立法會
Legislative Council

LC Paper No. CB(1)2589/11-12
(These minutes have been seen by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

Minutes of the 34th meeting held on Monday, 2 April 2012, at 2:30 pm in Conference Room 2 of the Legislative Council Complex

Members present : Hon Andrew LEUNG Kwan-yuen, GBS, JP (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
Dr Hon Margaret NG
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon 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
Hon Starry LEE Wai-king, 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
Hon WONG Yuk-man

Members absent	**:**	Hon Ronny TONG Ka-wah, SC (Deputy Chairman) Dr Hon Philip WONG Yu-hong, GBS Prof Hon Patrick LAU Sau-shing, SBS, JP Hon Cyd HO Sau-lan Dr Hon LAM Tai-fai, BBS, JP Hon CHAN Hak-kan Hon WONG Kwok-kin, BBS
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 and 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 Ms Jenny FUNG Mei-fung Senior Assistant Law Officer (Civil Law) (Acting) Department of Justice
Clerk in attendance	**:**	Mr Derek LO Chief Council Secretary (1)6
Staff in attendance	**:**	Mr Timothy TSO Assistant Legal Adviser 2 Ms Sarah YUEN Senior Council Secretary (1)6

I Confirmation of minutes

(LC Paper No. CB(1)1427/11-12 — Minutes of meeting held on 15 November 2011)

The minutes of the meeting held on 15 November 2011 were confirmed.

II Meeting with the Administration

(LC Paper No. CB(1)1450/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 19 March 2012

LC Paper No. CB(1)1450/11-12(02) — Administration's responses to outstanding issues arising from previous meetings

LC Paper No. CB(1)1371/11-12(01) — Submission from PCCW Limited and HKT Limited regarding the treatment of the telecommunications industry under the Bill

LC Paper No. CB(1)1450/11-12(03) — Administration's paper on amendments to Part 7 and leave requirement for appeal

LC Paper No. CB(1)91/11-12(01) — Administration's paper on responses to concerns on the Competition Bill (paragraphs 19 to 20 on stand-alone right of private action)

LC Paper No. CB(1)389/11-12(02) — Administration's response to follow-up questions arising from the meeting on 25 October 2011 and letter dated 25 October 2011 from Hon Jeffrey LAM Kin-fung as set out in LC Papers Nos. CB(1)257/11-12(03) and CB(1)389/11-12(01) (paragraph 14)

LC Paper No. CB(1)320/10-11(02) — Administration's information paper on overview of major components of the Competition Bill (paragraphs 40 to 42 on private actions))

2. 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)1357/11-12(01) —Marked-up copy of the Bill prepared by the Legal Service Division)

3. The Bills Committee examined clauses 104 to 106, and the draft Committee Stage amendments to Part 7 proposed by the Administration.

Follow-up actions required of the Administration

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

(a) provide a written response to the submission from PCCW Limited and HKT Limited regarding the treatment of the telecommunications industry under the Bill;

(b) provide a response to the outstanding issues in the submissions from the Hong Kong General Chamber of Commerce, in particular its call to specify a market share percentage in the guidelines on what constituted "substantial degree of market power";

Threshold for the de minimis arrangements

(c) formally report on its consideration of Mr WONG Ting-kwong's view that it was not sufficient to use HK$ 11 million, being the average annual business turnover of small and medium enterprises, as the threshold for exclusion from the application of the second conduct rule under the proposed de minimis arrangements;

Clause 21

(d) consider and respond to the proposal to set out in the Bill the relevant factors for determining "substantial degree of market power", by making reference to other laws, such as section 14 of the Broadcasting Ordinance (Cap. 562), section 7L of the Telecommunications Ordinance (Cap. 106), section 6 of Schedule 7 to the Bill, and the new section 7Q to be added to Cap. 106 by virtue of section 14 of Schedule 8 to the Bill;

Clause 106

(e) members expressed concern that by adding the phrase "or involves" to clause 106 regarding "no proceedings independent of this ordinance" as presently proposed, the clause would become so broad that it might have the effect of prohibiting proceedings to be brought independently of the enacted Ordinance, whether under any rule of law or any enactment, in any court in Hong Kong, if the cause of action "is or involves the defendant's contravention, or involvement in a contravention, of a conduct rule". The Administration was requested to refine the amendment in the light of the following views expressed at the meeting:

(i) that the provisions on the stand-alone right of private action would, as already proposed, be taken out from the Bill;

(ii) that the right to bring proceedings, e.g. those in relation to conspiracy to injure, currently available under the law might be affected if the case concerned "involved" the defendant's contravention, or involvement in a contravention, of a conduct rule. This was because, if amended as proposed, clause 106 would prohibit the bringing of proceedings independently of the enacted Ordinance if the case involved such contravention. However, while as a result of (i) above the right of private action would not be available under the Bill, according to clause 141 the Competition Tribunal (the Tribunal) would also not have the jurisdiction to hear and determine the above-mentioned proceedings in which conspiracy to injure was alleged; and

(iii) that there was a need to clarify whether, even though none of the cause of action was the defendant's contravention, or involvement in a contravention, of a conduct rule, proceedings would still be prohibited from being brought independently of the enacted Ordinance if the facts of the case involved such contravention;

Clause 115 and the proposed new clause 115A

(f) in relation to the proposed amendments to clause 115 and the proposed new clause 115A, provide a paper to clearly explain:

(i) the circumstances under which proceedings would be transferred from the Tribunal to the Court of First Instance and vice versa, with particular reference to clause 115(3);

(ii) whether there were restrictions on the number of transfers so made;

(iii) the factors that would be considered and the procedures followed when making such transfers; and

(iv) the likely consequences of such transfers on the complexity and cost of litigation;

The proposed new clause 153B

(g) provide details of the case of the United Kingdom (UK) that, according to the Administration, had given rise to the need to add an ouster clause, namely, the proposed new clause 153B, to the Bill to bar judicial review of the decisions, determinations or orders of the Tribunal made under the Bill, so as to put things beyond doubt that any decision, determination or order of the Tribunal as a superior court of record should only be reviewed by way of appeal to the Court of Appeal;

(h) explain the differences, if any, between the Tribunal to be set up under the Bill and the tribunal of the UK involved in the case mentioned in (g) above, in particular whether it was similarly a superior court of record, whether any application for judicial review of its decision was granted and if so, the justifications; and

(i) with reference to the following views expressed at the meeting, consider and advise on the appropriateness of adding the proposed new clause 153B to the Bill:

(i) that the proposed new clause 153B might be unnecessary if clauses 133 to 135 were sufficiently clear to establish the Tribunal as a superior court of record, on a par with the Court of First Instance;

(ii) that addition of the proposed new clause 153B might have the unintended consequence of causing people to apply for judicial review of the decisions, determinations or orders of other tribunals so far not challenged, if similar ouster clauses were not provided in the relevant legislation; and

(iii) that it might be undesirable to expressly prohibit judicial review in any legislation, as learnt from the mistake of a similar move in the UK.

5. The Chairman reminded members that the next meeting of the Bills Committee would be held on 10 April 2012 from 2:30 pm to 5:30 pm.

III Any other business

6. There being no other business, the meeting ended at 4:30 pm.

Council Business Division 1
Legislative Council Secretariat
17 September 2012

Appendix

Proceedings of the 34th meeting of
the Bills Committee on Competition Bill
on Monday, 2 April 2012, at 2:30 pm
in Conference Room 2 of the Legislative Council Complex

Time marker	Speaker	Subject(s)	Action required
Agenda Item I – Confirmation of minutes			
000255 – 000828	Chairman	Confirmation of minutes of meeting on 15 November 2011 (LC Paper No. CB(1)1427/11-12)	
Agenda Item II – Meeting with the Administration			
000829 – 001349	Chairman Administration	Briefing by the Administration on – (a) its responses to outstanding issues arising from previous meetings (LC Paper No. CB(1)1450/11-12(02)); and (b) its paper on amendments to Part 7 and leave requirement for appeal (LC Paper No. CB(1)1450/11-12(03)).	
Discussion on LC Papers Nos. CB(1)1450/11-12(02) and CB(1)1450/11-12(03)			
001350 – 001630	Chairman Mr Jeffrey LAM Administration	Mr Jeffrey LAM referred to the proposal to add an ouster clause, namely, the new clause 153B, to the Bill to bar judicial review of the decisions, determinations or orders of the Competition Tribunal (the Tribunal) made under the Bill, so that the above would only be reviewed by way of appeal, and expressed concern that the smooth operation of undertakings might be affected by the resulting appeal process which could be protracted. The Administration gave the following response – (a) the proposal only aimed to put things beyond doubt that any decision, determination or order of the Tribunal as a superior court of record should only be reviewed by way of appeal to the Court of Appeal (CA), which was a higher court than the Tribunal in the judicial hierarchy, in recognition that judicial review should essentially handle administrative decisions; (b) the appeal process had already been clearly provided in the Bill and no change to it would be introduced by the proposed new clause 153B; and (c) in the case of an appeal against the imposition, or the amount, of a pecuniary penalty, the effect of the decision, determination or order to which the appeal related would be suspended during the appeal process.	
001631 – 001928	Chairman Administration	The Chairman opined that to provide certainty for small and medium enterprises (SMEs), the Administration should give some indication of the market share percentage which would	

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		in its mind constitute "substantial degree of market power". The Administration stated that a 40% market share threshold had been put forward in the relevant consultation paper issued in May 2008. However, owing to the reasons given in LC Paper No. CB(1)1450/11-12(02), specifying a fixed market share threshold in the Bill was not preferred. It was the international best practice for the competition authorities to elaborate the factors for determining the degree of market power or abuse in detail in the regulatory guidelines. The Administration would willingly adopt this approach by making reference to overseas examples if found agreeable by members.	
001929 – 002756	Chairman Mr WONG Ting-kwong Administration Mr Jeffrey LAM	In response to Mr WONG Ting-kwong, the Administration advised that before proposing that the membership size of the Competition Commission (the Commission) should range between five (the lower limit) and 16 members (the proposed ceiling), reference had been made to the membership sizes of the following authorities – (a) three to 17 for the competition authority of Singapore; (b) the ceiling for the Consumer Council at 22; (c) seven to 12 for the Communications Authority; (d) five to 17 for the Equal Opportunities Commission; and (e) 13 to 20 for the West Kowloon Cultural District Authority. Mr WONG pointed out that in SMEs' view, to ensure the Commission would give regard to views from different sectors when making determinations, the lower limit should not be too low. Mr WONG requested the Administration to formally respond to his earlier stated view that it was not sufficient to use 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. Mr Jeffrey LAM shared Mr WONG's view. The Administration assured members that it would formally report on its consideration of Mr WONG's view above as soon as practicable, and advised that the delay in providing the report had been caused by the following – (a) the de minimis threshold had to be worked out on the basis of objective data and the Administration was seeking the latest statistics of the annual business turnover of SMEs from the Census and Statistics	The Administration to take action as requested in paragraph 4(c)

Time marker	Speaker	Subject(s)	Action required
		Department; and (b) the Administration was still examining the view that the statistics of "micro enterprises" should be excluded from the data from which the threshold was derived.	
002757 – 003007	Chairman Mr Jeffrey LAM Administration	Mr Jeffrey LAM requested the Administration to take the following actions – (a) respond to the outstanding issues in the submissions from the Hong Kong General Chamber of Commerce, in particular its call to specify a market share percentage in the guidelines on what constituted "substantial degree of market power"; and (b) notwithstanding the inappropriateness to set out the market share threshold in the Bill as the Administration had claimed, make reference to local market conditions and set out the relevant factors for determining "substantial degree of market power" in order to facilitate enforcement of the relevant guidelines. The Administration should also refer to the case law and regulatory guidelines of the European Union, the United Kingdom (UK) and Singapore, and include in the guidelines a market share of persistently over 50% as one of the criteria for establishing substantial degree of market power. The Administration agreed to provide a response to the above outstanding issues as soon as practicable.	The Administration to take action as requested in paragraph 4(b)
003008 – 004010	Chairman Administration Assistant Legal Adviser 2 (ALA2) Ms Audrey EU	ALA2 drew members' attention to the Administration's negative response to their suggestion that the criteria for assessing the degree of market power and for determining what constituted an abuse under the second conduct rule should be spelt out in the Bill (paragraph 12 of LC Paper No. CB(1)1450/11-12(02)), and opined that it might be preferable to set out in the Bill the relevant factors for determining "substantial degree of market power", by making reference to other laws, such as section 14 of the Broadcasting Ordinance (Cap. 562), section 7L of the Telecommunications Ordinance (Cap. 106), section 6 of Schedule 7 to the Bill, and the new section 7Q to be added to Cap. 106 by virtue of section 14 of Schedule 8 to the Bill. The Administration gave the following response – (a) it might not be suitable to work out the relevant factors for determining "substantial degree of market power" under the cross-sector Bill by referring to the sector-specific Telecommunications Ordinance (Cap.	

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		106) because the factors considered were different. As such, it might be more preferable to defer to the future Commission to draw up regulatory guidelines on the interpretation and implementation of the conduct rules during the transitional period; and (b) SMEs' concern about inadvertent contravention of the conduct rules might instead be addressed by specifying a market share threshold in the relevant guidelines for their reference. The Administration would in due course work out this threshold as well as other relevant factors for consideration. Ms Audrey EU opined that the relevant factors in Cap. 106 were in fact universal rather than sector-specific. The Administration should consider ALA2's proposal above considering the difficulties in specifying a market share percentage for determination of dominance as the Administration explained in paragraph 11 of LC Paper No. CB(1)1450/11-12(02). In response to Ms EU, ALA2 said that it might be suitable to include in the Bill the following factors with reference to those set out in section 7L of Cap 106 – (a) market share; (b) power to make pricing and other decisions; and (c) barriers to entry to competitors into the relevant market. At the request of Ms EU and the Chairman, the Administration agreed to consider and respond to ALA2's proposal above.	The Administration to take action as requested in paragraph 4(d)
004011 – 004105	Chairman Administration	The Chairman highlighted the submission from PCCW Limited and HKT Limited regarding the treatment of the telecommunications industry under the Bill, and requested the Administration to provide a written response to it.	The Administration to take action as requested in paragraph 4(a)
Clause-by-clause examination of the Bill			
004106 – 004807	Chairman Dr Margaret NG Administration	Briefing by the Administration on the amendments to Part 7 (Annex A to LC Paper No. CB(1)1450/11-12(03))	
004808 – 005644	Chairman Dr Margaret NG Administration ALA2	<u>Examination of clauses 104 to 106</u> Dr Margaret NG expressed concern that by adding the phrase "or involves" to clause 106 regarding "no proceedings independent of this ordinance" as presently proposed, the	

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		clause would become so broad that it might have the effect of prohibiting proceedings to be brought independently of the enacted Ordinance, whether under any rule of law or any enactment, in any court in Hong Kong, if the cause of action "is or involves the defendant's contravention, or involvement in a contravention, of a conduct rule". The addition of the above phrase was particularly worrying considering that the provisions on the stand-alone right of private action would, as already proposed, be taken out from the Bill. The Administration explained that the purpose of proposing the amendment was to ensure that clause 106 would cover composite claims. At Dr NG's invitation, ALA2 gave the following comments – (a) the above proposed amendment to clause 106 might signify a policy change because at present there was no such prohibition as that imposed by the amendment, and proceedings relating to composite claims that involved contravention of the Bill could be freely brought in the Court of First Instance (CFI); and (b) if the legislative intention of the amendment was simply to ensure that all claims relating to contravention of the Bill, including composite claims where the causes of action were not all related to the Bill, would be handled by the Tribunal, there might not be a need to use such a broad expression as "involves". Dr NG shared ALA2's views above, pointing out that the word "involves" was ambiguous and hence might be overly broad. At her request, the Administration agreed to consider refining the amendment.	
005645 – 010539	Chairman Ms Audrey EU Administration ALA2	Ms Audrey EU shared Dr Margaret NG's concern about the above proposed amendment to clause 106, and added that as a result of the amendment, the right to bring proceedings, e.g. those in relation to conspiracy to injure, currently available under the law might be affected if the case concerned "involved" the defendant's contravention, or involvement in a contravention, of a conduct rule. The Administration gave the following response – (a) the legislative intention of the amendment was to ensure that all claims relating to contravention of the Bill, including composite claims where the causes of action were not all related to the Bill, would be handled by the Tribunal. If according to clause 141 regarding "jurisdiction of Tribunal", certain claims in the composite claims were outside the Tribunal's jurisdiction, the claims concerned would be transferred	

Time marker	Speaker	Subject(s)	Action required
		to CFI, if it was in the interest of justice to do so, as set out in the relevant transfer mechanism; and (b) the above arrangement was made to give the Tribunal primary jurisdiction over all competition matters, and to ensure that the decision as to whether a claim should be heard in CFI or in the Tribunal would be a judicial one instead of being left to the parties of the proceedings, so as to address concerns that a concurrent jurisdiction of CFI and the Tribunal over composite claims might lead to procedural complications such as "forum shopping" in that parties would choose either CFI or the Tribunal to litigate depending on perceived procedural advantages. Ms EU pointed out that the above explanation could not address her concern because the said transfer arrangement would only apply to follow-on actions for determined contravention. At the Chairman's request, the Administration agreed to refine the amendment in the light of the above views. ALA2 opined that if the Administration only intended to give the Tribunal "primary" jurisdiction over all competition matters, and had no intention to prohibit bringing of proceedings not connected to the competition claims in composite claims, the amendment should be refined to address members' concerns above.	The Administration to take action as requested in paragraph 4(e)
010540 – 011909	Chairman Mr Paul TSE Administration Ms Audrey EU Dr Margaret NG	Mr Paul TSE expressed concern about the likely consequences of the above described transfer arrangement on the complexity and cost of litigation. Moreover, since the Tribunal's jurisdiction as specified in clause 141 was narrower than that of CFI, it might also not be in the interest of justice to strictly provide that composite claims involving contravention of a conduct rule should be brought in the Tribunal first. The Administration gave the following response – (a) it was important to give the Tribunal primary jurisdiction over all competition matters to discourage "forum shopping", and to give due recognition to the specialist court status of the Tribunal; and (b) according to clause 141, the Tribunal could only hear and determine competition-related matters. As such, claims not connected to the competition claims in composite claims would need to, as provided in the relevant proceedings transfer mechanism clearly set out in the Bill, be transferred to CFI. Ms Audrey EU and Dr Margaret NG expressed concern that	

Time marker	Speaker	Subject(s)	Action required
		if proceedings relating to composite claims that involved contravention of the Bill were not heard by the Tribunal and hence no transfer had been made, claims therein related to conspiracy to injure would also not be heard in CFI. This was because, if amended as presently proposed by adding the phrase "or involves", clause 106 would prohibit the bringing of proceedings independently of the enacted Ordinance if the case involved such contravention. However, while the stand-alone right of private action would, as already proposed, be taken out from the Bill, according to clause 141 the Tribunal would also not have the jurisdiction to hear and determine the above-mentioned proceedings in which conspiracy to injure was alleged. As a result, the right to bring proceedings, e.g. those in relation to conspiracy to injure, currently available under the law could in fact be affected if the case concerned "involved" the defendant's contravention, or involvement in a contravention, of a conduct rule. The Administration clarified that the Administration had no intention to affect the right to bring proceedings, e.g. those in relation to conspiracy to injure, currently available under the law. It would therefore refine the proposed amendment to clause 106 to clarify that the prohibition so imposed would only apply when one of the causes of actions concerned was a follow-on action.	
011910 – 012744	Chairman Mr Alan LEONG Administration Mr Paul TSE ALA2	Pointing out that the Tribunal and the Labour Tribunal were similarly having exclusive jurisdictions, Mr Alan LEONG questioned why the drafting of clause 106 was so different from its counterpart in the Labour Tribunal Ordinance (Cap. 25) (section 7(2) thereof). The Administration explained as follows – (a) the Bill was more complicated. Its jurisdiction was therefore set out in another clause instead of in clause 106; and (b) in contrast with the Labour Tribunal, the Tribunal to be set up under the Bill did not have exclusive jurisdiction. Mr Paul TSE pointed out that Mr LEONG's concern might be more related to clause 107 than to clause 106. At the Chairman's invitation, ALA2 recapitulated members' concerns about the above proposed amendment to clause 106 expressed at this meeting and highlighted the following actions required when the Administration refined the amendment – (a) clarify whether, even though none of the cause of action was the defendant's contravention, or	

Time marker	Speaker	Subject(s)	Action required
		involvement in a contravention, of a conduct rule, proceedings would still be prohibited from being brought independently of the enacted Ordinance if the facts of the case involved such contravention; and (b) set out clearly the transfer arrangements that might be necessitated as a result of the above proposed amendment to clause 106.	The Administration to take action as requested in paragraph 4(e)(iii)
012745–013057	Chairman Ms Audrey EU Administration	Ms Audrey EU reiterated her concern that if proceedings relating to composite claims that involved contravention of the Bill were not heard by the Tribunal, claims therein relating to conspiracy to injure might also not be heard in CFI because no transfer would then be made. As such, to avoid affecting the right to bring proceedings, e.g. those in relation to conspiracy to injure, currently available under the law, there was a need to refine the above proposed amendment to clause 106 because, if amended as proposed, clause 106 would prohibit the bringing of proceedings independently of the enacted Ordinance if the case concerned "involved" the defendant's contravention, or involvement in a contravention, of a conduct rule. However, while the right of private action would be taken out from the Bill as already proposed, according to clause 141 the Tribunal would also not have the jurisdiction to hear and determine the above-mentioned proceedings in which conspiracy to injure was alleged. The Administration confirmed that the above right to bring proceedings in CFI would not be affected if the claims concerned were not competition-related.	
013058 – 013828	Chairman Mr LEUNG Kwok-hung Administration ALA2	In response to Mr LEUNG Kwok-hung, the Administration explained that it had proposed to add the new clause 153B to the Bill to bar judicial review of the decisions, determinations or orders of the Tribunal under the Bill because judicial review should essentially be instituted against administrative decisions. However, being a superior court of record, the Tribunal's decisions were judicial decisions similar to those made by CFI, and as such should only be reviewed by way of appeal to CA, which was a higher court than the Tribunal in the judicial hierarchy, instead of by CFI as in the case of a judicial review. At Mr LEUNG's invitation to advise, ALA2 drew members' attention to the need to consider the need and appropriateness of adding the proposed new clause 153B to the Bill to expressly prohibit judicial review if similar ouster clauses were not provided in the legislation governing other tribunals. The Administration responded that the need to clearly bar	

Time marker	Speaker	Subject(s)	Action required
		judicial review of the Tribunal's decisions had arisen from a recent case of the UK where a tribunal's decision had been challenged by judicial review. Addressing Mr LEUNG's concern about the desirability of expressly prohibiting judicial review in the Bill, the Administration further explained that – (a) the Bill had already provided that appeals against decisions permissible under it should be made to CA. The proposed new clause 153B only served to further clarify the matter because of the above UK case; and (b) the Tribunal, being also a superior court of record as CFI, was already part of the Judiciary and would consist of the judges of CFI appointed in accordance with section 6 of the High Court Ordinance (Cap. 4).	
013829 – 014245	Chairman Mr Albert HO Administration ALA2	Mr Albert HO echoed Mr LEUNG Kwok-hung's views above and, highlighting the need for consistency where legislation was concerned, expressed concern that addition of the proposed new clause 153B might have the unintended consequence of causing people to apply for judicial review of the decisions, determinations or orders of other tribunals so far not challenged, if similar ouster clauses were not provided in the relevant legislation. The Administration responded that – (a) unlike the Tribunal to be set up under the Bill, many tribunals were administrative tribunals and hence their decisions could be challenged through judicial review; (b) although some tribunals were part of the Judiciary, they did not have the same status as the CFI; and (c) the prohibition to be imposed under the proposed new clause 153B would only apply to decisions of the Tribunal and not those of other tribunals. Mr HO opined that to convince members of the need to add the proposed new clause 153B to the Bill, the Administration should provide details of the UK case which, according to the Administration, had given rise to the above need. ALA2 added that in recognition of Mr HO's concern above, and the fact that the High Court Ordinance (Cap. 4) and the relevant Order 53 of the High Court Rules had already clearly specified the arrangements for judicial review, the Administration should provide sound justification for adding the proposed new clause 153B to the Bill. For example, to state whether in the UK case mentioned above, although the tribunal involved was similarly a superior court of record,	The Administration to take action as requested in paragraph 4(g)

Time marker	Speaker	Subject(s)	Action required
		application for judicial review of its decision had been granted, and the justifications (if any).	
014246 – 014800	Chairman Dr Margaret NG Administration	Dr Margaret NG expressed the following views – (a) it might be undesirable to expressly prohibit judicial review in any legislation, as learnt from the mistake of a similar move in the UK; (b) the proposed new clause 153B might be unnecessary if clauses 133 to 135 were sufficiently clear to establish the Tribunal as a superior court of record, on a par with CFI; and (c) the Administration should explain the differences, if any, between the Tribunal to be set up under the Bill and the tribunal of the UK involved in the UK case mentioned above, in particular whether it was similarly a superior court of record, whether any application for judicial review of its decision was granted and if so, the justifications. The Administration responded that the proposed new clause 153B was not intended to introduce any change to the existing appeal arrangements under the Bill but to enhance clarity. The Administration would examine members' views on the appropriateness of adding the proposed new clause 153B to the Bill and report back.	The Administration to take action as requested in paragraph 4(h) The Administration to take action as requested in paragraph 4(i)
014801 – 015024	Chairman Mr Paul TSE Dr Margaret NG	Mr Paul TSE opined that the express prohibition of judicial review might affect the right to seek judicial review to uphold procedural fairness where necessary. He shared Mr Albert HO's concern above, and stressed that addition of the proposed new clause 153B to the Bill required very strong justifications. Dr Margaret NG pointed out that since the Tribunal would be a superior court of record on a par with CFI as stated in clause 133, it would be unnecessary and hence abnormal to state the obvious by expressly prohibiting judicial review of its decisions.	
015025 – 015224	Chairman Ms Audrey EU Administration ALA2 Dr Margaret NG	Ms Audrey EU shared members' views above, and asked whether clauses 148 and 149 on findings of fact by the Tribunal and CFI respectively would remain even after the right of stand-alone private action was taken out and if so, the differences between the two clauses. The Administration responded that the above two clauses mainly involved defences that could be raised in proceedings before CFI. ALA2 referred members to the Administration's proposed amendments to clause 149, which should mean that clause	

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		149 would remain in the Bill even after the right of stand-alone private action was taken out. In reply to Ms EU on when clause 149 would apply, the Administration explained that the clause would apply in the case described in the proposed new clause 115A(3), namely, that "If the Court of First Instance transfers any proceedings to the Tribunal under section 115(3), the Tribunal may transfer back to the Court so much of those proceedings that the Tribunal considers should, in the interests of justice, be transferred back to the Court". Noting the above, Ms EU and Dr Margaret NG considered it necessary for the Administration to, in relation to the proposed amendments to clause 115 and the proposed new clause 115A, provide a paper to clearly explain – (a) the circumstances under which proceedings would be transferred from the Tribunal to CFI and vice versa, with particular reference to clause 115(3); (b) whether there were restrictions on the number of transfers so made; (c) the factors that would be considered and the procedures followed when making such transfers; and (d) the likely consequences of such transfers on the complexity and cost of litigation.	The Administration to take action as requested in paragraph 4(f)
015225 – 015747	Chairman Administration	Meeting arrangements	

Council Business Division 1
Legislative Council Secretariat
17 September 2012