立法會
Legislative Council

LC Paper No. CB(1)2646/11-12
(These minutes have been seen by the Administration)

Ref : CB1/BC/12/09

Bills Committee on Competition Bill

Minutes of the 37th meeting held on Tuesday, 24 April 2012, at 2:30 pm in Conference Room 3 of the Legislative Council Complex

Members present : Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)
Hon Ronny TONG Ka-wah, SC (Deputy Chairman)
Hon Fred LI Wah-ming, SBS, JP
Dr Hon Margaret NG
Hon CHAN Kam-lam, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yee, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Paul CHAN Mo-po, MH, 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 Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon LEE Cheuk-yan

Hon James TO Kun-sun
Hon Vincent FANG Kang, SBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon Starry LEE Wai-king, JP
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Hak-kan
Hon CHAN Kin-por, JP
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

Mr David Alan GROVER
Senior Government Counsel
Department of Justice

Clerk in attendance : Mr Derek LO
Chief Council Secretary (1)6

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Sarah YUEN
Senior Council Secretary (1)6

Action

I Confirmation of minutes

(LC Paper No. CB(1)1654/11-12 — Minutes of meeting held on 6 December 2011)

The minutes of the meeting held on 6 December 2011 were confirmed.

II Meeting with the Administration

(LC Paper No. CB(1)1652/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 17 April 2012

LC Paper No. CB(1)1652/11-12(02) — Administration's responses to outstanding issues arising from previous meetings

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)1357/10-11(04) — Marked-up copy of the Bill prepared by the Legal Service Division)

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

3. At this meeting, members discussed the use of "他或她" in the Chinese text of the Bill, what constituted a "substantial degree of market power", the adequacy of the presently proposed de minimis thresholds, the need to provide the guidelines early, whether the enacted Ordinance could effectively tackle concrete examples of anti-competitive conduct of concern to the general public, etc.

4. Dr Margaret NG said that although the Judiciary had expressed no objection to having Hong Kong's courts included in the definition of statutory bodies for the purposes of the Bill, she still considered it inappropriate to define courts as statutory bodies, and might propose Committee Stage amendments (CSAs) in this regard.

Follow-up actions required of the Administration

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

Admin.

General

(a) the Secretary for Commerce and Economic Development to explain in his speech for resumption of the second reading debate on the Bill that the Administration would review the recently proposed HK$ 40-million turnover threshold for exemption of conduct of lesser significance under the second conduct rule in the light of statistics of the Census and Statistics Department updated from time to time after enactment of the Ordinance;

(b) explain how the enacted Ordinance could tackle concrete examples of anti-competitive conduct of concern to the general public, such as the substantial market power of The Link REIT in Tin Shui Wai, collusive price fixing practices among oil companies, monopoly of supermarket chains, etc.;

(c) provide the relevant clause(s) of an updated version (if any) of the latest draft CSAs proposed by the Administration (LC Paper No. CB(1)1573/11-12(03) issued on 16 April 2012) in response to further comments of the legal adviser to the Bills Committee on these draft CSAs;

Clause 2

(d) clarify whether courts in Hong Kong would fall within the definition of "statutory body" in clause 2 of the Bill, and if so, consider revising the definition of "statutory body" to exclude courts from the definition;

Clause 6(2)

(e) refine the proposed CSA to clause 6(2) in LC Paper No. CB(1)1573/11-12(03) to clarify the policy intention that even though the agreement, concerted practice or decision referred to in clause 6(1) involved serious anti-competitive conduct, there was still a need to prove that the said agreement, concerted practice or decision had the object or effect of preventing, restricting or distorting competition in Hong Kong before they would constitute contravention of the enacted Ordinance; and

Clause 118

(f) respond to the views of Dr Margaret NG and her call to revise the

drafting of clause 118, preferably by improving the drafting of clause 118(2) and (3) and deleting the proposed new clause 118(4).

Legislative timetable and cancellation of meeting

6. Members agreed that the meeting on 30 April 2012 should be cancelled, and that the next meeting should be held on Tuesday, 8 May 2012, from 4:30 pm to 7:30 pm. Noting from the Administration that the outstanding CSAs would be ready for the meeting on 8 May 2012, members further agreed that the 8 May 2012 meeting should be the last meeting of the Bills Committee, and should focus on the Administration's responses to outstanding issues raised by members at previous meetings, and on any CSAs which members might wish to propose.

Clerk

7. The Bills Committee also agreed to the Administration's proposal to resume the Second Reading debate on the Bill at the Council meeting of 30 May 2012, and that the Bills Committee would report its deliberations to the House Committee at its meeting on 18 May 2012. The Chairman reminded members that the deadline for giving notice of CSAs would be 21 May 2012.

III Any other business

8. There being no other business, the meeting ended at 4:15 pm.

Council Business Division 1
Legislative Council Secretariat
27 September 2012

Appendix

Proceedings of the 37th meeting of
the Bills Committee on Competition Bill
on Tuesday, 24 April 2012, at 2:30 pm
in Conference Room 3 of the Legislative Council Complex

Time marker	Speaker	Subject(s)	Action required
Agenda Item I – Confirmation of minutes			
000521 – 000558	Chairman	Confirmation of minutes of meeting on 6 December 2011 (LC Paper No. CB(1)1654/11-12)	
Agenda Item II – Meeting with the Administration			
000559 – 001504	Chairman Assistant Legal Adviser 2 (ALA2) Administration	ALA2 drew members' attention to the use of "他或她" in the Chinese text of clause 138(2), and sections 5(2), 8(6) and 15(3) of Schedule 5 to the Bill, pointing out that on previous occasions in other committees, Members had expressed strong views about the use of such terms, in particular where amendment bills or regulations were concerned, as this new drafting practice would give rise to concerns about the possible inconsistency in the same Ordinance/Regulation between existing provisions containing references of masculine gender and amended provisions with gender-neutral references. ALA2 also stated that the use of "他或她" could in fact be avoided by repeating the subject (by using such terms as "該人士", "該人員", etc.) or changing the sentence structure as in clause 5(2) of the Bill, which had avoided the use of "他或她" as the Chinese rendition of "he or she". The Administration made the following response – (a) while there were different techniques to achieve gender neutrality in drafting a provision, the technique which would have the minimum effect on brevity and intelligibility in the particular context would be adopted. The phrase "他或她" in clause 138(2) was used because there were two subjects, "the President or Deputy President", in that particular clause; (b) since the Bill was a brand new piece of legislation, and unlike the previous case quoted by ALA2 above which involved an amendment regulation, no consistency concern would restrict the Bill from adopting the new gender-neutral drafting practice; and (c) the Law Drafting Division of the Department of Justice (DoJ) had since December 2009 been adopting a policy of gender-neutral drafting to keep up with other common law jurisdictions.	
001505 – 001749	Chairman Dr Margaret NG	Dr Margaret NG pointed out that the word "他" as used in the past could already function as a generic pronoun to	

Time marker	Speaker	Subject(s)	Action required
	Ms Emily LAU ALA2	include "她" and even "它", which were both unnecessary and undesirable new characters coined in modern times. She however opined that how bills should be drafted should be left to the decision of DoJ. At members' invitation, ALA2 advised that while he saw a need to draw members' attention to the above elaborated drafting issue, he agreed with Dr NG to allow the Law Drafting Division of DoJ to exercise discretion in drafting unless the legal effect was seriously affected. Since other members had no strong views in this regard, the Chairman concluded that the Administration could decide for itself how to pursue the above drafting issue.	
001750 – 001831	Chairman Administration ALA2	ALA2 reported that he had passed to the Administration further comments on the latest draft Committee Stage amendments (CSAs) proposed by the Administration (LC Paper No. CB(1)1573/11-12(03) issued on 16 April 2012), and said that the Administration had agreed to provide to the Bills Committee the relevant clause(s) of an updated version of these CSAs in response to the comments.	The Administration to take action as requested in paragraph 5(c)
Discussion on the Administration's responses to outstanding issues arising from previous meetings (LC Paper No. CB(1)1652/11-12(02))			
001832 – 002408	Chairman Administration	Briefing by the Administration on its responses to outstanding issues arising from previous meetings (LC Paper No. CB(1)1652/11-12(02))	
002409 – 003431	Chairman Mr Jeffrey LAM Administration ALA2	Mr Jeffrey LAM opined that whether an undertaking had a substantial degree of market power was still to be decided in a subjective manner, and that the Administration had yet to fully address concerns in this regard. The Administration's relevant responses were also confusing and contradictory as evidenced by its reply to his letter dated 25 October 2011, which stated that it would be a question of fact to determine whether the agreement of price cut between two local stores with no market power to compete with big players was anti-competitive; and the Administration's latest proposed CSA to clause 6(2), which would have the effect of providing that, if the agreement, concerted practice or decision referred to in clause 6(1) involved serious anti-competitive conduct, it would have the object or effect of preventing, restricting or distorting competition in Hong Kong regardless of the market power of the undertakings concerned and whether competition had been affected or promoted. The business sector, in particular small and medium enterprises (SMEs), was gravely concerned about the above seeming change in stance. He sought reasons for the change and opined that stakeholders, in particular SMEs, should be thoroughly consulted on the change. The Administration made the following response –	

Time marker	Speaker	Subject(s)	Action required
		(a) the Administration's long stated policy intention was to effectively tackle four serious anti-competitive conduct, including price-fixing, which would not be changed notwithstanding any CSAs proposed by the Administration to the Bill; and (b) whether a conduct was anti-competitive would be a question of fact. In the case of individual stores cutting prices to compete with big players in their vicinity, an agreement between stores on price level would raise competition concern and more details would be required for determining whether the agreement was anti-competitive. Noting the above response, Mr LAM opined that it would be difficult for SMEs to determine whether their business practices were anti-competitive or not. He stressed the need to ensure the Bill was clear lest it would affect the market. The Administration responded that it had already greatly enhanced the certainty of the Bill by – (a) clearly stating its stance regarding serious anti-competitive conduct and how it would interpret certain business practices; (b) clarifying what the four types of serious anti-competitive conduct were in the new definition of "serious anti-competitive conduct" in clause 2; and (c) introducing the warning notice for alleged contravention of the first conduct rule for agreements not involving serious anti-competitive conduct, so that if undertakings rectified their malpractices within a reasonable period of time, enforcement action would not be taken against them. In response to ALA2's comment on the proposed CSA to clause 6(2) in LC Paper No. CB(1)1573/11-12(03), the Administration confirmed its policy intention that even though the agreement, concerted practice or decision referred to in clause 6(1) involved serious anti-competitive conduct, there was still a need to prove that the said agreement, concerted practice or decision had the object or effect of preventing, restricting or distorting competition in Hong Kong before they would constitute contravention of the enacted Ordinance.	
003432 – 005019	Chairman Dr Margaret NG Administration	Dr Margaret NG made the following comments on clause 118 – (a) that the repeated use of "any" in clause 118(2) was undesirable, and that the clause should be improved	

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		by deleting the redundant word "any" in the phrase "any such proceedings", and by replacing the word "any" in the phrase "any earlier decision" with "an"; (b) that the phrase "where any such appeal" in the last part of clause 118(3) should be amended to read "where such an appeal"; (c) that if the Court of First Instance (CFI) and the Competition Tribunal (the Tribunal) enjoyed equal status, it might not be appropriate or necessary to expressly specify that the CFI or the Tribunal should be bound by an earlier decision of each other; and (d) that the proposed new clause 118(4) was unnecessary 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. The Administration undertook to consider Dr NG's comments on clause 118 above but explained that the new clause 118(4) had been proposed to address the concern that the term "any earlier decision" in clause 118(2) was unclear. The Administration would further consider whether to introduce the new clause in the light of members' views. In response to the Chairman, ALA2 explained that although it could be logically deduced that a decision of the CFI or the Tribunal overturned on appeal would automatically not be binding on the CFI or the Tribunal, "any earlier decision" as construed from the presently drafted clause 118(2) and (3) could include a decision that was overruled on appeal. Pointing out that the CFI or the Tribunal would naturally be bound by an earlier decision of each other unless there were overriding reasons to the contrary, and that if there was an appeal against such a decision, the CFI or the Tribunal would naturally wait for the appeal outcomes, Dr NG called upon the Administration to improve the drafting of clause 118(2) and (3) instead of adding the proposed new clause 118(4). At the Chairman's request, the Administration agreed to respond to the views of Dr NG and her call to revise the drafting of clause 118. For record purposes, Dr NG stated her comments on LC Paper No. CB(1)1573/11-12(02) as follows – (a) notwithstanding the Administration's removal of the new clause 153B, the Judiciary's stance regarding the proposal to add the new clause to bar judicial review of the Tribunal's decisions as reported in paragraphs 10 to 15 of LC Paper No. CB(1)1573/11-12(02)	The Administration to take action as requested in paragraph 5(f)

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		unsettling. In particular, it was self-contradictory that although as reported "the Judiciary considers that it is arguable that" the Tribunal's "decisions are amenable to judicial review in the CFI in the same or similar extent", it was still of the view that "the proposed clause 153B does **not** represent any removal of the right of the relevant parties to challenge the" Tribunal's "decisions on the basis of the usual grounds for judicial review"; (b) since it was the court which exercised discretion in deciding whether to grant leave for applications for judicial review, and that it was the Judiciary which had proposed the new clause 153B to bar the essential civil right of judicial review against the Tribunal's decisions, the public would find it hard to believe that the court's decisions regarding judicial review of the Tribunal's decisions would be fairly made. The Judiciary's involvement in proposing clause 153B was therefore highly regretful; (c) although the Judiciary had expressed no objection to having Hong Kong's courts included in the definition of statutory bodies for the purposes of the Bill, she still considered it inappropriate to define courts as statutory bodies and might propose CSAs in this regard. In her view, provision of a separate definition for "court" was not as difficult as the Administration had claimed because there was case-law in this regard; (d) the proposed CSA to clause 106 in LC Paper No. CB(1)1573/11-12(02) agreeable; and (e) it would not constitute forum shopping if the decision as to whether a claim should be heard in the CFI or the Tribunal was made by the parties of the proceedings concerned in the light of legal costs and perceived procedural advantages. It would not be appropriate to introduce the proposed transfer mechanism to the Bill to enable the Judiciary to transfer proceedings to suit its convenience, thereby making the court "an interested party" which was highly unsettling. Moreover, if the proceedings of the Tribunal were simple, competition claims would naturally be brought to it. She therefore had reservation about the introduction of the transfer mechanism. The Administration responded that the transfer arrangements were made to give the Tribunal primary jurisdiction over all competition matters and give due recognition of the specialist court status of the Tribunal, so as to enable the Tribunal to accumulate experience and	

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		expertise in the area of competition law, which was important for the overall development of an effective regulatory framework for competition matters in Hong Kong.	
005020 – 005351	Chairman Mrs Regina IP Administration	Mrs Regina IP – (a) reiterated her earlier expressed view that markets could be divided into market segments according to districts or product lines, and urged the Administration to make reference to relevant guidelines containing such concepts issued by such forerunners of competition laws as the European Union (EU) and Singapore; and (b) expressed concern about the absence of a specific market definition, and asked when the guidelines on the conduct rules and market definition would be available. The Administration made the following response – (a) market power was determined by the substitutability of goods/services. As such, whether there was a geographical market would depend on whether substitutability of goods/services was affected by local factors; and (b) papers on the above sample guidelines with examples had already been provided in 2011.	
005352 – 010245	Chairman Ms Miriam LAU Administration	Ms Miriam LAU – (a) pointed out that the above papers on guidelines had caused SMEs great concern rather than clarifying uncertainties. Although the Administration had responded to their concerns by taking out the stand-alone right of private action, proposing a warning notice mechanism, removing the payment requirement of a sum not exceeding HK$ 10 million under an infringement notice, SMEs were still concerned about the Bill because it was a new piece of legislation; (b) enquired how the public and SMEs could participate in formulation of the guidelines at an early stage, and when the guidelines would be made available; (c) shared Mrs Regina IP's view on the absence of a specific market definition, and on the need to note the existence of geographical markets, where an undertaking making small profit might still exceed the proposed "minimum" market share threshold of 25%, and the turnover threshold for conduct of lesser	

Time marker	Speaker	Subject(s)	Action required
		significance under the second conduct rule of HK$ 40 million. For example, in the case where there were only three shops selling taxis in a certain district. The above two thresholds therefore could not fully address SMEs' concerns; and (d) opined that although the Administration had claimed that raising the 25% "minimum" market share threshold further to 30% or 35% might have the effect of excluding certain oligopolies altogether from the application of the second conduct rule, the above threshold was in fact not absolute, and even after raising it a substantial degree of market power could still be established if other relevant factors provided strong evidence of such market power. Raising the threshold would not affect the effectiveness of the Bill to capture such concrete examples of anti-competitive conduct as collusive price fixing practices among oil companies. Moreover, the above threshold was in fact already quite strict being applied across the board without giving regard to the specific conditions of individual trades. The Administration made the following response – (a) while the sample guidelines provided earlier did raise some concerns about whether exchange of information would constitute anti-competitive conduct, the Administration had already tried to address these concerns as far as practicable by proposing to specify four types of hardcore activities in the Bill, and by proposing a warning notice mechanism; (b) if the turnover of an undertaking always exceeded the turnover threshold, the goods sold should logically be high-priced products free from geographical restrictions. Since the market concerned would then be big rather than restricted, the market share of the undertaking concerned would unlikely exceed the proposed market share threshold despite its large turnover; and (c) there was no need to be concerned about the proposed 25% market share threshold because an undertaking with a market share exceeding 25% would not be automatically assumed to possess a substantial degree of market power because, unlike a market share threshold of "presumed market power" **above** which a substantial degree of market power was presumed, the 25% threshold was the "minimum" threshold **below** which an undertaking would unlikely possess a substantial degree of market power.	

Time marker	Speaker	Subject(s)	Action required
010246 – 010525	Chairman Dr Philip WONG Administration	Dr Philip WONG welcomed the Administration's proposal to increase the turnover threshold for the conduct of lesser significance from HK$11 million to HK$40 million, as a result of which nearly 95% of all SMEs would be excluded from the application of the second conduct rule. To sustain the above effect, he enquired whether the threshold would be reviewed every few years, and increased as necessary in keeping with inflation. The Administration responded that in working out the above turnover threshold, reference had been made to the statistics of the Census and Statistics Department (C&SD) on the turnovers of SMEs after excluding undertakings with five or less employees, so that any necessary future adjustment to the threshold could be made objectively. The threshold would be reviewed in the light of statistics of C&SD updated from time to time. Should there be significant deviation of the threshold from the average turnover of SMEs at the time in question, the threshold would be adjusted by amending Schedule 1 to the Bill through the introduction of subsidiary legislation. In response to Dr WONG and the Chairman, the Administration agreed that the Secretary for Commerce and Economic Development would explain in his speech for resumption of the second reading debate on the Bill that the Administration would review the above turnover threshold in the light of statistics of C&SD updated from time to time after enactment of the Ordinance.	The Administration to take action as requested in paragraph 5(a)
010526 – 011300	Chairman Mrs Regina IP Administration	Mrs Regina IP expressed the following views – (a) depending on the type of goods sold, even SMEs could have a large market share in a certain geographical market; (b) since the guidelines to be formulated by the Competition Commission (the Commission) would inevitably be modeled on those of EU, Singapore and the United States (US), the Administration should be able to provide samples of the guidelines which the Commission would likely formulate; and (c) the guidelines of Singapore mainly looked at two aspects, the supply side and the demand side. In this regard, The Link REIT, which owned seven out of the eight shopping malls and hence in control of the supply side in Tin Shui Wai might possess a substantial degree of market power to abuse to the detriment of the price of goods and hence livelihood of the residents there. If the Bill could tackle such a concrete example of anti-competitive conduct, she might consider supporting the Bill.	

Time marker	Speaker	Subject(s)	Action required
		The Administration made the following response – (a) whether an undertaking selling certain goods or providing certain services possessed a substantial degree of market power would hinge on the substitutability of the goods and services concerned. As for undertakings selling high-priced goods and hence might easily exceed the turnover threshold, their market shares would unlikely exceed the proposed 25% "minimum" market share threshold because the total business receipts of all players in the market concerned should also be very significant. Moreover, the substitutability of their goods would also be high because consumers purchasing high-priced goods would tend to go around comparing prices; (b) the sample guidelines with examples had already been provided in 2011. The Administration would liaise with the Secretariat to re-issue the sample guidelines to members; (c) no competition law in the world provided a market definition in legislation, which would normally be provided in the guidelines. Upon passage of the Bill, the Commission would formulate the guidelines before implementing the enacted Ordinance. The business sector could therefore rest assured that it would have sight of the guidelines before implementation of the enacted Ordinance; and (d) whether the enacted Ordinance could tackle the substantial market power of The Link REIT in Tin Shui Wai would again hinge on the substitutability of the goods/services concerned and, before investigation could be conducted, there was difficulty in drawing a conclusion in this regard, especially as the consumers in the above case were not members of the public but shop operators, and that they might have the option of operating elsewhere. (*Post-meeting note:* The sample guidelines in (b) above were re-issued vide LC Paper No. CB(1)1686/11-12 on 25 April 2012)	
011301 – 011823	Chairman Ms Miriam LAU Administration	Ms Miriam LAU made the following points – (a) by owning seven out of the eight shopping malls and hence in control of the supply side in Tin Shui Wai, The Link REIT in fact enjoyed monopoly of the shop rental market there; (b) if the Bill could not tackle the above case, the Administration did not have the determination to	

Time marker	Speaker	Subject(s)	Action required
		tackle concrete examples of anti-competitive conduct to ensure a level playing field to benefit consumers. Instead, the Bill might only be able to target at SMEs, who were still concerned about the lack of a market definition and hence the likelihood of inadvertent contravention of the enacted Ordinance; and (c) to address SMEs' concerns about the high costs incurred in complying with the enacted Ordinance, the guidelines should be clear, and more examples, including those on the four serious anti-competitive conduct, should be provided in the relevant papers to be re-provided. The Administration made the following response – (a) the Bill if enacted would empower the Commission to conduct investigation into the above case concerning The Link REIT to establish whether it had engaged in any anti-competitive conduct. Before then it might be unfair and inaccurate to draw a conclusion in this regard; (b) the Administration had no intention to target the Bill at SMEs and had in fact been positively responding to their concerns by making various proposals to enhance certainty of the Bill and set out conditions under which SMEs would be excluded from the regulation of the Bill. All the above efforts had been made to strike a balance between the interests of SMEs and the need to maintain the overall effectiveness of the Bill; and (c) the guidelines provided in 2011 had in fact been modeled on those of the US and Europe, which were centred around the major principles already set out in the above highlighted papers on guidelines.	
011824 – 012037	Chairman ALA2 Administration	ALA2 commented that, as presently drafted, the proposed CSA to clause 6(2) in LC Paper No. CB(1)1573/11-12(03) would have the effect that, if serious anti-competitive conduct was involved, the agreement, concerted practice or decision referred to in clause 6(1) would per se have the object or effect of preventing, restricting or distorting competition in Hong Kong, and no further evidence would be required to prove that. In response, the Administration reaffirmed the policy intention that even though the agreement, concerted practice or decision referred to in clause 6(1) involved serious anti-competitive conduct, there was still a need to prove that the said agreement, concerted practice or decision had the object or effect of preventing, restricting or distorting competition in Hong Kong before they would	The Administration to take action as requested in paragraph 5(e)

Time marker	Speaker	Subject(s)	Action required
		constitute contravention of the enacted Ordinance, and agreed to refine the proposed CSA to clause 6(2) to clarify the above.	
012038 – 012759	Chairman Ms Emily LAU Administration	Ms Emily LAU expressed the following views – (a) the Administration's stance not to adjust the presently proposed 25% "minimum" market share threshold was agreeable since oligopolies were not uncommon in many sectors in Hong Kong. The Administration should tackle concrete examples of anti-competitive conduct of concern to the public with the enacted Ordinance; and (b) many members of the public were unsure about the effectiveness of the Bill given the many amendments to it made by the Administration. The Administration should send a clear message to the community that concrete examples of anti-competitive conduct of concern to the general public, such as the substantial market power of The Link REIT in Tin Shui Wai, collusive price fixing practices among oil companies, monopoly of supermarket chains, etc. could be actively tackled after enactment of the Ordinance. The Administration made the following response – (a) oligopoly would not in itself constitute contravention of the enacted Ordinance if it did not involve anti-competitive conduct; and (b) at present the Administration had no power to investigate whether there was collusive price fixing practices among oil companies, or whether supermarket chains were abusing their market power to control suppliers to create market entry barrier. Upon enactment of the Ordinance, the Commission could conduct investigation into such conduct on its own volition or in response to complaints and, if contravention could be established, the Commission could mete out penalties or bring proceedings before the Tribunal. The same was true in the case of The Link REIT if there was a complaint. As such, there was a need to enact the Ordinance as early as practicable. In response to Ms LAU's request for overseas examples of abuse of market power, the Administration said that these included predatory pricing to eliminate or substantially damage competitors, and creation of market entry barrier through controlling the supplier(s).	

Time marker	Speaker	Subject(s)	Action required
		At Ms LAU's request, the Administration agreed to explain how the enacted Ordinance could tackle the above concrete examples of anti-competitive conduct.	The Administration to take action as requested in paragraph 5(b)
012800 – 013302	Chairman Ms Miriam LAU Administration	Ms Miriam LAU enquired if the enacted Ordinance could tackle collusive price fixing if the relevant agreement had been made tacitly without any written proof. The Administration made the following response – (a) since "agreement" as defined in clause 2 included any agreement whether express or implied, written or oral, tacit collusion in the form of tacit understanding or spontaneous co-ordination of business policies could be tackled; and (b) parallel pricing per se might not necessarily constitute contravention because it might be the result of competition rather than tacit collusion. Ms LAU indicated hope for the Administration to really make efforts to effectively tackle the collusive price fixing practices among oil companies, which were abnormal and unique to Hong Kong.	
013303 – 013954	Chairman Mr LEUNG Kwok-hung Administration	Mr LEUNG Kwok-hung opined that the enacted Ordinance could serve little purpose if it could not tackle collusive price fixing practices among oil companies. To achieve this target, the Bill should, instead of adopting the principle of presumption of innocence as presently proposed, adopt the Independent Commission Against Corruption's seeming presumption of guilt approach by requiring the parties involved in parallel pricing to account for their prices. The Administration made the following response – (a) regulatory authorities in common law jurisdictions would be required to prove the accused's guilt, and rarely would they require him to prove his innocence; and (b) according to overseas experience, there was always difficulty in capturing the conduct of cartels. However, leniency agreements with persons who had allegedly contravened the conduct rules in exchange for their co-operation in the relevant investigation would help bring enforcement proceedings before the Tribunal in respect of other parties involved in the same contravention. Such leniency agreement arrangements were also available in the Bill and as such, introduction of the Bill could help tackle cartels.	

Time marker	Speaker	Subject(s)	Action required
		Pointing out that anti-competitive conduct was as serious as bribery and corruption, Mr LEUNG urged the Administration to re-consider his proposal above. The Administration made the following response – (a) in view of the difficulty that the community might have in adapting to the Bill which was a brand new piece of legislation, the present approach of presumption of innocence was appropriate; and (b) while bribery was criminal in nature, the Bill would not impose any criminal sanctions and as such, the presumption of innocence would not apply. However, notwithstanding the standard civil burden of proof, the Commission could draw inference from matters like parallel pricing and conduct investigation accordingly. Since it had already been given considerable investigative power, the standard of proof should apply. Moreover, it might not be desirable to introduce a regime under which the accused had to defend himself against accusation made without any supporting evidence.	
013955 – 014142	Chairman Administration	The way forward Meeting arrangements	

Council Business Division 1
Legislative Council Secretariat
27 September 2012