of a substantial degree of market power in a market. The de minimis arrangements also provided certainty to SMEs as to what conduct would be excluded from the application of the second conduct rule.</p> | |
| 012911 – 015346 | <p>Chairman Administration Ms Emily LAU Mr Jeffrey LAM Mr Ronny TONG Mr WONG Ting-kwong</p> | <p>Chairman's concern that 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.</p> <p>Chairman's, Ms Emily LAU's and Mr WONG Ting-kwong's suggestion that when deciding whether an undertaking had a "dominant position", a lower threshold, such as a market share of, say, 30%, could be adopted. Such a threshold would help enhance certainty to address SMEs' concerns about being unjustifiably regarded as having a "substantial degree of market power".</p> <p>The Administration reiterated its responses to Mr Jeffrey LAM in (b) and (c) above, and emphasized that –</p> <p>(a) the statement of a specific percentage of market share as one of the criteria for assessment of market power might not help because a SME could not ascertain its market share without in-depth assessment involving, above all, the definition of a market from which the market share of the SME was derived;</p> <p>(b) an indicative market share in the Bill might undermine the flexibility of the Commission, and restrict its ability to target at big companies which, albeit falling short of the statutory market share threshold, engaged in abusive conduct which prevented or restricted competition in the market; and</p> <p>(c) the Administration was open to suggestions to adjust the proposed de minimis threshold provided that the overall effectiveness of the Bill in tackling anti-competitive conduct was not undermined.</p> <p>The Chairman's and Mr WONG Ting-kwong's view that the above proposed exclusion threshold, considered too low by many members and SMEs because companies with such a small turnover were only "micro enterprises", would only give rise to SMEs' greater concerns.</p> <p>The Chairman's views –</p> | |

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| | | <p>(a) in overseas jurisdictions, regard would be given to factors other than the market share percentage when assessing whether an undertaking had a substantial degree of market power; and</p> <p>(b) instead of specifying the percentage in the Bill, the Secretary for Commerce and Economic Development might consider highlighting the said percentage in his speech during the Second Reading debate on the Bill.</p> <p>Ms Emily LAU's view that, to expedite scrutiny of the Bill, deputations' views on the exclusion threshold should be solicited at the meeting of the Bills Committee scheduled for 15 November 2011 to receive public views.</p> <p>The Administration's agreement to provide responses to the various suggestions made by Members above.</p> | <p>The Administration to provide information as requested in paragraphs 7(c)(i) and 7(c)(ii)</p> |
| 015347 – 015638 | Chairman Ms Miriam LAU Administration | <p>Ms Miriam LAU's indication of agreement with the Chairman's and Mr WONG Ting-kwong's above views on the proposed exclusion threshold, and her suggestion to adopt instead, as SMEs proposed, the financial criteria for a company to list in the Hong Kong Stock Exchange.</p> <p>The Administration's response –</p> <p>(a) the listing financial criteria, i.e. having a revenue of at least HK\$500 million for the most recent audited financial year, or profits of at least HK\$20 million recorded in the most recent year, might be too high and might undermine the overall effectiveness of the Bill in tackling anti-competitive act committed by undertakings capable of appreciably affecting competition in a market;</p> <p>(b) the Administration would consider views on the de minimis threshold and provide a paper to explain how the Administration had worked out the threshold, including the methodology of the Census and Statistics Department in compiling the statistics from which the average annual business turnover of SMEs from 2005 to 2009 at about HK\$ 11 million was derived; and</p> <p>(c) the Administration would provide a response to Ms Miriam LAU's proposal above and give the reasons if it did not consider the proposal preferable.</p> | <p>The Administration to provide information as</p> |

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| | | | requested in paragraphs 7(c)(iii) and 7(d)(ii) |
| 015639 – 020445 | Chairman Mr Ronny TONG Administration | <p>Mr Ronny TONG's views –</p> <p>(a) when considering the above proposed improvements, it should be noted that over-reliance on the financial capability of an undertaking in determining whether the undertaking had a substantial degree of market power might weaken the power of the Bill in deterring anti-competitive acts committed by SMEs to enlarge their market shares in an emerging market, or a geographic market like Tin Shui Wai; and</p> <p>(b) in recognition of members' diverse views on the Bill, it might be more advisable to leave it to individual members to introduce Committee Stage amendments (CSAs) to the Bill as they wished to facilitate enactment of the Bill within the 2011-2012 session, instead of trying to achieve a consensus by revisiting points already discussed repeatedly at previous meetings, or making further concessions lest the Bill would be rendered powerless.</p> <p>The Administration noted Mr Ronny TONG's view in (a) above, and explained that the de minimis threshold had been proposed to address some Members' concern about the lack of details of the de minimis arrangements in the Bill.</p> <p>Chairman's views –</p> <p>(a) the Bill should be targeted at large enterprises and not SMEs; and</p> <p>(b) the recently proposed new instrument of warning notice would enable the Commission to take swift action to halt non-hardcore activities while at the same time address the concern that businesses, particularly SMEs, might unknowingly engage in non-hardcore activities.</p> | The Administration to provide information as requested in paragraph 7(d)(i) |
| 020446 – 020958 | Chairman Mr Jeffrey LAM Administration | <p>Mr Jeffrey LAM's view –</p> <p>(a) the Bill should take out the concept of "abuse of market power" because, as evidenced by experience overseas, particularly in EU, there was difficulty in understanding what constituted abuse, especially as the examples given in clause 21(2)(b) were by no means exhaustive; and</p> <p>(b) it was unclear as to what "predatory behaviour towards competitors" in clause 21(2)(a) meant.</p> | |

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| | | <p>Such uncertainties had already caused SMEs grave concern.</p> <p>The Administration's explanation that –</p> <ul style="list-style-type: none"> (a) since competition law was principle-based and the Bill adopted the general prohibition approach, it was impossible to list out in the Bill all kinds of conduct that would be considered as anti-competitive; (b) clause 21(1) had already given a non-exhaustive list of conduct that might constitute "abuse"; (c) the concept of "abuse" of market power had been adopted by overseas competition jurisdictions for many years and was the crux of the second conduct rule under the Bill. The Bill would not be able to tackle anti-competitive conduct of an undertaking with a substantial degree of market power if the "abuse" concept was removed from the second conduct rule; and (d) SMEs would unlikely possess a substantial degree of market power within the meaning of the second conduct rule while large enterprises would have the experience of complying with competition laws overseas and the means to understand the requirements of the second conduct rule. | |
| 020959 – 021533 | Chairman Ms Miriam LAU Administration | <p>Ms Miriam LAU's views –</p> <ul style="list-style-type: none"> (a) there was a need to thoroughly discuss the Bill to address SMEs' concerns about it to obviate the need to amend it when problems arose after its enactment; and (b) the Tin Shui Wai case quoted by Mr Ronny TONG above would cause SMEs to worry that the Bill was targeted at them instead of only large enterprises. <p>In response, the Administration said that whether Tin Shui Wai might constitute a geographic market in itself would need to be examined in greater detail, noting the availability of similar product from the vicinity such as Yuen Long. The Bill when enacted would empower the Commission to conduct an investigation into the matter.</p> | |
| 021534 – 022329 | Chairman Mr LEUNG Kwok-hung Administration | <p>Mr LEUNG Kwok-hung's views that –</p> <ul style="list-style-type: none"> (a) the Tin Shui Wai case should be handled if the SME concerned aimed to increase the prices of goods/services after enlarging its market share by removing its competitor(s) from the market through predatory pricing. Hence, in determining whether | |

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| | | <p>the object and nature of an act was anti-competitive, there was a need to subject it to the test whether "consumers would not be worse off but would benefit at the end";</p> <p>(b) there was also a need to ensure the Commission would have sufficient resources to conduct the necessary investigations, and to impose fines on the undertaking concerned for compensating its competitor(s) removed as a result of its anti-competitive act; and</p> <p>(c) to help address SMEs' concerns, consideration should be given not only to the turnover but also the market share of an undertaking when determining whether it had a substantial degree of market power .</p> <p>The Administration's explanation –</p> <p>(a) the Bill was set to tackle predatory behaviour towards competitors highlighted in (a) above;</p> <p>(b) the contravention of a competition rule would be subject to pecuniary penalties not exceeding 10% of the turnover of an undertaking; and</p> <p>(c) a person who had suffered loss or damage as a result of any act that had been determined to be a contravention of a conduct rule had a right of follow-on private action against the undertaking. The Tribunal might also make an order requiring a person to pay damages to any person who had suffered loss or damage as a result of the contravention.</p> <p>Mr LEUNG Kwok-hung's view that instead of requiring the person who suffered loss to institute legal actions at his own cost, a fund should be established to provide financial assistance for the person to take such actions.</p> | |
| 022330 – 022809 | Chairman Mr Jeffrey LAM Administration Assistant Legal Adviser 2 (ALA2) | <p>Mr Jeffrey LAM stressed that, in recognition of the controversies surrounding the Bill even before its enactment, there was a need to clarify such uncertainties as whether the selling of a product by different retailers at the same price would constitute price fixing, and whether the purchaser was abusing the market if he threatened not to buy a product unless there was discount.</p> <p>The Administration reiterated its response to Mr Jeffrey LAM earlier on the undesirability of removing the "abuse" concept from the Bill, and undertook to continue its dialogue with SMEs to help them understand the Bill.</p> <p>ALA2's view on the need to align clause 21(2)(b) with</p> | |

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| | | <p>clause 6(2)(b), and the Administration's explanation that since both clauses sought to give examples only and they were related to different conduct rules, their wording needed not be the same.</p> | |
| 022810 – 023340 | <p>Chairman Administration ALA2 Mr Jeffrey LAM</p> | <p><u>Examination of clauses 22 to 24</u></p> <p>The Administration's agreement in response to ALA2 to consider moving amendments to clauses 7 and 22, by introducing to clause 22 similar CSAs which the Administration had earlier undertaken to introduce to clause 7.</p> <p>Mr Jeffrey LAM expressed concern about whether the Commission would have sufficient resources to handle applications for decisions if, according to clause 24(1), all undertakings that had engaged in, was engaging in or was proposing to engage in certain conduct might apply to the Commission for a decision as to whether or not the conduct was excluded or exempt from the application of the second conduct rule, not to mention that the need to file such applications might affect the smooth operation of the undertakings concerned and in turn the economy.</p> <p>The Administration's response –</p> <p>(a) with the Commission's regulatory guidelines on the interpretation and implementation of the conduct rules and as case law built up, the need of undertakings to seek a decision from the Commission might diminish over time. The Administration would also ensure that the Commission would have sufficient resources to handle such applications; and</p> <p>(b) regulatory guidelines would be issued and educational programmes conducted to familiarize the public and the business sector with the Bill upon its enactment during the transitional period.</p> | <p>The Administration to take action as requested in paragraph 7(f)(i)</p> |
| 023341 – 023559 | <p>Chairman Ms Miriam LAU Administration</p> | <p>Ms Miriam LAU referred to a hypothetical case where there were only two restaurants in Tin Shui Wai, and one of them had caused the other restaurant to close down by selling similar goods at lower prices, and enquired whether the former would have inadvertently committed an anti-competitive act because, according to clause 22(2), an undertaking might be taken to have engaged in conduct that had as its object the prevention, restriction or distortion of competition even if that object could be ascertained only by inference.</p> <p>The Administration explained that the above conduct to compete purely in terms of price and quality were legitimate market competition even though the undertaking concerned allegedly had a 50% market share as described</p> | |

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| | | above. | |
| 023600 – 023719 | Chairman Ms Emily LAU Administration | <p>Ms Emily LAU's call upon the Administration to provide sufficient resources to the Commission to enable it to make the decisions under clause 24 efficiently to prevent backlog, and to suitably increase the rough full-year cost for operating the Commission at \$67 million in future.</p> <p>The Administration undertook to ensure the Commission would operate efficiently with adequate resources to handle applications for decisions, and explained that the \$67 million above was only the estimate for the initial stage and would be reviewed in light of the actual workload and operational experience.</p> | |
| 023720 – 023930 | Chairman Administration Ms Emily LAU | <p><u>Examination of clauses 25 to 26</u></p> <p>The Administration's confirmation in response to Ms Emily LAU that clause 34 would be amended as earlier undertaken to ensure the Commission would make use of the Internet and other appropriate means in publishing the decisions under clause 26.</p> | |
| 023931 – 024629 | Chairman Administration ALA2 | <p><u>Examination of clauses 27 to 30</u></p> <p>The Administration's confirmation in response to the Chairman that according to clause 29(6), if the Commission was satisfied that any information on which it based its decision was incomplete, false or misleading in a material particular, the date from which the rescission of decision took effect might be earlier than the date on which the rescission notice was given.</p> <p>The Administration's agreement in response to ALA2 to consider moving amendments to the following clauses to ensure consistency in the drafting of similar provisions –</p> <ul style="list-style-type: none"> (a) the Chinese text of clauses 12(2) and 27(2); (b) the Chinese text of clauses 14(2) and 29(2); and (c) the Chinese text of clauses 14(7) and 29(7). | The Administration to take action as requested in paragraphs 7(f)(ii) to 7(f)(iv) |
| 024630 – 025340 | Chairman Ms Miriam LAU Administration ALA2 | <p><u>Examination of Subdivision 2 – Exemptions from Conduct Rules (clauses 31 to 33)</u></p> <p>The Administration's clarification/response in reply to Ms Miriam LAU –</p> <ul style="list-style-type: none"> (a) agreements or conduct that would be exempted in overseas jurisdictions on public policy grounds under provisions similar to clause 31 were rare and mainly concerned national security or defence; and | |

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| | | <p>(b) the Administration would provide case law in overseas jurisdictions on agreements or conduct that would be exempted on public policy grounds under provisions similar to clause 31, and on general exclusions from the conduct rules as a result of provisions similar to Schedule 1.</p> <p>The Administration's undertaking to –</p> <p>(a) amend the Chinese text of clause 33(2) to reflect the phrase "by resolution passed" in the English text of this clause with reference to the Chinese text of section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) and section 10(2) of Schedule 7 to the Bill; and</p> <p>(b) amend the phrase "在立法會下一屆會期" in the Chinese text of clauses 33(3) and 33(5) to "在立法會下一會期".</p> | <p>The Administration to provide information as requested in paragraph 7(e)</p> <p>The Administration to take action as requested in paragraph 7(g)</p> <p>The Administration to take action as requested in paragraph 7(h)</p> |
| 025341 – 025444 | Chairman Clerk Administration | Meeting Arrangements | |