

**立法會**  
**Legislative Council**

LC Paper No. CB(1)2612/11-12  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/12/09

**Bills Committee on Competition Bill**

**Minutes of the 36<sup>th</sup> meeting held on  
Tuesday, 17 April 2012, at 4:30 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)  
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP  
Hon Fred LI Wah-ming, SBS, JP  
Hon James TO Kun-sun  
Hon CHAN Kam-lam, SBS, JP  
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP  
Hon Miriam LAU Kin-ye, 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  
Hon CHIM Pui-chung  
Hon Cyd HO Sau-lan  
Hon Starry LEE Wai-king, JP  
Dr Hon LAM Tai-fai, BBS, JP  
Hon CHAN Hak-kan  
Hon Paul CHAN Mo-po, MH, JP  
Hon CHAN Kin-por, JP  
Hon Paul TSE Wai-chun, JP  
Hon Alan LEONG Kah-kit, SC  
Hon LEUNG Kwok-hung  
Hon WONG Yuk-man
- Members absent** : Hon Albert HO Chun-yan  
Hon LEE Cheuk-yan

Dr Hon Margaret NG  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon WONG Ting-kwong, BBS, JP  
Prof Hon Patrick LAU Sau-shing, SBS, JP  
Dr Hon LEUNG Ka-lau  
Hon WONG Kwok-kin, BBS  
Hon Mrs Regina IP LAU Suk-yea, GBS, JP  
Hon Tanya CHAN

**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

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

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Action

**I Confirmation of minutes**

(LC Paper No. CB(1)1566/11-12 —Minutes of meeting held on 22 November 2011)

The minutes of the meeting held on 22 November 2011 were confirmed.

**II 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)1573/11-12(01) —List of follow-up actions arising from the discussion at the meeting on 10 April 2012

LC Paper No. CB(1)1573/11-12(02) —Administration's responses to outstanding issues arising from previous meetings

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)1635/10-11(01) —Submission from Concern Group for a Competitive Exhibition Industry in Hong Kong)

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

3. Members noted the submission from the Concern Group for a Competitive Exhibition Industry in Hong Kong tabled at the meeting.

Clause-by-clause examination of the Bill

(LC Paper No. CB(1)1573/11-12(03) —Draft Committee Stage amendments proposed by the Administration

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)

4. The Bills Committee examined clauses 110 to 120 and Part 10 of the Bill, and the Administration's proposed Committee Stage amendments (CSAs) thereto. Members also completed examination of the draft CSAs to the Bill proposed by the Administration as of 5 April 2012 (LC Paper No. CB(1)1573/11-12(03)).

Follow-up actions required of the Administration

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

Admin.

*Clause 2*

- (a) consider whether it was necessary and appropriate to add a note to supplement the definition of "serious anti-competitive conduct" in clause 2, considering that it would be the only note used in the Bill, and that on various occasions in the past, Members had expressed reservation about the use of notes in bills;

*Part 7*

- (b) report further CSAs to Part 7 as a result of the Bills Committee's discussion on this part at recent meetings;

*Clause 118*

- (c) respond to the proposal to refine the drafting of clause 118 to avoid giving people the wrong impression that an earlier decision of the Court of First Instance (CFI) or the Competition Tribunal (the Tribunal) would still be binding on the CFI or the Tribunal even though the decision had been overturned on appeal;

*Clause 153*

- (d) review the appropriateness of clause 153(2)(b), considering that finality provisions had been ruled unconstitutional by the Court of Final Appeal in the past;
- (e) if the Administration should decide to retain the above finality provision, the Administration should consider the view that the phrase "終局命令" in the Chinese text of clause 153(2)(b) in fact meant "終局決定、裁定或命令" as deduced from the first part of the sentence concerned. As such, to enhance clarity without repeating the phrase "決定、裁定或命令", it might be preferable to amend the phrase "訂明審裁處的決定、裁定或命令屬終局命令的情況下" to "訂明審裁處的決定、裁定或命令屬終局的情況下";
- (f) amend the phrase "該命令是在有關各方同意下作出的上訴" in the Chinese text of clause 153(2)(c) to more accurately reflect the phrase "an order of the Tribunal made with the consent of the parties" in the English text of this clause; and

*The proposed new section 28B of Schedule 5*

- (g) amend the phrase "a member a committee" in the English text of the proposed new section 28B(7) of Schedule 5 to the Bill to "a member of a committee".

6. The Chairman reminded members that the next meeting of the Bills Committee would be held on 24 April 2012 from 2:30 pm to 5:30 pm.

**III Any other business**

7. There being no other business, the meeting ended at 7:00 pm.

Council Business Division 1  
Legislative Council Secretariat  
24 September 2012

**Proceedings of the 36<sup>th</sup> meeting of  
the Bills Committee on Competition Bill  
on Tuesday, 17 April 2012, at 4:30 pm  
in Conference Room 1 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
<b>Agenda Item I – Confirmation of minutes</b>			
001314 – 001354	Chairman	Confirmation of minutes of meeting on 22 November 2011 (LC Paper No. CB(1)1566/11-12)	
<b>Agenda Item II – Meeting with the Administration</b>			
001355 – 002217	Chairman Administration	Opening remarks  Briefing by the Administration on its responses to outstanding issues arising from previous meetings (LC Paper No. CB(1)1573/11-12(02))	
<b><i>Discussion on the Administration's responses to outstanding issues arising from previous meetings (LC Paper No. CB(1)1573/11-12(02))</i></b>			
002218 – 002317	Chairman Administration	The Chairman welcomed the following latest proposals of the Administration set out in LC Paper No. CB(1)1573/11-12(02) –  (a) further revision of clause 106;  (b) clarification of the proposed transfer mechanism set out in clauses 115, 115A, 115B and 115C; and  (c) agreement to remove the earlier proposed new clause 153B.	
002318 – 003104	Chairman Mr WONG Yuk-man Administration	Mr WONG Yuk-man expressed the following views–  (a) the concept of "involvement" in clause 106 was not conducive to the certainty of the clause although the Administration had clarified that a private party might bring an action based purely on common law causes of action, even if the facts of the claim might support a finding of contravention of a conduct rule, as long as the contravention of a conduct rule was not pleaded as a cause of action in such a claim. Clause 106 should incorporate the Administration's clarification;  (b) it was necessary to exercise care when drafting the Bill, which was the first of its kind in Hong Kong; and  (c) members' concerns about clause 153B could alternatively be addressed by incorporating provisions similar to clause 153B in the High Court Ordinance (Cap. 4) or the Interpretation and General	

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		<p>Clauses Ordinance (Cap. 1) to ensure that any decisions, determinations, or orders of the Competition Tribunal (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.</p> <p>The Administration made the following response –</p> <ul style="list-style-type: none"> <li>(a) clause 105 had already defined what constituted involvement ;</li> <li>(b) the revised clause 106 would already have the effect of not restricting the bringing of any common law claims which did not have a contravention of a conduct rule pleaded as a cause of action; and</li> <li>(c) the proposed new clause 153B aimed to obviate disputes but in recognition of certain members' concern that the clause might seem to be banning judicial review of the Tribunal's decisions altogether, the Administration had decided to remove the clause. The alternative option highlighted by Mr WONG above was outside the purview of the Bill.</li> </ul> <p>Mr WONG noted that clauses 115 and 115A provided that claims could be transferred to or retained in the Court of First Instance (CFI) if it was "in the interests of justice" to do so, and asked about the factors (other than costs, convenience and actual operational experience) which other jurisdictions would take into account when examining whether it was in the interests of justice to transfer part(s) of a claim to the other court or retain such part(s) in the original court.</p> <p>In response, the Administration advised that the factors considered by overseas jurisdictions included the size of the claim(s) closely connected to the follow-on claim(s), the ratio of the follow-on claim(s) to the non-competition claim(s) in the composite claim concerned, whether the follow-on claim(s) and non-competition claim(s) in the composite claim concerned were easily separable, whether transfer would increase legal costs and handling time, etc.</p>	
<b><i>Clause-by-clause examination of the Bill</i></b>			
003105 – 003712	Chairman Administration Assistant Legal Adviser 2 (ALA2)	<p><u>Examination of clauses 110 to 115A</u></p> <p>In response to ALA2, the Administration explained how proceedings with a contravention, or involvement in a contravention, of a conduct rule being alleged as a defence would be handled under clause 115(3). In the case where the competition claim(s) in a composite claim were transferred to the Tribunal, it could be assumed that proceedings retained in the CFI would proceed only after</p>	



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		the Tribunal had made a decision on the competition claim(s) transferred to it although actual arrangements would be decided by the CFI.	
003713 – 003900	Chairman ALA2 Administration	<u>Examination of clauses 115B to 116</u>  In response to ALA2, the Administration explained the reason(s) for introducing the proposed Committee Stage amendment (CSA) to clause 116.	
003901 – 004417	Chairman ALA2 Mr WONG Yuk-man Administration	<u>Examination of clauses 117 and 118</u>  ALA2 opined that clauses 118(2) and 118(3) as presently drafted would give people the wrong impression that an earlier decision of the CFI or the Tribunal would still be binding on the CFI or the Tribunal even though the decision had been overturned on appeal. He proposed that the drafting of clause 118 be refined to avoid the above. Mr WONG Yuk-man shared his view.  The Administration responded that there should not be any such interpretation problem in recognition that a decision of the CFI or the Tribunal overturned on appeal would automatically not be binding on the CFI or the Tribunal.  In response to ALA2 and Mr WONG, the Administration agreed to respond to the above proposal to refine the drafting of clause 118.	The Administration to take action as requested in paragraph 5(c)
004418 – 004519	Chairman Administration	<u>Examination of clauses 119 and 120</u>	
004520 – 005653	Chairman Administration ALA2 Mr Ronny TONG	<u>Examination of Part 10</u>  ALA2 opined that it might not be appropriate for clause 153(2)(b) to prohibit appeal against a decision, determination or order of the Tribunal if it was provided by any Ordinance or by the rules of the Tribunal that the decision, determination or order was final, considering that certain finality provisions had been ruled unconstitutional by the Court of Final Appeal (CFA) in the past.  The Administration made the following response –  (a) the clause had solely been modeled on the relevant provision of the High Court Ordinance (Cap. 4) (section 14, in particular sub-section (3)(c)). The Administration in fact did not have any specific plan to prohibit appeal against any decision, determination or order of the Tribunal; and  (b) cases where finality provisions had been ruled unconstitutional by the CFA each had their own specific backgrounds and should not be used to	

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		<p>conclude that in general such provisions should not appear in any Ordinance. In fact, certain cases had been ruled unconstitutional mainly because they involved claims that appeals against certain decisions could be made to the CA only and that CA's decisions would be final, while in fact according to the Basic Law, appeals could be further made to the CFA. As such, the above cases were not exactly relevant to clause 153(2)(b), which only sought to prohibit appeal against a decision, determination or order of the Tribunal if it was final according to any Ordinance or any rules of the Tribunal.</p> <p>Noting the above response, ALA2 pointed out that –</p> <ul style="list-style-type: none"> <li>(a) clause 153(2)(b) would be unnecessary if the Administration did not have any specific plan to prohibit appeal against any decision, determination or order of the Tribunal; and</li> <li>(b) if clause 153(2)(b) would be retained, consideration would need to be given to the above unconstitutionality cases should there be any plan to provide by any rule to be made under clause 156 that a decision, determination or order of the Tribunal was final.</li> </ul> <p>Mr Ronny TONG shared ALA2's view in (a) above, and also considered clause 153(2)(b) unnecessary. The Chairman added that there were already clear provisions regarding appeal arrangements in the Interpretation and General Clauses Ordinance (Cap. 1) and in the High Court Ordinance (Cap. 4).</p> <p>The Administration responded that there was a need to incorporate relevant provisions of Cap. 4 in the Bill in the form of clause 153(2)(b) to, where necessary, confer on the Tribunal similar power to make rules as that enjoyed by the CFI, in recognition that the two would enjoy equal status, and that their operation and appeal arrangements were similar.</p> <p>ALA2 reiterated his point in (a) above, and the need to consider, in the light of relevant cases, whether from a policy perspective it was desirable to provide that any decision, determination or order of the Tribunal was final and could not be appealed against. Mr TONG added that clause 156 could already provide for the making of rules to regulate and prescribe the practice and procedure to be followed in the Tribunal. The Chairman further pointed out that the clause might not be necessary if it had already been clearly specified that the Tribunal and the CFI would enjoy equal status. At the Chairman's request, the Administration agreed to review the appropriateness of</p>	<p>The Administration to take action as requested in paragraph 5(d)</p>

Time marker	Speaker	Subject(s)	Action required
		clause 153(2)(b).	
005654 – 005910	Chairman Administration ALA2	<p>ALA2 opined that if the Administration should decide to retain the above finality provision, the Administration should consider the view that the phrase "終局命令" in the Chinese text of clause 153(2)(b) in fact meant "終局決定、裁定或命令" as deduced from the first part of the sentence concerned. As such, to enhance clarity without repeating the phrase "決定、裁定或命令", it might be preferable to amend the phrase "訂明審裁處的決定、裁定或命令屬終局命令的情況下" to "訂明審裁處的決定、裁定或命令屬終局的情況下".</p> <p>In response to ALA2, the Administration agreed to amend the phrase "該命令是在有關各方同意下作出的上訴" in the Chinese text of clause 153(2)(c) to more accurately reflect the phrase "an order of the Tribunal made with the consent of the parties" in the English text of this clause.</p>	<p>The Administration to take action as requested in paragraph 5(e)</p> <p>The Administration to take action as requested in paragraph 5(f)</p>
<p><b>Discussion on the draft Committee Stage amendments proposed by the Administration (LC Paper No. CB(1)1573/II-12(03))</b></p>			
005911 – 011124	Chairman Administration ALA2	<p><u>Examination of CSAs to Part 1</u></p> <p>ALA2 made the following comments –</p> <p>(a) the proposed CSA to the definition of "shadow director" in clause 2 could serve the purpose of bringing the definition in line with that adopted in common law; and</p> <p>(b) it might not be necessary nor appropriate to add a note to supplement the definition of "serious anti-competitive conduct" in clause 2, considering that it would be the only note used in the Bill, and that the proposed note had also given rise to the need to add the new clause 2(3) to explain that the note was provided for information only and would have no legislative effect.</p> <p>The Administration responded that the proposed note could clarify the meaning of "serious anti-competitive conduct" by reminding readers that provisions supplementing the definition were contained in clause 2(2).</p> <p>Ms Miriam LAU opined that despite the above clarifying effect of the proposed note, there was a need to consider the following –</p> <p>(a) on various occasions in the past, Members had expressed reservation about the use of notes in bills and had through other arrangements managed to delete the notes;</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>(b) if the proposed note would not have legislative effect, it might as well not be included in the Bill; and</p> <p>(c) deletion of the proposed note as presently drafted would not affect the clarity of the definition of "serious anti-competitive conduct".</p> <p>ALA2 echoed Ms LAU's points, and added that since the proposed note did not have any significant substance, it could be easily done without if found unnecessary.</p> <p>The Chairman opined that consideration might instead be given to clarifying the definition of "serious anti-competitive conduct" in the regulatory guidelines. The Administration responded that clause 2(2) which the note directed readers to see had legislative effect and hence could not be incorporated in the guidelines only. The Administration, however, agreed to consider whether it was necessary and appropriate to add the proposed note.</p>	<p>The Administration to take action as requested in paragraph 5(a)</p>
011125 – 011924	Chairman Administration	<u>Examination of CSAs to Part 2</u>	
011925 – 012313	Chairman Administration	<u>Examination of CSAs to Part 3</u>	
<b><i>Break from 012314 to 013505</i></b>			
013506 – 013539	Chairman Administration	<u>Continued examination of CSAs to Part 3</u>	
013540 – 014044	Chairman Administration	<u>Examination of CSAs to Part 4</u>	
014045 – 014209	Chairman Administration	<u>Examination of CSAs to Part 5</u>	
014210 – 014443	Chairman Administration	<p><u>Examination of CSAs to Part 6</u></p> <p>The Administration advised that further CSAs to Part 7 as a result of the Bills Committee's discussion on this part at recent meetings would be reported to the Bills Committee later.</p>	<p>The Administration to take action as requested in paragraph 5(b)</p>
014444 – 014625	Chairman Administration	<p><u>Examination of CSAs to Part 8</u></p> <p>The Administration advised that no CSAs had been proposed to Part 9.</p>	
014626 – 014751	Chairman Administration	<u>Examination of CSAs to Part 10</u>	
014752 – 015110	Chairman Administration	<u>Examination of CSAs to Part 11</u>	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
015111 – 015416	Chairman Administration	<u>Examination of CSAs to Part 12</u>	
015417 – 015724	Chairman Administration	<u>Examination of CSAs to Schedule 1</u>	
015725- 020030	Chairman Administration	<u>Examination of CSAs to Schedule 2</u>	
020031- 020107	Chairman Administration	<u>Examination of CSAs to Schedule 3</u>  The Administration advised that no CSAs had been proposed to Schedule 4.	
020108 – 020907	Chairman Administration ALA2	<u>Examination of CSAs to Schedule 5</u>  In response to ALA2, the Administration agreed to amend the phrase "a member a committee" in the English text of the proposed new section 28B(7) of Schedule 5 to "a member <b>of</b> a committee".	The Administration to take action as requested in paragraph 5(g)
020908 – 021003	Chairman Administration	<u>Examination of CSAs to Schedule 6</u>	
021004 – 021523	Chairman Administration Mr CHAN Kam-lam	<u>Examination of CSAs to Schedule 7</u>  Mr CHAN Kam-lam opined that it might be more advisable to continue examination of the draft CSAs to the Bill when more members were present.  The Chairman advised that the CSAs had in fact been discussed before at previous meetings but compiled together to facilitate further examination. Since the consolidated CSAs had already been dispatched to all members before the meeting, members could pass any comments which they might have on the CSAs to him and the Administration for further action where necessary. ALA2 would also go through the CSAs on behalf of the Bills Committee.	
021524 – 021829	Chairman Administration	<u>Examination of CSAs to Schedule 8</u>	
021830 – 022005	Chairman Administration	<u>Examination of CSAs to Schedule 9</u>	
022006 – 022131	Chairman Administration	The way forward  Meeting arrangements	