

立法會
Legislative Council

LC Paper No. LS3/09-10

**Paper for the House Committee Meeting
on 23 October 2009**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 16 October 2009**

Date of tabling in LegCo : 21 October 2009

Amendment to be made by : 18 November 2009 (or 9 December 2009 if extended by resolution)

PART I THE ROAD CARGO SYSTEM (ROCARS)

Import and Export Ordinance (Cap. 60)

Import and Export (Electronic Cargo Information) Regulation (L.N. 188)

The object of this Regulation is to provide for the Road Cargo System (ROCARS), under which certain information relating to any cargo to be imported into or exported from Hong Kong by a motor vehicle in respect of which the Regulation applies (prescribed vehicle) must be lodged with the Commissioner of Customs and Excise ("the Commissioner"). Under the Regulation, the information must be lodged by electronic means before the cargo is imported or exported. Offences are created for contravention of these requirements, with penalties prescribed.

2. Schedule 1 to the Regulation sets out the information required to be lodged with the Commissioner.

3. Schedule 2 to the Regulation sets out the places where customs clearance points are located.

4. We have clarified with the Administration about the following points in relation to the Regulation (paragraphs 5 – 12 below). The Administration's reply is annexed to this report for Members' easy reference.

Scope of application of the Regulation – Section 3

5. Under section 3(1) of the Regulation, the Regulation applies in respect of any motor vehicle licensed or required to be licensed under the Road Traffic

Ordinance (Cap. 374) (RTO) other than a private bus, a private car, a private light bus, a public bus and a public light bus.

6. In response to our enquiries on the scope of prescribed vehicles under the Regulation, the Administration has replied that by virtue of the definition of the term "motor vehicle" under section 2 of RTO¹ and section 3(1) of the Regulation, a list of motor vehicles to which the Regulation applies is as follows-

- (a) Taxi;
- (b) Light goods vehicle;
- (c) Medium goods vehicle;
- (d) Heavy goods vehicle;
- (e) Special purpose vehicle;
- (f) Motor cycle;
- (g) Motor tricycle; and
- (h) Invalid carriage.

7. According to the Administration, under section 2 of RTO, special purpose vehicles² and invalid carriages³ are motor vehicles. In the unlikely event that they carry any cargo across the boundary, the policy intention of the Administration is that the Regulation should apply to them.

Failure to lodge information before import or export – Section 4

8. Section 4(5) of the Regulation provides that a person who imports or exports any undeclared cargo in or on a prescribed vehicle, knowing that the cargo, or part of the cargo, consists of a prohibited article⁴, commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 2 years.

9. Section 4(6) of the Regulation provides that it is a defence to a charge under subsection (5), if the defendant proves that he did not know and could not with reasonable diligence have known that the cargo was undeclared cargo.

¹ Under section 2 of RTO, the term "motor vehicle" is defined to mean any mechanically propelled vehicle. Therefore, trailer and rickshaw are not motor vehicles within the definition.

² Under section 2 of RTO, the term "special purpose vehicle" means a motor vehicle designed, constructed or adapted primarily for a use other than the carriage on a road of goods, the driver or passengers. The Administration has given the following examples in its reply: caravan, mobile office and mobile medical unit.

³ Under section 2 of RTO, the term "invalid carriage" means a motor vehicle especially designed and constructed for the sole use of a person suffering from physical defects or disabilities. The Administration has given the following example in its reply: a motor vehicle with a modified steering wheel.

⁴ Under section 2 of the Import and Export Ordinance (Cap. 60), the term "prohibited article" means any article-

- (a) the import or export of which is prohibited under the provisions of this Ordinance;
- (b) the import or export of which is permitted subject to the terms and conditions of a licence; or
- (c) the import or export of which is prohibited or controlled under any other law, not being an article in transit which is excluded from such prohibition or control.

10. The Administration has clarified in its reply that a person, who avails himself of a defence under section 4(6) to a charge under section 4(5) of the Regulation, may be charged with a separate offence for importing or exporting a prohibited article under the appropriate legislation, depending on the evidence and the circumstances of the particular case.

Indication of unladen vehicle – Section 10

11. Section 10(2) of the Regulation requires the person in charge of a prescribed vehicle that is about to enter or leave Hong Kong and is not carrying any cargo to make an indication at a customs clearance point by means of a device provided by the Commissioner to the effect that it is not carrying any cargo. The Administration has clarified in its reply that the device would be in the form of a button on a panel to be installed at each vehicular lane at the Land Boundary Control Points (LBCPs). There will be messages reminding truck drivers to press the button if no cargo is carried on the truck. Members may refer to the tentative design of the device set out in the Administration reply.

Exemption –Section 14

12. Section 14 of the Regulation empowers the Commissioner to grant exemptions from the Regulation. Section 14(3) empowers the Commissioner to grant exemptions from the Regulation, if the Commissioner is satisfied that there exist exceptional circumstances that make it impracticable for any person or vehicle of that class or description to comply with those provisions. The Administration has clarified in its reply that the "exceptional circumstances" may include computer system breakdown or power failure at the LBCPs. Under such circumstances, cargo data cannot be lodged through ROCARS and customs clearance at the LBCPs has to be reverted to manual processing.

13. At the meeting of the Commerce and Industry Panel held on 17 March 2009, the Administration briefed members on the proposed subsidiary legislation for implementing the ROCARS. Members noted that the Administration proposed to prescribe a transitional period of 18 months before mandating ROCARS submissions in mid-2011. The Panel supported in principle the legislative proposal. Hon Miriam LAU suggested that to ensure a smooth migration, an open-ended transitional period should be provided to allow the industry to adapt to the new mode of operation. The Administration should review the situation by the end of 2010, taking into consideration the take-up rate by shippers and truckers and the smooth operation of the system, before mandating ROCARS submissions.

14. Members may refer to LegCo Brief File Ref: CITB CR/89/14/21/1 of 14 October 2009 issued by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau for background information.

15. This Regulation will come into operation on the expiry of the period of 18 months beginning on the day on which the Import and Export (Amendment) Ordinance 2007 (8 of 2007) comes into operation. Paragraph 8 of the LegCo Brief states that the Administration intends to appoint a date in early 2010 as the commencement date for the Amendment Ordinance. As such the Regulation will come into operation 18 months afterwards, i.e. by the third quarter of 2011.

PART II APPOINTMENT OF NEW SERVICE PROVIDER (SP) FOR THE GOVERNMENT ELECTRONIC TRADING SERVICES (GETS)

Dutiable Commodities Ordinance (Cap. 109)

Dutiable Commodities Ordinance (Amendment of Schedules 1A and 1B) Notice 2009 (L.N. 189)

Import and Export Ordinance (Cap. 60)

Import and Export Ordinance (Amendment of Schedules 2 and 3) Notice 2009 (L.N. 190)

Reserved Commodities Ordinance (Cap. 296)

Reserved Commodities Ordinance (Amendment of Schedules 1 and 2) Notice 2009 (L.N. 191)

16. In 1997, the Government introduced GETS through which the trading community furnishes by electronic means a number of commonly used trade-related documents⁵ to the Government.

17. Administration of the six GETS documents is governed by different Ordinances. The GETS SPs appointed by the Government are responsible for collecting data electronically from traders or carriers, confirming their identity, validating and transmitting such data to the Government's backend systems.

18. In addition to the two existing SPs, the Government appoints Brio Electronic Commerce Limited (Brio) as the third SP. Consequently, legislative amendments are to be made to the following Ordinances to effect the change.

L.N. 189

19. Schedules 1A and 1B to the Dutiable Commodities Ordinance (Cap, 109) are amended to empower Brio to provide services for Dutiable Commodities Permit.

⁵ At present, the GETS documents include (a) Import and Export Declaration; (b) Dutiable Commodities Permit; (c) Cargo Manifest; (d) Certificate of Origin; (e) Production Notification; and (f) notifications under the Textile Trader Registration Scheme.

L.N. 190

20. Schedules 2 and 3 to the Import and Export Ordinance (Cap. 60) are amended to empower Brio to provide services for Import and Export Declaration, Certificate of Origin and Cargo Manifest.

L.N. 191

21. Schedules 1 and 2 to the Reserved Commodities Ordinance (Cap. 296) are amended to empower Brio to provide services for Cargo Manifest.

22. At the meeting of the Commerce and Industry (CI) Panel held on 20 November 2007 and 17 March 2009, the Administration briefed members on the proposed arrangements for the provision of GETS after the expiry of the current service contracts between the Government and the two incumbent SPs in December 2009, and the Government's intention to appoint, subject to market response, up to three SPs. Panel members were generally in support of the opening up of the market for fair competition. At the meeting of the CI Panel held on 17 February 2009, members noted and raised no query on the Administration's paper on the outcome of the tendering exercise for GETS post-2009.

23. Members may refer to LegCo Brief File Ref: CITB 89/01/10 of October 2009 issued by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau for background information.

24. L.N. 189 to L.N. 191 will come into operation on 1 January 2010.

25. No difficulties have been identified relating to the legal and drafting aspects of the above items of subsidiary legislation.

Encl

Prepared by

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Legislative Council Secretariat
21 October 2009

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Your Ref : LS/S/2/09-10

21 October 2009

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Urgent By Fax : 2877 5029

Dear Mr Lam,

**Import and Export (Electronic Cargo Information) Regulation
L.N. 188 of 2009**

Thank you for your letter dated 19 October 2009. Our reply to your questions is as follows –

Section 3

- (a) The Road Cargo System (ROCARS) is an electronic advance cargo information system for customs clearance of road cargoes carried by cross-boundary trucks. The benefit of adopting the exclusion approach in prescribing the application of the Import and Export (Electronic Cargo Information) Regulation (the Regulation) is that the Regulation would apply to all motor vehicles except those classes of motor vehicles specifically set out in section 3(1)(a) to (e). This would ensure that most motor vehicles that are capable of carrying cargo into or out of Hong Kong will be subject to the requirements of the Regulation.

- (b) Having regard to section 3(1) of the Regulation and Schedule 1 to the Road Traffic Ordinance (Cap. 374), the Regulation applies to the following -

Taxi;
Light goods vehicle;
Medium goods vehicle;
Heavy goods vehicle;
Special purpose vehicle;
Motor cycle;
Motor tricycle; and
Invalid carriage.

- (c) Under section 2 of the Road Traffic Ordinance (Cap. 374), “special purpose vehicle” (特別用途車輛) means a motor vehicle designed, constructed or adapted primarily for a use other than the carriage on a road of goods, the driver or passengers (e.g. caravan, mobile office, mobile medical unit). And “invalid carriage” (傷殘者車輛) is defined under that section as a motor vehicle especially designed and constructed for the sole use of a person suffering from physical defects or disabilities (e.g. a motor vehicle with a modified steering wheel). In the unlikely event that these vehicles carry any cargo across the boundary, our policy intention is that the Regulation should apply to them.

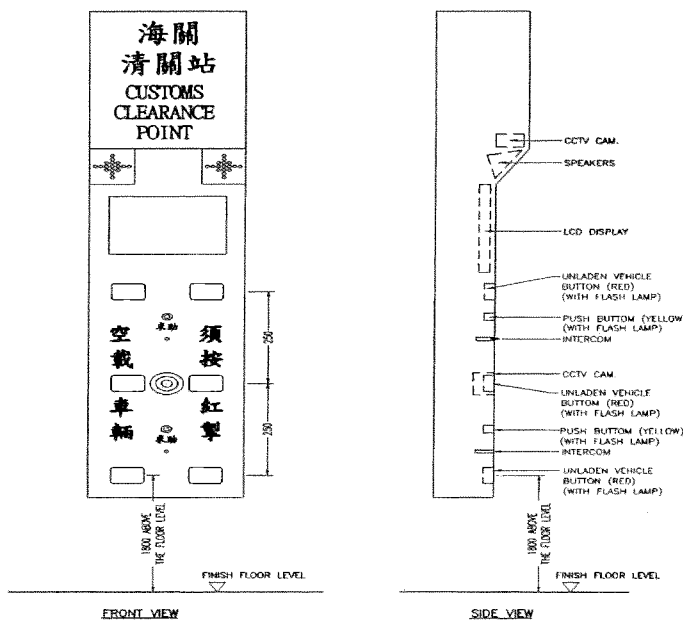
Section 4

- (a) Under the Regulation, a person who imports or exports any cargo is required to provide a pre-defined set of cargo information to the Customs and Excise Department (C&ED) electronically through the ROCARS before the cargo consignment enters or exits Hong Kong by a prescribed vehicle.
- (b) If a person imports a prohibited article, say Dangerous Drug (DD) and he can prove that he did not know and could not with reasonable diligence have known that the cargo, containing DD, was undeclared, he may use section 4(6) as a defence to a charge under section 4(5) even though he is found to have known that the cargo contains DD.
- (c) For example, Shipper A imported certain DD and had asked Agent B to lodge information with C&ED in respect of the DD through ROCARS, but for unknown reasons Agent B failed to do so. If prosecution is instituted against Shipper A for committing an offence under section 4(5), Shipper A may rely on the defence under section 4(6) if he had made due efforts to check whether the required information had been lodged.

- (d) Whether Shipper A would be charged with a separate offence depends, of course, on the evidence available and the circumstances of the particular case. Under section 4 of the Dangerous Drugs Ordinance (Cap 134), it is an offence to traffic a DD if the DD is imported not under or in accordance with that Ordinance or a licence granted under that Ordinance. Since Shipper A had asked Agent B to lodge the required information in respect of the DD, it is most likely that he had already obtained a valid licence for the import of the DD. In this case, no offence under section 4 of Cap. 134 is committed. On the other hand, if Shipper A did not intend to import the DD lawfully and therefore no licence had been obtained for the import of the DD, he would have committed an offence under section 4 of Cap. 134. It is also unlikely that he can rely on the defence under section 4(6) of the Regulation because he would not have taken any steps to lodge the required information or to check whether such information has been lodged.

Section 10

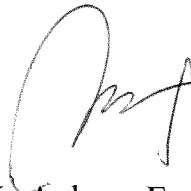
The device would be in the form of a button on a panel to be installed at each vehicular lane at the Land Boundary Control Points (LBCPs). There will be messages reminding truck drivers to press the button if no cargo is carried on the truck. Attached below is the tentative design of the device –



Section 14

The “exceptional circumstances” may include computer system breakdown or power failure at the LBCPs. Under such circumstances, cargo data cannot be lodged through ROCARS and customs clearance at the LBCPs has to be reverted to manual processing.

Yours sincerely,



(Ms Aubrey Fung)

for Secretary for Commerce and Economic Development

c.c. DoJ (Attn: Mr Sunny Chan,
Mr M Y Cheung,
Ms Angie Li)

C of CE (Attn: Mr K Chow,
Mr Jim Kwok)