

立法會

Legislative Council

LC Paper No. CB(4)745/14-15
(These minutes have been
seen by the Administration)

Ref : CB4/SS/6/14

Subcommittee on Four Subsidiary Legislation Related to Competition Ordinance Gazetted on 18 February 2015

**Minutes of the first meeting held on
Monday, 16 March 2015, at 10:45 am
in Conference Room 2 of the Legislative Council Complex**

Members present : Hon Andrew LEUNG Kwan-yuen, GBS, JP(Chairman)
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Cyd HO Sau-lan, JP
Hon Paul TSE Wai-chun, JP
Hon Charles Peter MOK, JP
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP
Hon Martin LIAO Cheung-kong, SBS, JP
Dr Hon CHIANG Lai-wan, JP
Ir Dr Hon LO Wai-kwok, BBS, MH, JP
Hon CHUNG Kwok-pan

Member attending : Hon Ronny TONG Ka-wah, SC

**Public Officers
attending** : Agenda item II

Ms Carol YUEN, JP
Deputy Secretary for Commerce and Economic
Development (Commerce and Industry)1

Mr Sam HUI
Principal Assistant Secretary for Commerce and
Economic Development (Commerce and
Industry)2

Miss Ada CHAN
Principal Assistant Secretary for Financial
Services and the Treasury (Financial Services)2

Mr Jonathan LUK
Government Counsel
Department of Justice

Clerk in attendance : Ms Debbie YAU
Chief Council Secretary (4)5

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Shirley TAM
Senior Council Secretary (4)5

Ms Zoe TONG
Legislative Assistant (4)5

Miss Shanice LOK
Clerical Assistant (4)4

Action

I. Election of Chairman

Election of Chairman

Mr Jeffrey LAM, the member with the highest precedence among those present at the meeting, presided over the election of the Chairman of the Subcommittee. He invited nominations for the chairmanship of the Subcommittee.

2. Mr Andrew LEUNG was nominated by Mr LO Wai-kwok and the nomination was seconded by Dr CHIANG Lai-wan. Mr Andrew LEUNG accepted the nomination. There being no other nomination, Mr LEUNG was elected Chairman of the Subcommittee.

Action

3. Members agreed that there was no need to elect a Deputy Chairman.

II. Meeting with the Administration

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|---------------------------------|---|
| (L.N. 36 of 2015 | -- Competition (Application of Provisions) Regulation |
| L.N. 37 of 2015 | -- Competition (Disapplication of Provisions) Regulation |
| L.N. 38 of 2015 | -- Competition (Turnover) Regulation |
| L.N. 39 of 2015 | -- Competition Ordinance (Commencement) Notice 2015 |
| File Ref.: CITB CR 05/62/25/14 | -- Legislative Council Brief issued by Commerce and Economic Development Bureau on Competition (Application of Provisions) Regulation and Competition (Disapplication of Provisions) Regulation |
| File Ref.: CITB CR 05/62/25/14 | -- Legislative Council Brief issued by Commerce and Economic Development Bureau on Competition (Turnover) Regulation and Competition Ordinance (Commencement) Notice 2015 |
| LC Paper No. LS41/14-15 | -- Legal Service Division Report on Subsidiary Legislation Gazetted on 18 February 2015 |
| LC Paper No. CB(4)640/14-15(01) | -- Letter from the Assistant Legal Adviser to the Administration dated 10 March 2015 |
| LC Paper No. CB(4)640/14-15(02) | -- Letter from the Administration dated 13 March 2015 in |

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response to the Assistant Legal Adviser's letter

- LC Paper No. CB(4)640/14-15(03) -- Letter from the Administration to the Subcommittee dated 11 March 2015
- LC Paper No. CB(4)640/14-15(04) -- Background brief prepared by the Legislative Council Secretariat)

4. Mr Paul TSE declared that he was a member of the Helena May. Mr Andrew LEUNG also declared that he was a member of the Federation of Hong Kong Industries.

5. The Subcommittee deliberated (index of proceedings attached at the **Annex**).

Follow-up actions to be taken by the Administration

Admin 6. To facilitate further discussion, the Administration was requested to provide a written response on the following issues –

Competition (Turnover) Regulation ("C(T)R")

- (a) elaboration of the term "ordinary activities" further to the reference on its use as clarified by the Administration in paragraph 4 of LC Paper No. CB(4)640/14-15(02) and paragraph 2 of CB(4)640/14-15(03), such as -
- (i) apart from the sale of goods and/or the rendering of services, whether transactions of properties and foreign currencies, and distribution of bonus or dividends were also regarded as "ordinary activities"; and
 - (ii) examples of non-ordinary activities;
- (b) way(s) to set out the principles/criteria on the classification of an activity as "ordinary" or not "ordinary" in the relevant provisions for public's reference –
- (i) in respect of the Administration's reference to Hong Kong Accounting Standard 18 ("HKAS 18") in the interpretation of the term "ordinary activities", clarification on its legal status and

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whether it was feasible to draw a clear reference to HKAS 18 in the provisions having regard to local and overseas legislation/practices;

- (ii) consider if the term "ordinary activities" could be more clearly defined in C(T)R;
- (iii) given that the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 of the United Kingdom ("UK") ("the UK Order 2000") provided that "[t]he provisions of this Schedule shall be interpreted in accordance with generally accepted accounting principles and practices"¹, whether the Administration would consider modeling the UK practice and make similar express provisions in C(T)R;
- (iv) noting the Administration's advice that it had communicated with the Competition Commission when making C(T)R, whether any guidelines would be issued by the Competition Commission under the Competition Ordinance (Cap. 619) for the purpose of determining the turnover of an undertaking and if so, under which section of Cap. 619;
- (c) given that UK had made specific provisions in the UK Order 2000 on the determination of turnover for "credit institutions", "financial institutions" and "insurance undertakings", whether Hong Kong should also have similar provisions;
- (d) given that turnover was a measurement for determining the cap on pecuniary penalties under section 93 of Cap. 619, whether the amounts derived from the local sale of goods exporting to overseas should form part of the turnover;
- (e) noting that "sales rebates" and "taxes directly related to the revenues" would be deducted from the amounts derived by the undertaking in determining the turnover of an undertaking for the purposes of section 93 or sections 5 and 6 of Schedule 1 to Cap. 619, whether and if yes, how their scope of coverage would be set out in detail in C(T)R; and
- (f) whether the "amounts" referred to in section 2(1) and (2) of C(T)R include both monetary and non-monetary rewards.

¹ Section 2 of the UK Order 2000. See website: <http://www.legislation.gov.uk/ukxi/2000/309/made>

Action

7. Noting the legislative timetable, the Subcommittee agreed to extend the scrutiny period of the subsidiary legislation. Members noted that the Chairman would move the relevant motion at the Council meeting of 25 March 2015.

8. Members agreed that it was not necessary to invite deputations' views on the subsidiary legislation.

III. Any other business

Date of next meeting

9. Members agreed that the next meeting be held on 27 March 2015.

(Post-meeting note: The next meeting of the Subcommittee was rescheduled to 24 March 2015 due to a possible clash with the Council meeting, and the notice of meeting was issued on 20 March 2015 vide LC Paper No. CB(4)685/14-15.)

10. There being no other business, the meeting ended at 12:30 pm.

Council Business Division 4
Legislative Council Secretariat
8 April 2015

**Proceedings of the first meeting of the Subcommittee
on Four Subsidiary Legislation Related to Competition Ordinance Gazetted on 18 February 2015
on Monday, 16 March 2015, at 10:45 am
in Conference Room 2 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda item I – Election of Chairman			
000142 – 000309	Mr Jeffrey LAM Ir Dr LO Wai-kwok Mr Andrew LEUNG Dr CHIANG Lai-wan	Election of Chairman	
Agenda item II –Meeting with the Administration			
000310 – 000828	Chairman Administration	Briefing by the Administration on Competition (Application of Provisions) Regulation ("C(AP)R"), Competition (Disapplication of Provisions) Regulation ("C(DP)R"), Competition Ordinance (Commencement) Notice 2015 ("the Notice") and Competition (Turnover) Regulation ("C(T)R")	
000829 – 001151	Chairman Dr CHIANG Lai-wan Administration	Discussion on C(AP)R and C(DP)R	
001152 – 002012	Chairman Mr Martin LIAO Administration	<p>Discussion on whether the amounts derived from the local sale of goods to overseas customers should form part of the turnover under C(T)R</p> <p>The Administration advised that the pecuniary penalty imposed in relation to conduct that constituted a single contravention might not exceed in total 10% of the turnover obtained in Hong Kong by the undertaking concerned for each year in which the contravention occurred, for up to three years. In practice, the turnover obtained in Hong Kong would include sales of an undertaking to customers in Hong Kong as well as its export sales made from Hong Kong. It should be noted that the cap of pecuniary penalty should have sufficient deterrent effect.</p>	The Administration to follow up as per paragraph 5(d) of the minutes
002013 – 002600	Chairman Mr Dennis KWOK Administration	<p><u>C(DP)R</u></p> <p>Mr KWOK referred to the case of Silver v New York Stock Exchange (373 U.S. 341 (1963)) whereby the Supreme Court in the United States ("US") ruled that the duty of self-regulation imposed upon the New York Stock Exchange by the Securities Exchange Act of 1934 did not exempt it from the antitrust laws of US. He asked about the Administration's consideration about this case.</p> <p>The Administration advised that the seven</p>	

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		<p>non-statutory bodies under C(DP)R were already regulated under the Securities and Futures Ordinance (Cap. 571) which included competition as one of its objectives of regulation. The disapplication arrangement would prevent any regulatory ambiguity that might otherwise arise as a result of their activities being subject to regulation under both Cap. 571 and Cap. 619. The Administration referred to various overseas practices, for example, the US courts had found that where there was legislation regulating the conduct of security exchanges, such legislation might take precedence over antitrust laws. Moreover, the Financial Conduct Authority and Competition and Markets Authority in the United Kingdom ("UK") had concurrent jurisdiction in competition issue in relation to financial services markets. The Securities and Futures Commission was establishing a regular dialogue with the Competition Commission ("the Commission") to share experience in regulating competition matters.</p>	
002601 – 002755	Chairman Mr Martin LIAO Administration	Discussion on scope of coverage of "sales rebates" and "taxes directly related to the revenues" under section 93 of or sections 5 and 6 of Schedule 1 to Cap. 619	The Administration to follow up as per paragraph 5(e) of the minutes
002756 – 003526	Chairman Mr Ronny TONG Administration	<p>Mr TONG welcomed C(AP)R as it was more appropriate for the Commission to determine whether a particular body was in breach of the Competition Rules or otherwise based on the outcome of investigation.</p> <p>Mr TONG considered dis-applying the key provisions of Cap. 619 to any person might undermine the legal effect of the legislation unless the bodies concerned were regulated by another piece of legislation containing competition provisions like the seven non-statutory bodies under C(DP)R which were regulated by Cap. 571.</p> <p>In reply to Mr TONG's enquiry, the Administration advised that C(DP)R applied to the seven non statutory bodies in their entirety. These seven non-statutory bodies were regulated under Cap. 571. However, C(DP)R did not include subsidiary companies of these bodies, which would continue to be subject to the key provisions of Cap. 619.</p>	

Time marker	Speaker	Subject(s)	Action required
003527 – 003617	Chairman	Invitation of deputations' views Extension of scrutiny period	
003618 – 004114	Chairman Administration Assistant Legal Adviser 2 ("ALA2") Mr Ronny TONG Mr Paul TSE	<u>Examination of provisions</u> <u>C(AP)R, C(DP)R and the Notice</u> Members did not raise any question. Declaration of interest by Mr TSE and the Chairman	
004115 – 005113	Chairman Administration ALA2	<u>C(T)R</u> <u>Section 1</u> Members did not raise any question. <u>Section 2</u> Discussion on issues raised in ALA2's letter and the Administration's reply (LC Paper Nos. CB(4)640/14-15(01) and (02))	The Administration to follow up as per paragraph 5(a), (b)(i) and (ii) of the minutes
005114 – 010316	Chairman Mr Ronny TONG Administration ALA2	Discussion of the meanings of "ordinary activities" and "amounts", and ways to set out the principles/criteria on the classification of an activity as "ordinary" or not "ordinary"	The Administration to follow up as per paragraph 5(a)(i), (b) and (f) of the minutes
010317 – 010834	Chairman Mr Paul TSE Administration	Mr TSE supported defining the term "ordinary activities" in C(T)R to obviate cross-referencing to Hong Kong Accounting Standard ("HKAS") 18 on Revenue. Discussion on specific provisions in respect of determination of turnover for "credit institutions", "financial institutions" and "insurance undertakings"	The Administration to follow up as per paragraph 5(b)(i) and (c) of the minutes
010835 – 011609	Chairman Mr Ronny TONG	Given the Legislative Council ("LegCo") was not empowered to scrutinize the content of and any changes to HKAS 18 and the Commission's Guidelines, Mr TONG cautioned against making reference to them in respect of the use of the term "ordinary activities" in C(T)R as this would over-ride the LegCo's power to amend the subsidiary legislation.	

Time marker	Speaker	Subject(s)	Action required
		Mr TONG considered it more appropriate to use "revenue" or "benefit" instead of "amounts" or "sum" in sections 2 and 3 of C(T)R.	
011610 – 012014	Chairman Ir Dr LO Wai-kwok Administration	In reply to Ir Dr LO, the Administration explained that, for example, if an undertaking received Government subsidy in return for a contractual obligation to provide homes for the elderly, the subsidy was to be recognized as an amount derived by the undertaking from its ordinary activities. However, if a one-off financial assistance was provided by the Government without a contractual obligation to supply goods or services, the financial assistance was not to be regarded as deriving from the undertaking's ordinary activities.	
012015 – 013101	Chairman Mr Ronny TONG Administration Ir Dr LO Wai-kwok	<u>Sections 3 and 4</u> Discussion of what the turnover period would be under specific circumstances set out in sections 5(4) and 6(3) of Schedule 1 to Cap. 619	
Agenda item III – Any other business			
013102 – 013141	Chairman	Date of next meeting	