

立法會
Legislative Council

LC Paper No. CB(1)2156/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

**Minutes of the thirtieth meeting held on
Tuesday, 31 January 2012, at 2:30 pm
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 LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
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 Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
Dr Hon LEUNG Ka-lau
Hon WONG Kwok-kin, BBS
Hon Paul TSE Wai-chun, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Tanya CHAN
- Members absent** : Dr Hon Margaret NG
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP

Dr Hon Philip WONG Yu-hong, GBS
Hon Vincent FANG Kang, SBS, 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 CHAN Hak-kan
Hon Mrs Regina IP LAU Suk-yea, 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 : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Sarah YUEN
Senior Council Secretary (1)6

Action

I Confirmation of minutes

(LC Paper No. CB(1)920/11-12 — Minutes of meeting held on 8
November 2011)

The minutes of the meeting held on 8 November 2011 were confirmed.

II Meeting with the Administration

(LC Paper No. CB(1)518/11-12(02) — List of follow-up actions arising
from the discussion at the
meeting on 22 November 2011

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

LC Paper No. CB(1)922/11-12(01) — Administration's response to
follow-up questions arising from
the meetings on 22 November
2011 and 3 January 2012

LC Paper No. CB(1)922/11-12(02) — List of follow-up actions arising
from the discussion at the
meeting on 16 January 2012

LC Paper No. CB(1)320/10-11(02) — Administration's information
paper on overview of major
components of the Competition
Bill (paragraphs 34 to 39 on
enforcement)

LC Paper No. CB(1)389/11-12(02) — Administration's response to
CB(1)257/11-12(03) and
CB(1)389/11-12(01) (pages 4 and
5 of Appendix D)

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

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

Clause-by-clause examination of the Bill

- (LC Paper No. CB(1)643/11-12(03) — Marked-up copy of major amendments to parts 4 to 6 provided by the Administration
- LC Paper No. CB(3)885/09-10 — The Bill
- LC Paper No. CB(1)320/10-11(04) — Marked-up copy of the Bill prepared by the Legal Service Division
- LC Paper No. CB(1)320/10-11(03) — Assistant Legal Adviser's letter dated 26 October 2010 to the Administration (paragraph on Part 6)
- LC Paper No. CB(1)1034/10-11(05) — Administration's response to CB(1)320/10-11(03) (paragraph 14))

3. The Bills Committee examined clauses 92 to 103, Schedules 3 and 4, and clauses 162 to 174. Members noted that the Administration was still reviewing the activities of a large number of statutory bodies to be exempted from the Bill, and that the necessary amendments to provisions in Division 5 of Part 12 of the Bill, Schedules 8 and 9 (concerning consequential and related amendments, and transitional and savings provisions) arising from the implementation of the Communications Authority Ordinance were being worked out. The Bills Committee agreed that examination of clauses related to the list of exemptions and the clauses relating to the consequential amendments, etc. would continue when these were available.

Follow-up actions required of the Administration

Admin.

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

- (a) make all necessary consequential amendments to the Bill following the passage of the Communications Authority Bill;

Clause 94 – Order to pay costs of Commission investigation

- (b) amend the phrase "相等於該項調查的開支**或**附帶開支" in the Chinese text of clause 94(1) to "相等於該項調查的開支**及**附帶開支", so as to more accurately reflect the meaning of its English version "equal to the amount of the costs of **and** incidental to any

investigation";

Clause 99 – Disqualification order

- (c) amend clause 99(2)(b) to cover "provisional liquidator", so as to achieve consistency with the definition of "disqualification order" in clause 43(4) of the Companies Bill currently under scrutiny;

Clause 101 – Unfitness to be concerned in management of company

- (d) amend clause 101(2)(b) by adding "reasonable" before the word "steps" in the phrase "took no steps to prevent" contravention of a competition rule;
- (e) consider deleting clause 101(2)(c), and advise whether there was a similar provision in the Companies Ordinance (Cap. 32) and the Companies Bill;

Clause 166 – Service of documents other than on Commission

- (f) amend clause 166(1)(d)(ii) to achieve consistency with clauses 166(1)(b)(ii) and 166(1)(c)(ii);

Clause 167 – Certain indemnities of officers, employees or agents void

- (g) amend clause 167(1)(b)(ii) to cover offences under Division 4 of Part 12 (clauses 170 to 174);
- (h) amend the word "required" in clause 167(1)(b)(iii) to "ordered", in recognition that according to clause 91, payment of the pecuniary penalty concerned would be ordered by the Competition Tribunal;
- (i) change the word "secretary" in paragraph (a) of the definition of "officer" under clause 167(3) to "company secretary", so as to achieve consistency with the Companies Bill;

Clause 172 – Employees not to suffer termination etc. for assisting Commission

- (j) amend the phrase "可處第4級罰款或監禁3個月" in the Chinese text of clause 172(3) to "可處第4級罰款及監禁3個月", so as to more accurately reflect the meaning of its English version "liable to a fine at level 4 **and** to imprisonment for 3 months";

Clause 174 – Offences by bodies corporate and partners

- (k) change the word "secretary" in clause 174(1) to "company secretary", so as to achieve consistency with the Companies Bill; and

Schedule 3 – Orders that may be made by Tribunal in relation to contraventions of competition rules

- (l) amend the Chinese text of section 2(b), so as to more accurately reflect the meaning of its English version "registrable".

5. The Chairman reminded members that the next meeting of the Bills Committee would be held on 7 February 2012 from 2:30 pm to 5:30 pm. Noting that the list and consequential amendments highlighted in paragraph 3 above might not be ready beforehand, Ms Emily LAU proposed and members agreed that unless the Administration could provide the above information for discussion at the 7 February meeting, the 7 February meeting should be cancelled, and the Bills Committee should next meet on 14 February 2012 instead.

(Post-meeting note: The meeting on 7 February 2012 was subsequently cancelled.)

III Any other business

6. There being no other business, the meeting ended at 4:25 pm.

Council Business Division 1
Legislative Council Secretariat
12 June 2012

**Proceedings of the thirtieth meeting of
the Bills Committee on Competition Bill
on Tuesday, 31 January 2012, at 2:30 pm
in Conference Room 1 of the Legislative Council Complex**

| Time marker | Speaker | Subject(s) | Action required |
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| Agenda Item I – Confirmation of minutes | | | |
| 001207 – 001251 | Chairman | Opening remarks Confirmation of minutes of meeting on 8 November 2011 (LC Paper No. CB(1)920/11-12) | |
| Agenda Item II – Meeting with the Administration | | | |
| 001252 – 002020 | Chairman Administration | Briefing by the Administration on its response to follow-up questions arising from the meetings on 22 November 2011 and 3 January 2012 (LC Paper No. CB(1)922/11-12(01)) | |
| <i>Discussion on the Administration's response to follow-up questions arising from the meetings on 22 November 2011 and 3 January 2012 (LC Paper No. CB(1)922/11-12(01))</i> | | | |
| 002021 – 002859 | Chairman Assistant Legal Adviser 2 (ALA2) Administration Mr Ronny TONG | ALA2 drew members' attention to the following – (a) according to the new section 5(3)(a) of Schedule 1, the turnover period of an undertaking would be the financial year of the undertaking that ended in the preceding calendar year if the undertaking had a financial year. As such, if a contravening act was committed in November 2011 and the financial year of the undertaking was from April of a year to March of the following year, revenue of the undertaking during April 2009 to March 2010 (i.e. more than a year before) instead of a more recent period would be taken into account when calculating its turnover for de minimis arrangements under the second conduct rule. Notwithstanding, given the time gap so resulting, the above arrangement might have the merit of ensuring that the annual accounting of the undertaking would have completed at the time when its turnover was calculated; and (b) regarding the Administration's clarification that if a contravention straddled two financial years, 10% of the local turnover of each of the two financial years would be counted, there might be a need to consider that it might not be justified to count the turnover of two years for a contravention that lasted only a few months, and that if two undertakings with different financial years were involved, the turnover calculation of the two undertakings would be | |

| Time marker | Speaker | Subject(s) | Action required |
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| | | <p>different and this might not be desirable.</p> <p>The Administration explained that –</p> <p>(a) the de minimis arrangements were intended to provide certainty to undertakings, hence the determination of the relevant turnover period should also be of sufficient degree of certainty. The time gap highlighted in (a) above would be inevitable if certainty was to be achieved; and</p> <p>(b) despite the scenario in (b) above, it should be noted that the turnover so determined for the purpose of clause 91 would only serve as the cap of pecuniary penalty, which had already been lowered from 10% of the global turnover of every year of contravention to 10% of the local turnover for each year of infringement, up to a maximum of three years. According to experience in overseas jurisdictions, when determining the level of penalty, the authorities would first focus on the duration and seriousness of the contravention, and that the cap was only the last step in the penalty calculation to ensure that the proposed penalty would not exceed the ceiling set out in the legislation, thereby striking a balance between the deterrent effect of the penalty and the financial capability of the undertaking(s) concerned.</p> <p>Mr Ronny TONG enquired whether there had been cases where the penalty imposed had been doubled because of the counting of the turnover of two financial years as highlighted by ALA2 above, or that penalty calculation would be conducted as described by the Administration above.</p> <p>The Administration responded that –</p> <p>(a) the level of penalties determined by competition authorities in overseas case law seldom reached the cap;</p> <p>(b) the relevant authority would consider the cap only as a last step in the penalty calculation; and</p> <p>(c) clause 91(2) had set out the matters which the Competition Tribunal (the Tribunal) might have regard to in determining the amount of the pecuniary penalty, and such matters did not include the cap.</p> | |
| 002900 – 002957 | Chairman ALA2 Administration | ALA2 drew members' attention to the proposal to add a new empowering provision of clause 162A as reported in paragraph 4 of the Appendix to LC Paper No. CB(1)922/11-12(01) to empower the Secretary for Commerce and Economic Development to, by regulations | |

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| | | published in the Gazette, provide for the determination of the turnover of an undertaking, but that such regulations would be subject to negative vetting by the Legislative Council. | |
| <i>Clause-by-clause examination of the Bill</i> | | | |
| 002958 – 003719 | Chairman Administration Mr Ronny TONG ALA2 | <p><u>Examination of clauses 92 to 94</u></p> <p>In response to Mr Ronny TONG, the Administration confirmed that Order 62 of the Rules of the High Court would apply to the Tribunal to ensure that the amount of the costs of Commission investigation it might order a person to pay under clause 94 would be reasonable. The Tribunal's decisions in this regard would be amenable to appeal under clause 153.</p> <p>In response to ALA2, the Administration confirmed that it would amend the phrase "相等於該項調查的開支或附帶開支" in the Chinese text of clause 94(1) to "相等於該項調查的開支及附帶開支", so as to more accurately reflect the meaning of its English version "equal to the amount of the costs of and incidental to any investigation".</p> | The Administration to take action as requested in paragraph 4(b) |
| 003720 – 004829 | Chairman Administration ALA2 Mr Ronny TONG Mr Albert HO | <p><u>Examination of clauses 95 to 99</u></p> <p>In response to the Chairman, ALA2 and Mr Ronny TONG on the important role of the provisional liquidator, whose appointment might span two to three years, the Administration agreed to amend clause 99(2)(b) to cover "provisional liquidator", so as to achieve consistency with the definition of "disqualification order" in clause 43(4) of the Companies Bill currently under scrutiny.</p> <p>Mr Albert HO expressed concern about the wide impact of the disqualification order, which according to clause 99(2)(d) could restrict a person from being directly or indirectly concerned or taking part in the promotion, formation or management of a company without the leave of the Tribunal for a specified period, considering that any staff member of the management of the company could be interpreted as having so concerned regardless of their ranks.</p> <p>The Administration and ALA2 explained that similar restrictions were also imposed under the Companies Ordinance (Cap. 32), and that clause 99(2)(d) had been so drafted to include all persons of authority, including staff and in particular shadow directors by whatever name they were called, so as to prevent people from circumventing their responsibilities.</p> | The Administration to take action as requested in paragraph 4(c) |
| 004830 – 004944 | Chairman Administration ALA2 | <u>Examination of clause 100 – circumstances in which disqualification order may be made</u> | |

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| 004944 – 005624 | Chairman Administration ALA2 Mr Ronny TONG | <p><u>Examination of clause 101 - unfit to be concerned in management of company</u></p> <p>The Chairman expressed concern that under clause 101(2)(c), a person would be decided to be unfit to be concerned in the management of a company even though he "did not know" that the conduct concerned constituted contravention if he "ought to have known" it.</p> <p>In response to the Chairman on clause 101, ALA2 advised that –</p> <ul style="list-style-type: none"> (a) the expression "did not know but ought to have known" was commonly found in laws though not used in the Companies Bill; (b) members could decide whether to adopt the above highlighted policy approach in determining fitness to be concerned in management; and (c) from the drafting point of view, there might be a need to amend clause 101(2)(b) by adding "reasonable" before the word "steps" in the phrase "took no steps to prevent" contravention of a competition rule. <p>The Administration made the following response –</p> <ul style="list-style-type: none"> (a) the expression "did not know but ought to have known", which appeared in clause 101(2)(c), had been modelled on relevant provisions of the competition law of the United Kingdom, which was similar to the Bill and well-tested over time. There was no similar competition-specific provisions in either the Companies Ordinance (Cap. 32) or the Companies Bill. The clause was considered necessary to provide some useful and more specific guidance to the Tribunal in determining a person's fitness to be concerned in management, thereby enhancing certainty; and (b) the amendment proposed by ALA2 in (c) above would have the effect of imposing more responsibility on the person(s) concerned to demonstrate that he had taken reasonable steps, not just any step, to prevent the contravention. <p>Mr Ronny TONG opined that to prevent a director of a company from avoiding being considered unfit to be concerned in the management of the company by just taking cosmetic steps to prevent contravention, clause 101(2)(b) should be amended as ALA2 had proposed above.</p> <p>In response to the Chairman, the Administration agreed to</p> | <p>The Administration to take action as requested in paragraph 4(d)</p> <p>The</p> |

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| | | consider deleting clause 101(2)(c), and advise whether there was a similar provision in the Companies Ordinance (Cap. 32) and the Companies Bill. | Administration to take action as requested in paragraph 4(e) |
| 005625 – 005802 | Chairman Administration | <u>Examination of clauses 102 and 103</u> | |
| 005803 – 010506 | Chairman Administration ALA2 | <u>Examination of Schedule 3 – order that may be made by Tribunal in relation to contraventions of competition rules</u> In response to ALA2, the Administration confirmed that it would amend the Chinese text of section 2(b), so as to more accurately reflect the meaning of its English version "registrable" | The Administration to take action as requested in paragraph 4(l) |
| 010507– 011216 | Chairman Administration Mr Jeffrey LAM | <u>Examination of Schedule 4 – provisions that may be contained in orders made by Tribunal in relation to anticipated mergers and mergers</u> In response to Mr Jeffrey LAM, the Administration advised that – (a) the expression "the persons concerned" in section 4 referred to any person involved in making the relevant merger decisions; and (b) section 4 had not been drafted to sanction disclosure of any planned merger to outside parties but to ensure that the persons concerned would observe any prohibitions or restrictions imposed by or under the captioned orders. | |
| 011217 - 011804 | Chairman Administration | <u>Examination of clauses 162 to 164</u> The Administration advised that amendments would be made to clause 164 following the implementation of the Communications Authority Ordinance to reflect the institutional changes to the Broadcasting Authority and the Telecommunications Authority. | The Administration to take action as requested in paragraph 4(a) |
| 011805 – 011958 | Chairman Administration | <u>Examination of clause 165 – service of documents on Commission</u> In response to the Chairman, the Administration confirmed that calendar days would be used in working out the deadlines for service of documents under clause 165(2). | |
| 011959 – 012219 | Chairman Administration ALA2 | <u>Examination of clause 166 – service of documents other than on Commission</u> In response to ALA2, the Administration confirmed that it would amend clause 166(1)(d)(ii) to achieve consistency | The Administration |

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| | | with clauses 166(1)(b)(ii) and 166(1)(c)(ii). | to take action as requested in paragraph 4(f) |
| 012220 – 012917 | Chairman Administration Mr Ronny TONG ALA2 | <p><u>Examination of clause 167 - Certain indemnities of officers, employees or agents void</u></p> <p>In response to Mr Ronny TONG and ALA2, the Administration confirmed that it would –</p> <p>(a) change the word "secretary" in paragraph (a) of the definition of "officer" under clause 167(3) to "company secretary", so as to achieve consistency with the Companies Bill;</p> <p>(b) amend the word "required" in clause 167(1)(b)(iii) to "ordered", in recognition that according to clause 91, payment of the pecuniary penalty concerned would be ordered by the Tribunal; and</p> <p>(c) amend clause 167(1)(b)(ii) to cover offences under Division 4 of Part 12 (clauses 170 to 174), in particular those under clause 171 on provision of false information.</p> | <p>The Administration to take action as requested in paragraph 4(i)</p> <p>The Administration to take action as requested in paragraph 4(h)</p> <p>The Administration to take action as requested in paragraph 4(g)</p> |
| 012918 – 014041 | Chairman Administration | <u>Examination of clauses 168 to 169</u> | |
| <i>Break from 013151 to 014041</i> | | | |
| 014042 – 014437 | Chairman Administration | <p><u>Examination of clauses 170 to 172</u></p> <p>The Administration reported that it would amend the phrase "可處第4級罰款或監禁3個月" in the Chinese text of clause 172(3) to "可處第4級罰款及監禁3個月", so as to more accurately reflect the meaning of its English version "liable to a fine at level 4 and to imprisonment for 3 months".</p> | The Administration to take action as requested in paragraph 4(j) |
| 014438 – 014724 | Chairman Administration ALA2 | <p><u>Examination of clause 173 – obstruction of specified persons</u></p> <p>The Administration advised that amendments would be made to clause 173 following the implementation of the Communications Authority Ordinance.</p> <p>In response to ALA2's enquiries on the need to align the penalties under clause 173 and clause 54 respectively, the Administration explained that there might be a need to impose heavier penalties for the more serious offence</p> | The Administration to take action as requested in paragraph 4(a) |

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| | | under clause 54, which involved obstruction of search pursuant to warrant, than those for the offence under clause 173, which involved obstruction of performance of any function under the Bill more generally. | |
| 014725 – 015110 | Chairman Administration | <u>Examination of clause 174 – offences by bodies corporate and partners</u> The Administration reported that it would change the word "secretary" in clause 174(1) to "company secretary", so as to achieve consistency with the Companies Bill. | The Administration to take action as requested in paragraph 4(k) |
| 015111 – 015211 | Chairman Administration Clerk Ms Emily LAU | The progress and way forward in scrutinizing the Bill Meeting arrangements | |