立法會
Legislative Council

LC Paper No. CB(1)2639/11-12
(These minutes have been seen by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

Minutes of the 35th meeting held on Tuesday, 10 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 Ronny TONG Ka-wah, SC (Deputy Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon LEE Cheuk-yan
Hon Fred LI Wah-ming, SBS, JP
Dr Hon Margaret NG
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Starry LEE Wai-king, JP
Hon CHAN Hak-kan
Hon Paul CHAN Mo-po, MH, JP
Hon CHAN Kin-por, JP
Hon WONG Kwok-kin, BBS
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

Members absent : Hon Albert HO Chun-yan
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS

Hon Abraham SHEK Lai-him, SBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Cyd HO Sau-lan
Dr Hon LAM Tai-fai, BBS, JP
Dr Hon LEUNG Ka-lau
Hon Tanya CHAN
Hon WONG Yuk-man

Public Officers attending : Agenda item I

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

Mr David Alan GROVER
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

Action

I Meeting with the Administration

(LC Paper No. CB(1)1506/11-12(01) —List of follow-up actions arising from the discussion at the meeting on 2 April 2012

LC Paper No. CB(1)1506/11-12(02) —Administration's responses to outstanding issues arising from previous meetings

LC Paper No. CB(1)1506/11-12(03) —Administration's paper on the judgment of the UK Supreme Court based on which the Administration proposes a clause to the Competition Bill to bar judicial review against decisions of the Competition Tribunal

LC Paper No. CB(1)1496/11-12(01) —Submission from The Hong Kong Association of Banks

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 13)

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)

LC Paper No. CB(1)1539/10-11(01) —Submission from Global Sources

LC Paper No. CB(1)1545/10-11(01) —Press cutting on the Bill)

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

2. Mr Jeffrey LAM, Ms Miriam LAU and Mr CHAN Kam-lam welcomed the Administration's latest proposal to increase the turnover threshold for conduct of lesser significance under the second conduct rule from the originally proposed HK$11 million to HK$ 40 million since it would help address the concern of small and medium enterprises (SMEs) by excluding them from the application of the second conduct rule. Ms LAU, however, opined that the new de minimis threshold might not be able to cater for the case where the annual turnover of an undertaking exceeded the threshold because the prices of its goods or services were high but its profit was in fact small. Ir Dr Raymond HO expressed similar views on the new de minimis threshold for the first conduct rule of HK$200 million.

3. As regards the proposal to adopt a "minimum" market share threshold of 25% for assessing whether an undertaking possessed a substantial degree of market power, Mr Jeffrey LAM and Mr CHAN Kam-lam considered it an improvement that could enhance certainty. Mr LAM, however, pointed out that the proposed "minimum" market share threshold might be too low to cater for the specific conditions of individual trades. Pointing out that some countries adopted thresholds above 40%, he urged the Administration to adjust the threshold upwards in response to strong requests from the business sector. Mr CHAN Kin-por opined that the threshold should be adjusted to 30% or 35%.

4. Ms Miriam LAU preferred a sectoral approach in determining the market share threshold, and opined that the threshold should be prescribed in the Bill. Ir Dr Raymond HO added that it was difficult to rigidly apply the proposed "minimum" market share threshold of 25%, pointing out that in the case of a contractor, its market share could be significantly boosted by just one successful tender bid involving a large contract sum.

5. Mr Ronny TONG stressed the need to listen to the views of consumers apart from those of the business sector, and considered the Administration's latest proposals regarding the thresholds for agreements/conduct of lesser significance unacceptable, not to mention further adjusting them upwards. He cautioned that if the Administration made further significant concessions, he would not support the Bill. Mr LEUNG Kwok-hung echoed Mr TONG's views on the need to ensure the Bill would benefit consumers and not to make further concessions.

6. Some members including Ms Audrey EU requested the Administration to further clarify the arrangements for transfer of proceedings arising from clause 106, and questioned the appropriateness of adding a new clause 153B to the Bill to prohibit judicial review of the decisions of the Competition Tribunal (the Tribunal).

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)

7. The Bills Committee examined clauses 107 to 109 of the Bill and the Administration's proposed Committee Stage amendments thereto.

Follow-up actions required of the Administration

Admin. 8. The Bills Committee requested the Administration to take the following actions –

(a) provide a written response to the submission dated 5 April 2012 from the Hong Kong General Chamber of Commerce on the Bill [LC Paper No. CB(1)1519/11-12(02) issued on 10 April 2012];

Market power threshold

(b) the Secretary for Commerce and Economic Development to explain in his concluding speech for resumption of the second reading debate on the Bill that in determining whether an undertaking had a "substantial degree of market power", regard would be given to the specific conditions of individual trades instead of rigidly applying the presently proposed "minimum" market share threshold of 25%;

(c) respond to the proposal to adjust the presently proposed "minimum" market share threshold of 25% in the light of the following different views of members:

(i) that the proposed threshold was too low to address the concerns of SMEs, and should preferably be adjusted to 30% or 35%;

(ii) that the proposed threshold was low if compared with those of overseas jurisdictions and was even lower than the 30% threshold proposed by the Consumer Council; and

(iii) that the effectiveness of the Bill would be seriously affected if further concessions were made;

Threshold for the de minimis arrangements

(d) provide a table on the respective thresholds proposed by different parties (including various trade associations) for exclusion from the application of the second conduct rule under the proposed de minimis arrangements, so as to enable members to ascertain how far the Administration's latest proposal to increase the turnover threshold for conduct of lesser significance under the second conduct rule (from the originally proposed HK$11 million to HK$ 40 million) could respond to their requests, and whether certain majority request(s) needed to be followed up;

Clause 106

(e) to clearly explain how the arrangements for transfer of proceedings under the Bill would operate in order to address Ms Audrey EU's concern that as a result of the arrangements provided under clause 106, one set of facts might give rise to more than one set of proceedings, resulting in parallel proceedings; and

The new clause 153B

(f) with reference to the following views expressed at the meeting, review the need for adding the proposed new clause 153B to bar judicial review of the decisions of the Tribunal:

(i) it was unacceptable to rigidly prohibit judicial review of the Tribunal's decisions since the right to apply for judicial review was an essential civil right;

(ii) judicial review should essentially be used to handle decisions made by courts lower than the Court of First Instance (CFI) in the judicial hierarchy. If the Tribunal would be established as a superior court of record, on a par with CFI, judicial review would in principle not apply to the Tribunal's decisions; and

(iii) even without clause 153B, CFI could still decide on its own whether to grant leave for applications for judicial review. If clause 153B had been proposed by the Judiciary, consideration should be given to the need to uphold the important principle of separation of powers.

9. The Chairman reminded members that the next meeting of the Bills Committee would be held on 17 April 2012 from 4:30 pm to 7:30 pm.

II Any other business

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

Council Business Division 1
Legislative Council Secretariat
27 September 2012

Appendix

Proceedings of the 35th meeting of
the Bills Committee on Competition Bill
on Tuesday, 10 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 – Meeting with the Administration			
000532 – 001502	Chairman Administration	Opening Remarks Briefing by the Administration on its responses to outstanding issues arising from previous meetings (LC Paper No. CB(1)1506/11-12(02))	
Discussion on the Administration's responses to outstanding issues arising from previous meetings (LC Paper No. CB(1)1506/11-12(02))			
001503 – 001925	Chairman Mr Jeffrey LAM Administration	Mr Jeffrey LAM welcomed the latest proposal of the Administration to increase the turnover threshold for exclusion of conduct of lesser significance from application of the second conduct rule from the originally proposed HK$11 million to HK$40 million (the HK$40-million de minimis threshold) since it would address the concerns of small and medium enterprises (SMEs) by excluding most SMEs from the application of the second conduct rule. He expressed the following views – (a) while the proposal to adopt a "minimum" market share threshold of 25% (the proposed 25% "minimum" market share threshold) for assessing whether an undertaking possessed a substantial degree of market power could enhance certainty, it was insufficient because the threshold was too low to cater for the specific conditions of individual trades; and (b) the Administration should respond as soon as possible to the outstanding issues raised by the Hong Kong General Chamber of Commerce (the Chamber) on the Bill in its submission [LC Paper No. CB(1)1519/11-12(02)] dated 5 April 2012]. The Administration gave the following response – (a) as learnt from overseas experience, whether an undertaking possessed a substantial degree of market power should be determined by many factors and market share was but one of them. The market share percentage that would constitute a substantial degree of market power would also vary for different sectors taking account of their different market circumstances. To provide flexibility, the threshold would not be specified in the Bill; and (b) the Chamber's views had been discussed repeatedly at	The

Time marker	Speaker	Subject(s)	Action required
		meetings of the Bills Committee. The Administration's stance regarding them had already been clearly explained and responses to certain issues raised had also been incorporated in LC Paper No. CB(1)1506/11-12(02). Nonetheless, the Administration would respond to the Chamber's submission dated 5 April 2012. At Mr LAM's request, the Administration said that the Secretary for Commerce and Economic Development (SCED) would explain in his concluding speech for resumption of the second reading debate on the Bill that in determining whether an undertaking had a "substantial degree of market power", regard would be given to the specific conditions of individual trades instead of rigidly applying the proposed 25% "minimum" market share threshold.	Administration to take action as requested in paragraph 8(a) The Administration to take action as requested in paragraph 8(b)
001926 – 002844	Chairman Ms Audrey EU Administration Mr Ronny TONG	In response to Ms Audrey EU, the Administration advised that it would formally 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 [item 4 of the list of follow-up actions arising from the discussion at the meeting on 2 April 2012 (LC Paper No. CB(1)1506/11-12(01))]. The Administration briefed members the following – (a) how turnover of undertakings would be calculated for the purpose of determining whether the turnover thresholds for agreements/conduct of lesser significance were exceeded, in particular how undertakings' turnover periods would be determined according to their respective conditions; (b) the circumstances under which the turnover period of an undertaking would be specified in a regulation made under clause 162A(2) [Annexes A and B to LC Paper No. CB(1)1506/11-12(02)]; and (c) the turnover periods of different undertakings in the same agreement might be different because, when working out the combined turnover of the agreement, the turnover periods of the undertakings involved would be determined according to their respective conditions as set out in Annexes A and B to LC Paper No. CB(1)1506/11-12(02). Mr Ronny TONG opined that turnover calculation seemed arbitrary, and expressed concern that an undertaking might avoid regulation of the Bill by deliberately entering into an agreement with a newly established company. The Administration responded that in working out the	

Time marker	Speaker	Subject(s)	Action required
		turnover calculation methods, reference had been made to overseas practices. Moreover, the above concern could be addressed by providing under the proposed new sections 5(4) and 6(3) of Schedule 1 that the turnover period would be specified in a regulation made under clause 162A(2) if the financial year of the undertaking(s) concerned or the period in which it was engaged in economic activity was less than 12 months. Similar practices were adopted in the United Kingdom (UK) and Singapore.	
002845 – 003400	Chairman Ms Miriam LAU Administration	Ms Miriam LAU expressed the following view/enquiry – (a) the HK$40-million de minimis threshold might not be sufficiently high to cater for the case where the annual turnover of an undertaking, such as a jewelry shop, exceeded the threshold because the prices of its goods or services were high but its profit was in fact small. She indicated intention to consult the SMEs whether this threshold could address their concerns; and (b) whether under the proposed de minimis arrangements, companies with five or less employees would be excluded from the application of the second conduct rule in the same way as they had been excluded from the calculation of the average turnover of SMEs for the purpose of working out the HK$40-million de minimis threshold. The Administration gave the following response – (a) there was difficulty in working out a de minimis threshold that could cater to the characteristics of every sector. The Administration considered it preferable to work out the threshold on the basis of objective criteria instead of adopting a sectoral approach, so that any necessary future adjustment to the threshold could be made objectively; and (b) companies with five or less employees had been excluded from the calculation of the $40-million de minimis threshold because the Administration recognized that such small companies would very unlikely possess any market power, and that their inclusion in the calculation would only distort the resultant threshold. However, this did not mean that they would be excluded from the application of the second conduct rule under the proposed de minimis arrangements.	
003401 – 004035	Chairman Ir Dr Raymond HO Administration	Ir Dr Raymond HO welcomed the Administration's latest proposal to adjust upwards the threshold for excluding agreements of lesser significance from the application of	

Time marker	Speaker	Subject(s)	Action required
		the first conduct rule from the existing threshold of a combined turnover of the undertakings involved of not exceeding HK$100 million to HK$ 200 million (the HK$200 million threshold for the first conduct rule). He expressed the following views – (a) it was difficult and probably unfair to rigidly apply the proposed 25% "minimum" market share threshold in determining whether an undertaking had a "substantial degree of market power". The market share of a contractor or supplier could be significantly boosted by just one successful tender bid if the contract sum concerned was large. The Administration should clarify as soon as practicable how the proposed 25% "minimum" market share threshold would be applied instead of waiting till SCED gave his concluding speech for resumption of the second reading debate on the Bill; and (b) the calculation of turnover was complicated since an agreement might span a few years, so that the average annual contract sum concerned was in fact not significant. Moreover, if sub-contracting was made, the profits made might be even smaller. The Administration gave the following response – (a) whether an undertaking possessed a substantial degree of market power was determined by many factors, and market share was but one such factor proposed to provide certainty to the business sector; (b) how the proposed 25% "minimum" market share threshold would be applied had already been explained in LC Paper No. CB(1)1506/11-12(02). SCED's speech would only serve to reaffirm the relevant policy stance; (c) if the market share of an undertaking could be significantly boosted by just one successful tender bid, the total business receipts of all players in the market concerned should be very significant. The market share of the undertaking concerned would unlikely exceed the proposed 25% "minimum" market share threshold; (d) an undertaking having a market share exceeding the proposed 25% threshold would not automatically mean that the undertaking possessed a substantial degree of market power as this should be a question of fact depending on the circumstances of each case. Nor would it automatically mean that the undertaking was abusing its market power in contravention of the enacted Ordinance; and	

Time marker	Speaker	Subject(s)	Action required
		(e) regardless of the contract sum concerned and whether there was subcontracting, the exclusion of an agreement of lesser significance from the application of the first conduct rule would only hinge on the combined turnover of the undertakings involved.	
004036 – 004425	Chairman Mr CHAN Kin-por Administration	Mr CHAN Kin-por opined that the proposed 25% "minimum" market share threshold should be adjusted to 30% or 35% because – (a) jurisdictions adopting "dominance" as their market power test considered that undertakings with market share percentages less than the range of 35% to 40% would unlikely be dominant; (b) it had been proposed in the Administration's public consultation document "Detailed Proposals for a Competition Law – A Public Consultation Paper" issued in May 2008 that the market share percentage threshold for "substantial market power" should be about 40%; and (c) the Bill should aim to tackle monopoly and hence should target at large consortia instead of SMEs. The Administration gave the following response – (a) the 40% threshold in (b) above was an assumption under which undertakings with market share exceeding 40% would likely have substantial market power. The proposed 25% "minimum" market share threshold was also an assumption under which undertakings with a market share below 25% are considered unlikely to possess a substantial degree of market power. Taken together, the two thresholds could help the business sector understand how the Administration assessed whether an undertaking had a "substantial degree of market power"; and (b) since the proposed 25% threshold was the "minimum" threshold, it might be undesirable to raise it to 30% or 35% lest it would be too high when compared with those adopted by overseas jurisdictions. Moreover, Hong Kong was a small and geographically concentrated economy, it was not unusual for a small number of firms, each constituting only some 25% to 35%% market share, to have control over certain markets in Hong Kong (i.e. oligopolistic market). Adopting a threshold as high as 35% would affect the effectiveness of the Bill in addressing public concerns over anti-competitive conduct of some oligopolies in Hong Kong.	

Time marker	Speaker	Subject(s)	Action required
		Mr CHAN opined that the market share threshold should be left to the trade associations to decide as they best understood the operation of their trades.	
004426 – 004935	Chairman Mr CHAN Kam-lam Administration	While welcoming the Administration's latest proposals concerning the market power threshold for the second conduct rule and the thresholds for agreements/conduct of lesser significance, Mr CHAN Kam-lam enquired whether they could address the business sector's concerns and relevant suggestions from deputations. The Administration gave the following response – (a) by adjusting the de minimis threshold for the first conduct rule from the originally proposed HK$100 million to HK$ 200 million, the Administration had accepted deputations' proposal to bring the threshold close to the "small agreement" threshold of GBP 20 million adopted in the UK's Competition Act; (b) the HK$40-million de minimis threshold had been worked out after accepting the suggestion to exclude "micro enterprises" from calculation of the turnover threshold by excluding SMEs with five or less employees. The Administration considered this new threshold reasonable because companies with turnovers below the threshold would be excluded from the application of the second conduct rule. Moreover, action would not be taken against undertakings whose turnover exceeded the threshold if they did not engage in anti-competitive conduct; and (c) the various suggestions of deputations on the threshold for the second conduct rule had already been set out in paragraph 7 of LC Paper No. CB(1)1506/11-12(02). The HK$40-million de minimis threshold was close to the thresholds suggested by some deputations. The Administration did not accept the suggestion to make the threshold on par with the listing requirements for listing on the Main Board of the Hong Kong Exchange (i.e. HK$ 500 million) because such a high threshold would have the effect of excluding the vast majority of, or even all, undertakings in a market and severely affect the effectiveness of the Bill. The suggestion of sectoral thresholds was impracticable because of the reasons stated in LC Paper No. CB(1)1506/11-12(02). At Mr CHAN's request, the Administration agreed to provide a table on the respective thresholds proposed by different parties (including various trade associations) for exclusion from the application of the second conduct rule under the proposed de minimis arrangements, so as to	The Administration to take action as requested in paragraph 8(d)

Time marker	Speaker	Subject(s)	Action required
		enable members to ascertain how far the Administration's latest proposal to increase the turnover threshold for conduct of lesser significance under the second conduct rule (from the originally proposed HK$11 million to HK$ 40 million) could respond to their requests, and whether certain majority request(s) needed to be followed up.	
004936 – 005600	Chairman Mr Jeffrey LAM Administration	Pointing out that some countries adopted market share thresholds above 40%, Mr Jeffrey LAM expressed the following views – (a) the proposed 25% "minimum" market share threshold was insufficient, and opined that unless there were strong justification, the Administration should review the threshold in response to strong requests from the business sector; and (b) the Administration should give regard to local conditions and overseas practices when working out the market share threshold. The Administration gave the following response that – (a) the thresholds of 40% and above quoted by members were ceilings assuming that undertakings exceeding them would have substantial degree of market power. Jurisdictions adopting "dominance" as their market power test considered that undertakings with market share of less than 35% to 40% would unlikely be dominant, which meant a margin of 10% to 15% between the threshold for presumed dominance and the "minimum" market share threshold. Taking account of international practices, and the fact that the Administration had adopted a lower threshold of "a substantial degree of market power" than the "dominance" test for the second conduct rule, the Administration considered the adoption of a "minimum" market share threshold of 25% reasonable; and (b) given that Hong Kong was a small and geographically concentrated economy, it was not unusual for a small number of firms, each constituting only about 30% market share, to have control over certain markets in Hong Kong (i.e. oligopolistic market). Adopting a threshold as high as over 30% or 35% would, as agreed by the Consumer Council, affect the effectiveness of the Bill in addressing public concerns over anti-competitive conduct of some oligopolies in Hong Kong, such as supermarket chains. Mr LAM was not convinced, and opined that the Administration should not use the circumstances in certain markets as justifications for decisions, such as the	The Administration to take action as

Time marker	Speaker	Subject(s)	Action required
		"minimum" market share threshold, which would affect the economy of Hong Kong as a whole. Moreover, the threshold proposed by the Consumer Council was 30%. He urged the Administration to review the 25% "minimum" market share threshold.	requested in paragraph 8(c)
005601 – 010200	Chairman Mr Ronny TONG Administration	Mr Ronny TONG stressed the need to listen to the views of consumers apart from those of the business sector and, quoting the views expressed by certain deputations and members at the meeting of the Bills Committee on 25 October 2011, pointed out that the Administration's latest proposals regarding the thresholds for agreements/conduct of lesser significance were unacceptable, not to mention further the adjustments as requested by other members at this meeting. He cautioned that the adjustments to the Bill announced in October 2011 [LC Paper No. 91/11-12(01)] were already his bottom-line and, if the Administration made further significant concessions, he would not support the Bill. The Administration responded that the latest proposals announced at this meeting had not brought any policy change but were only refinements of the adjustments to the Bill announced in October 2011, and had been proposed in recognition that the basis on which the latter had been made might still not fully reflect the actual market situation. Mr TONG opined that adjustments to the above thresholds would affect the effectiveness of the Bill and hence should be introduced with great care. Upward adjustment of the thresholds was not conducive to achieving objectives of the Bill to protect consumers and not the business sector and to deter anti-competitive acts regarded as acceptable by the public The Administration responded that it would uphold the principle that any adjustment to the Bill must not undermine its overall effectiveness in tackling abuse of market power. The Administration would not exclude agreements involving four types of serious anti-competitive conduct (i.e. price-fixing, bid-rigging, market allocation and output control) from regulation of the enacted Ordinance. It also had reservation about further raising the HK$ 40-million de minimis threshold.	
010201 – 010708	Chairman Mr LEUNG Kwok-hung Administration	In response to Mr LEUNG Kwok-hung, the Administration explained the reason for the adoption of a "minimum" market share threshold of 25% and advised that the major consideration of the proposed thresholds for agreements/conduct of lesser significance was whether they could truly reflect the actual market situation. To ensure this, reference had been made to the statistics of the	

Time marker	Speaker	Subject(s)	Action required
		Census and Statistics Department on the turnovers of SMEs during the period from 2006 to 2010 instead of between 2005 and 2009 and, in working out the average turnover from the data, undertakings with five or less employees had been excluded. The other consideration was whether the latest proposals would affect the overall effectiveness of the Bill. Mr LEUNG opined that the Administration should not make further concessions on the Bill. In response, the Administration confirmed that it considered the latest proposals most appropriate if the Bill was to preserve its effectiveness.	
010709 – 011739	Chairman Ms Miriam LAU Administration	Ms Miriam LAU expressed the following views/enquiries – (a) despite the need to protect consumers, no unnecessary and unreasonable responsibilities should be imposed on SMEs, who were in fact vulnerable and could not afford the high costs incurred in complying with the enacted Ordinance. To address concerns about fairness, there was a need to give regard to the fact that the annual turnover of certain undertakings, such as jewelry shops, would easily exceed the HK$40-million de minimis threshold due to the high prices of the goods they sold; (b) whether an undertaking would be regulated by the Bill if its annual turnover exceeded the HK$ 40-million de minimis threshold but its market share was below the proposed 25% "minimum" market share threshold; (c) to address SMEs' concern, the proposed 25% "minimum" market share threshold should be prescribed in the Bill instead of being set out in SCED's concluding speech for resumption of the second reading debate; and (d) a sectoral approach might be more acceptable because the relevant thresholds for exclusion could then cater to the specific circumstances of different sectors. The Administration gave the following response that – (a) even if an undertaking's annual turnover exceeded the HK$ 40-million de minimis threshold, if its market share did not exceed 25%, the relevant enforcement agency would normally still assume that the undertaking did not possess a substantial degree of market power to abuse unless other relevant factors provided strong evidence of such market power. Moreover, facts would prevail at the end and, even if	

Time marker	Speaker	Subject(s)	Action required
		an undertaking did possess a substantial degree of market power and had an annual turnover of over HK$40 million, enforcement action would not be taken against it unless there was prima facie evidence that it had abused its substatial market power; and (b) the international best practice was to set out the market share threshold and other factors for assessing market power in non-statutory regulatory guidelines. The Administration would suggest to the Competition Commission (the Commission) that the market share threshold be set out likewise in the regulatory guidelines.	
011740 – 012736	Chairman Dr Margaret NG Administration	Dr Margaret NG expressed the following views – (a) she opposed the proposal to add the new clause 153B to the Bill to bar judicial review of the decisions of the Competition Tribunal (the Tribunal) because judicial review should essentially be used to handle decisions made by courts lower than the Court of First Instance (CFI) in the judicial hierarchy. If the Tribunal would be established as a superior court of record, on a par with CFI, judicial review would in principle not apply to the Tribunal's decisions. Moreover, it might be undesirable to expressly prohibit judicial review in any legislation; (b) the UK Supreme Court case on which the new clause 153B was based (the UK case) [LC Paper No. CB(1)1506/11-12(03)] was not entirely relevant because its major point of argument was whether, and on what basis, the right to judicial review of a decision of the Upper Tribunal should be restricted. Moreover, the judgment had pointed out that the right to seek judicial review was a very important basic right and should not be restricted or denied. The Administration should not add a clause to the Bill to prohibit judicial review out of resource considerations; and (c) the proposed new clause 153B should be taken out or Hong Kong's rule of law would suffer a heavy blow, and the door might be opened for prohibition of judicial review in more cases. The Administration gave the following response – (a) adding the new clause 153B to the Bill was not due to workload or resource considerations but because the Tribunal's decisions were judicial decisions similar to those made by CFI, and 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	

Time marker	Speaker	Subject(s)	Action required
		hierarchy, instead of by the Tribunal's counterpart CFI as in the case of a judicial review. Prohibition of judicial review of the decisions of the Tribunal would not affect the functions of the judiciary or the rule of law; and (b) the Bill had already provided that appeals against decisions should be made to CA. The proposed new clause 153B only served to further clarify the matter because it had been held in the UK case that the preclusion of judicial review should be "done by the most clear and explicit language and not by implication". Noting the response, Dr NG urged the Administration to note that the judgment in the UK case had pointed out that given the statutory restrictions on the scope of judicial review, the granting of it was already limited to exceptional cases. The Administration should therefore consider whether there was still a need to rigidly prohibit judicial review, so that such a step could not be taken even under very special circumstances. The right to apply for judicial review was an essential civil right that should be safeguarded. If judicial review procedures were too complicated and time-consuming, the Administration should seek to streamline the relevant court procedures instead of prohibiting judicial review. The Administration responded that the proposal to add the new clause 153B had in fact been made by the Judiciary. The Administration would consult the Judiciary before deciding whether to withdraw the proposal. Dr Margaret NG expressed grave concern about the involvement of the Judiciary and stressed the responsibility of the Legislative Council (LegCo) to safeguard the essential civil right of judicial review.	
012737 – 013402	Chairman Mrs Regina IP Administration	Mrs Regina IP expressed the following views – (a) whether there was a substantial degree of market power was determined not so much by market share but by how market was defined; (b) the success of the 759 Store showed that even without a competition law, there could still be healthy competition in the market to enable small enterprises to develop into large enterprises. SMEs like the 759 Store might have difficulty in promoting their business if they were subject to the regulation of the Bill, under which they might be accused of committing anti-competitive acts if they competed with smaller enterprises located within a small district. The Bill therefore could not help SMEs	

Time marker	Speaker	Subject(s)	Action required
		develop as claimed; (c) the Administration should respond to a press cutting of South China Morning Post dated 31 March 2012, which reported that an international law firm had criticized the Bill as having an unclear objective and was self-contradictory; and (d) undertakings which could sell goods cheaply because of their operational efficiency would benefit consumers and hence should not be restricted from doing so. The Administration gave the following response – (a) there was a consensus in the community on the need for the Bill reached after thorough public consultation and discussion; (b) while undertakings competed freely in Hong Kong, they might still commit anti-competitive acts, which should be tackled; (c) by protecting small enterprises from becoming prey to large enterprises' abuse of market power, SMEs would have better opportunities to survive and develop their business; (d) it was a normal phenomenon that small undertakings would grow into large ones, as in the case of the 759 Store; and (e) the location of a market would not restrict an undertaking from competing with other undertakings in the area concerned. Mrs Regina IP pointed out that markets could be divided into market segments according to districts or product lines. In segmented markets there might be problems with the free flow of products.	
013403 – 014058	Chairman Mr Ronny TONG Administration	Mr Ronny TONG made the following comments on the proposed new clause 153B – (a) judicial review should essentially be used to handle decisions made by courts lower than CFI in the judicial hierarchy. If the Tribunal would be established as a superior court of record, on a par with CFI, judicial review would in principle not apply to the Tribunal's decisions. Moreover, since the Bill would already provide for an appeal mechanism, applications for judicial review of decisions made under it would normally not be approved. Under these circumstances, there was no need to rigidly prohibit	

Time marker	Speaker	Subject(s)	Action required
		judicial review by proposing to add the new clause 153B to the Bill. Notwithstanding, the proposal would not affect the rule of law because the scope of appeal under the Bill was much wider than that of judicial review, which could essentially only examine procedural fairness; (b) according to the principle of separation of powers, under which LegCo should act independently of the Judiciary, the Judiciary might alert LegCo to the need to add the proposed new clause 153B but should respect LegCo's power to decide on whether the amendment should be made; and (c) even without the new clause 153B, the Judiciary could still decide on its own whether to grant leave for applications for judicial review. In response to Mr TONG, the Administration confirmed that – (a) clause 133 would suffice to establish the Tribunal as a superior court of record, and there was no need to amend the High Court Ordinance (Cap. 4) for the purpose; and (b) the proposed new clause 153B would not bar judicial review of the decisions of the Commission.	
014059 – 015414	Chairman Mr LEUNG Kwok-hung Administration	Mr LEUNG Kwok-hung pointed out that if the objective of the Bill was to bring benefits to consumers, concerns and disputes regarding the above turnover and market share thresholds and the de minimis arrangements could be obviated. He urged the Administration to withdraw the new clause 153B for the following reasons – (a) the clause was unnecessary if decisions of the Tribunal could really not be subject to judicial review; and (b) if judicial review should be allowed under special circumstances, it would be unfair to rigidly prohibit judicial review of the Tribunal's decisions because judicial review was an essential civil right for members of the public to challenge administrative unfairness. The Administration reiterated that addition of the proposed new clause 153B to the Bill would not deny people the right to review the Tribunal's decisions because appeal could still be lodged against the Tribunal's decisions. In fact, the scope of appeal under the Bill was wider than that of judicial review. The new clause just sought to clarify that appeals against the judicial decisions of the Tribunal	

Time marker	Speaker	Subject(s)	Action required
		should be made to CA instead of through judicial review. Mr LEUNG suspected that notwithstanding the above explanation, the proposed new clause 153B might still deny people of the option of instituting judicial review of a wrongful administrative decision of the Commission which had led to the making of a decision by the Tribunal. The Administration gave the following response – (a) applications for judicial review of the above decision of the Commission could be made if the relevant review deadline had not been exceeded, and that this decision of the Commission had not been quoted as a cause of action in the relevant proceedings in the Tribunal; and (b) notwithstanding the institution of a judicial review against the above decision of the Commission, the party concerned still had to appeal against the resultant decision of the Tribunal if the party was aggrieved by the latter.	The Administration to take action as requested in paragraph 8(f)
Break from 0105415 to 020241			
Clause-by-clause examination of the Bill			
020242 – 020540	Chairman Ms Miriam LAU Administration	<u>Examination of clauses 107 and 108</u> The Administration said that it would respond to members' concerns about clause 106 at the next meeting of the Bills Committee.	
020541 – 020732	Chairman Mr Ronny TONG Administration	<u>Examination of clause 109 – commencement of follow-on actions</u> In response to Mr Ronny TONG, the Administration explained its intention to provide greater certainty by providing in clause 109(3) that proceedings for a follow-on action might not be brought more than three years after the earliest date on which the action could have been commenced, and said that similar deadlines had been imposed in other jurisdictions.	
020733 – 021055	Chairman Mrs Regina IP Administration	In response to Mrs Regina IP, the Administration gave the following response – (a) examples of cases where follow-on actions could be brought included seeking compensation for proven economic loss suffered as a result of a contravention of a conduct rule, such as bid-rigging and price-fixing; and (b) follow-on actions were necessary to enable private actions to be brought by persons who had suffered loss or damage as a result of a contravention of a	

Time marker	Speaker	Subject(s)	Action required
		conduct rule to claim damages because, after the elimination of the stand-alone right of private action, the Commission would become the sole channel for taking legal actions against anti-competitive conduct. Under the circumstances, any pecuniary penalties imposed and illegal gains recovered would mostly be paid to the Government instead of to the parties concerned, unless there was evidence that other parties to the legal action concerned were affected. Moreover, even if the Tribunal did award damages to aggrieved parties, certain affected parties who were not parties to the legal action might still not be compensated.	
021056 – 021635	Chairman Mr Jeffrey LAM Administration Mr Ronny TONG Mrs Regina IP	Mr Jeffrey LAM enquired whether there were any restrictions on the parties that could claim damages, and whether the accused could claim damages if found not guilty, such as compensation for damaged reputation. The Administration responded that whether and how damages were awarded would hinge on the facts of the relevant case, in particular the justifications for lodging the claim and the claim amount. For example, evidence that a person had suffered loss because of a contravention of a conduct rule. Mr LAM asked whether guidelines could be formulated on the claims of damages arising from contravention of the enacted Ordinance, so as to prevent abuse of follow-on actions to the detriment of the business environment. The Administration responded that claims for damages under the Bill and other civil claims for damages would be handled similarly. The Chairman added that the likelihood of abuse was remote in recognition that legal costs were involved, and that the claimant might not necessarily win the case. Mr Ronny TONG echoed the Administration's point above, and added that the common law in fact imposed very stringent thresholds on claims for damages and would not award compensation for monetary loss unless under very special circumstances, such as in the case of breach of statutory duties. If the stand-alone right of private action would be taken out from the Bill to address SMEs' concern about abuse, so that follow-on right of action would only be taken for determined contraventions, the threshold on claims for damages through follow-on actions under the Bill should not be as high as that of other common law claims for damages as described above, and consideration might need to be given to clearly setting out in clause 109 that the Tribunal should order compensation for monetary loss where appropriate to protect consumers and SMEs against such loss.	

Time marker	Speaker	Subject(s)	Action required
021636 – 023657	Chairman Ms Audrey EU Administration	Ms Audrey EU noted that as a result of clause 106, the competition claims and other claims in composite claims could be separately brought in the Tribunal and other courts in parallel. She considered the arrangement undesirable as it would run against the general principle of law that all disputes relating to one set of facts should be disposed of in one set of proceedings. The Administration briefed members on how pure competition claims and composite claims consisting of competition claims and other claims would be handled under the Bill [paragraph 4 of LC Paper No. CB(1)1450/11-12(03)], and explained that the above transfer arrangements were made to give the Tribunal primary jurisdiction over all competition matters. Ms EU opined that things might be simpler if the Tribunal would only deal with follow-on actions for damages, and considered the above transfer arrangements undesirable because – (a) it would go against the principle of consolidation of proceedings; (b) it was unclear as to how claims would be retained in CFI or transferred to CFI "in the interest of justice"; and (c) if parallel proceedings were brought, it was unclear as to whether the Tribunal or CFI would override, and whose decision would be taken as the final decision. The Administration gave the following response – (a) it was for prevention of the scenario in (c) above that the above transfer arrangements were 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 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; (b) the jurisdiction of the Tribunal had been set out in clause 141. It was therefore clear as to what claims would be heard in the Tribunal and which would not; (c) the above transfer arrangements had already provided clear guidance on the circumstances under which CFI	

Time marker	Speaker	Subject(s)	Action required
		should transfer claims to the Tribunal and vice versa. The expression "in the interest of justice" was added to cater for the exercise of discretion under special circumstances; and (d) since transfer of proceedings could be made only once, there would not be any question of which court would override.	
023658 – 024257	Chairman Ms Miriam LAU Administration	Pointing out that the proceedings transfer arrangements under the Bill were complicated, Ms Miriam LAU enquired whether there were similar arrangements overseas and if so, whether their experience could be drawn on to simplify or clarify the arrangements. The Administration gave the following response – (a) overseas legislation might not be of much reference value because, as different from overseas competition laws such as those in the European Union, UK and Singapore which adopted the administrative model, the Bill would provide for a judicial enforcement model; and (b) the transfer arrangements might not be as complicated as they appeared. In fact, they all served to uphold the principle that whatever the scenario, the Tribunal should be given primary jurisdiction over all competition matters.	
024258 – 024631	Chairman Mr Ronny TONG Ms Miriam LAU Administration	Addressing members' concern about the transfer arrangements, Mr Ronny TONG pointed out that all claims arising from tort had to be made on the basis of an illegal act. To claim damages for loss suffered as a result of a contravention of a conduct rule, there was a need to seek determination of the contravention in the Tribunal first, and hence the need to refer all matters relating to competition to the Tribunal. The above transfer arrangements were therefore normal and simple, and would not have any implications on the common law right to claim tort damages. The Administration gave the following comments – (a) the proposed amendment to clause 106 would be refined to address concern that the above right might be affected; and (b) no alleged contravention of conduct rule could be brought in CFI because the stand-alone right of private action would be taken out from the Bill, so that only the follow-on right of action for determined contraventions would be available under the Bill.	

Time marker	Speaker	Subject(s)	Action required
024632 – 025412	Chairman Ms Audrey EU Administration Assistant Legal Adviser 2 (ALA2)	Ms Audrey EU requested the legal adviser to the Bills Committee to examine and brief members on the likely implications of clause 106. She expressed concern that according to clause 141, the Tribunal would not have the jurisdiction to hear and determine proceedings in which such tortuous acts as conspiracy to injure or breach of contract was alleged, even though the case concerned was connected to competition matters, and that the transfer of the relevant proceedings to it had been made in the interest of justice. ALA2 gave the following response – (a) clause 141(1)(f) might address Ms EU's concern above by providing that the Tribunal had jurisdiction to hear and determine "any matter related to a matter referred to in paragraph (a), (b), (c), (ca), (d) or (e) if the matters arise out of the same or substantially the same facts" ; and (b) if the proceedings connected to competition matters brought in CFI were to be transferred to the Tribunal, clause 115would apply . The Chairman urged the Administration to clearly explain how the arrangements for transfer of proceedings under the Bill would operate in order to address Ms EU's concern that as a result of the arrangements provided under clause 106, one set of facts might give rise to more than one set of proceedings, resulting in parallel proceedings.	The Administration to take action as requested in paragraph 8(e)
025413 – 025510	Chairman Administration	Meeting arrangements	

Council Business Division 1
Legislative Council Secretariat
27 September 2012