

立法會
Legislative Council

LC Paper No. LS41/14-15

**Paper for the House Committee Meeting
on 27 February 2015**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 18 February 2015**

Tabling in LegCo	: Council meeting of 25 February 2015
Amendment to be made by	: Council meeting of 25 March 2015 (or that of 15 April 2015 if extended by resolution)
Competition (Application of Provisions) Regulation	(L.N. 36)
Competition (Disapplication of Provisions) Regulation	(L.N. 37)
Competition (Turnover) Regulation	(L.N. 38)
Competition Ordinance (Commencement) Notice 2015	(L.N. 39)

Background

The Competition Ordinance

The Competition Ordinance (Cap. 619) was passed by the Legislative Council (LegCo) on 14 June 2012 and published in the Gazette on 22 June 2012. The objective of Cap. 619 is to prohibit and deter undertakings¹ in all sectors from adopting abusive or other anti-competitive conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. Cap. 619 provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule under section 6, the second conduct rule under section 21, and the merger rule under section 3 of Schedule 7, which are collectively known as the "Competition Rules" in Cap. 619) as well as the institutional arrangements and penalty provisions for their enforcement.

¹ "Undertaking" is defined under section 2(1) of Cap. 619 to mean "any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity".

Phased implementation of the Competition Ordinance

2. The Administration's intention is to implement Cap. 619 in phases after its enactment to allow sufficient time for setting up the Competition Commission (Commission) and the Competition Tribunal (Tribunal) and preparing the guidelines² (Guidelines) before the Competition Rules come into force. According to the Administration, such arrangements will enable the public and the business sector to familiarize themselves with the new legal requirements during the transitional period and make the necessary adjustments to their business practices.

3. By the Competition Ordinance (Commencement) Notice 2012 (L.N. 177 of 2012), which was gazetted on 23 November 2012, the provisions in Cap. 619 relating to the establishment of the Commission, the short title and commencement, interpretation, and the issue of guidelines by the Commission etc. came into force on 18 January 2013. The provisions relating to the establishment of the Tribunal and some of the provisions relating to its operation came into force on 1 August 2013.

4. The rest of Cap. 619 including the Competition Rules and the relevant penalty provisions will come into operation only when all the relevant preparatory work has been completed. Such preparatory work includes the issue of Guidelines³ by the Commission (which are not subsidiary legislation) regarding the Competition Rules, block exemption orders, lodging of complaints as well as investigations, and the making of rules by the Chief Judge of the High Court regulating and prescribing the practice and procedure to be followed in the Tribunal.⁴

5. Members may refer to the two LegCo Brief (File Ref: CITB CR 05/62/25/14) on L.N. 36 to L.N. 39 both issued by the Commerce and Economic Development Bureau on 16 February 2015 for further information.

² Under sections 35(1) of Cap. 619, the Commission must issue guidelines (a) indicating the manner in which it expects to interpret and give effect to the conduct rules; (b) regarding the manner and form in which it will receive applications for a decision or block exemption order; and (c) indicating how it expects to exercise its power to make a decision or grant block exemptions. Under section 35(8), guidelines issued under section 35 and amendments made to them are not subsidiary legislation.

³ Under sections 35(4) and 59(3) of and section 17(4) of Schedule 7 to Cap. 619, before issuing any guidelines or amendments to them, the Commission must consult LegCo and any persons the Commission considers appropriate. At the meeting on 24 November 2014, the Panel on Economic Development was briefed on the preparation and consultation of the draft Guidelines. Members may wish to refer to LC Paper No. CB(4)370/14-15 for the minutes of the meeting for further information.

⁴ Under section 158(1) of Cap. 619, the Chief Judge of the High Court may, after consulting the President of the Tribunal, make rules regulating and prescribing the practice and procedure to be followed in the Tribunal. At the meeting on 16 February 2015, the Panel on Administration of Justice and Legal Services was consulted on four sets of draft rules. Members may refer to LC Paper No. CB(4)493/14-15(03) for further details.

L.N. 36 and L.N. 37

6. Section 3(1) of Cap. 619 provides that the provisions referred to in section 3(1) (the Key Provisions) do not apply to a statutory body⁵. The Key Provisions are Part 2 (The conduct rules), Part 4 (Enforcement powers of Commission), Part 6 (Enforcement before Tribunal) and Schedule 7 (Mergers).

7. Section 5(1)(a) of Cap. 619 provides that the Chief Executive (CE) in Council may, by regulation, apply the Key Provisions to any statutory body; or any statutory body, to the extent that it is engaged in an activity specified in the regulation only if he or she is satisfied that all of the four criteria set out in section 5(2) of Cap. 619 are met.⁶ Section 5(1)(b) of Cap. 619 provides that the CE in Council may, by regulation, disapply the Key Provisions to any person, or any person, to the extent that the person is engaged in an activity specified in the regulation.

8. L.N. 36 is made by the CE in Council under section 5(1)(a) of Cap. 619 to apply the Key Provisions to the following statutory bodies: –

- (a) Ocean Park Corporation (established under the Ocean Park Corporation Ordinance (Cap. 388));
- (b) Federation of Hong Kong Industries (established under the Federation of Hong Kong Industries Ordinance (Cap. 321));
- (c) The general committee of the Federation of Hong Kong Industries (established under the Federation of Hong Kong Industries Ordinance (Cap. 321));
- (d) Matilda and War Memorial Hospital (incorporated under the Matilda and War Memorial Hospital Ordinance (Cap. 1035));
- (e) Kadoorie Farm and Botanic Garden Corporation (established under the Kadoorie Farm and Botanic Garden Corporation Ordinance (Cap. 1156)); and

⁵ "Statutory body" is defined in section 2(1) of Cap. 619 to mean "a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under an Ordinance, but does not include (a) a company; (b) a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306); (c) a society registered under the Societies Ordinance (Cap.151); (d) a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33); or (e) a trade union registered under the Trade Unions Ordinance (Cap. 332)".

⁶ The criteria set out in section 5(2) of Cap. 619 are: (a) the statutory body is engaging in an economic activity in direct competition with another undertaking; (b) the economic activity of the statutory body is affecting the economic efficiency of a specific market; (c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and (d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

- (f) The Helena May (incorporated under The Helena May Incorporation Ordinance (Cap. 1021)).⁷

9. L.N. 37 is made by the CE in Council under section 5(1)(b) of Cap. 619 to disapply the Key Provisions to the following seven non-statutory bodies, which are all market or platform operators regulated under the Securities and Futures Ordinance (Cap. 571): –

- (a) The Stock Exchange of Hong Kong Limited;
- (b) Hong Kong Futures Exchange Limited;
- (c) Hong Kong Securities Clearing Company Limited;
- (d) HKFE Clearing Corporation Limited;
- (e) The SEHK Options Clearing House Limited;
- (f) OTC Clearing Hong Kong Limited; and
- (g) Hong Kong Exchanges and Clearing Limited.

10. According to paragraphs 7 to 10 of the LegCo Brief referred to in paragraph 5 above, the above non-statutory bodies are regulated under Cap. 571 which provides a specially calibrated regime for regulating them. As they play a key role in maintaining Hong Kong's position as an international financial centre, the Administration is satisfied that they should continue to be regulated under the framework of Cap. 571. According to the Administration, this will 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.

11. L.N. 36 and L.N. 37 come into operation on the day on which section 5(1)(a) and (b) of Cap. 619 comes into operation, i.e. 17 April 2015 (see L.N. 39 below).

L.N. 38

12. Under section 163(2) of Cap. 619, the Secretary for Commerce and Economic Development may, by regulations published in the Gazette, provide for the determination of the turnover of an undertaking.

13. Turnover of an undertaking over a turnover period is the measurement of eligibility for the exclusions of "agreements of lesser significance" and "conduct

⁷ Members may refer to paragraphs 4 to 6 of the Administration's paper for the Panel on Economic Development in November 2014 (LC Paper No. CB(4)166/14-15(03)) for further information. Members may also refer to the Administration's paper to the Bills Committee on Competition Bill (LC Paper No. CB(1)1031/11-12(02)) for further details relating to the exemption arrangements for statutory bodies.

of lesser significance" under sections 5 and 6 of Schedule 1 to Cap. 619. Section 5 of Schedule 1 provides that the first conduct rule does not apply to an agreement or a concerted practice between undertakings which does not involve serious anti-competitive conduct if their combined turnover for the relevant turnover period does not exceed \$200 million⁸. Section 6 of Schedule 1 provides that the second conduct rule does not apply to conduct of an undertaking the turnover of which does not exceed \$40 million for the relevant turnover period.

14. Turnover is also the measurement for determining the cap on pecuniary penalties under section 93 of Cap. 619. The maximum amount of pecuniary penalty imposed in relation to conduct that constitutes a single contravention may not exceed in total 10 percent of the turnover obtained in Hong Kong by the undertaking concerned for each year in which the contravention occurred for up to three years.

15. L.N. 38, made by the Secretary for Commerce and Economic Development under section 163 of Cap. 619, specifies how turnover is to be determined, what the turnover period would be under specific circumstances set out in sections 5(4) and 6(3) of Schedule 1 to Cap. 619, and other related issues such as the determination of turnover of undertakings that consist of two or more undertakings and each prepares accounts, and undertakings that receive any sum from a public body by way of grant, subsidy or similar financial assistance.

16. L.N. 38 comes into operation on 17 April 2015.

Consultation with LegCo Panel

17. In respect of L.N. 36 to L.N. 38, the Clerk to the Panel on Economic Development (EDEV Panel) has advised that the EDEV Panel was consulted on 24 November 2014. Members of the EDEV Panel generally supported the introduction of the legislative proposals into LegCo. However, some members noted the objections raised by the Federation of Hong Kong Industries as well as its general committee in relation to the legislative proposal to apply the Key Provisions to them as they did not meet all the criteria set out in section 5(2) of Cap. 619. Other members considered the legislative proposal to disapply the Key Provisions to the seven non-statutory bodies to be unnecessary as those bodies were required to comply with the requirements of Cap. 571 which had already incorporated the competition principle. A member considered it necessary to review Cap. 571 to strengthen its competition principle. Other members enquired about the thresholds for the determination of the turnover of an undertaking over a turnover period. Members may refer to the minutes of the meeting (LC Paper No. CB(4)370/14-15) for further information.

⁸ If a decision of an association of undertakings is involved, the relevant criteria is that the total gross revenues of all the members of the association for the relevant turnover period do not exceed \$200 million.

L.N. 39

18. L.N. 39 is made by the Secretary for Commerce and Economic Development under section 1(2) of Cap. 619 to provide for the commencement of the empowering and related provisions relating to the making of L.N. 36 and L.N. 37 (i.e. section 3 (Application to statutory bodies), section 4 (Application to specified persons and persons engaged in specified activities) and section 5 (Regulations) of Cap. 619) on 17 April 2015.

19. As advised by the Clerk to the EDEV Panel, the Administration has not consulted the Panel on L.N. 39.

Declaration of Change of Titles (Student Financial Assistance Agency and Controller, Student Financial Assistance Agency) Notice 2015

(L.N. 40)

20. L.N. 40 is made by the Chief Secretary for Administration under section 55 of the Interpretation and General Clauses Ordinance (Cap. 1) to: –

- (a) declare that the title of the Student Financial Assistance Agency (SFAA) is to be changed to the Working Family and Student Financial Assistance Agency;
- (b) declare that the title of the Controller, Student Financial Assistance Agency (Controller, SFAA) is to be changed to the Head, Working Family and Student Financial Assistance Agency; and
- (c) consequentially amend references to the titles of SFAA and Controller, SFAA in The Ombudsman Ordinance (Cap. 397) and those references wherever occurring in any instruments, contracts or legal proceedings made or commenced before 1 March 2015.

21. According to the LegCo Brief (File Ref: LWB CR 2/5110/13) issued by the Labour and Welfare Bureau in February 2015, the CE announced in his 2014 Policy Address the Government's proposal to introduce the Low-income Working Family Allowance (LIFA), with the aim to relieve the financial burden of low-income working families which are not on Comprehensive Social Security Assistance, as well as to promote self-reliance and upward social mobility. The change in titles is necessary as the administration of the LIFA scheme and the schemes of SFAA will be put under the same government department and a new agency, namely the Working Family and Student Financial Assistance Agency (comprising the existing SFAA and the new Working Family Allowance Office), will be established on 1 March 2015.

22. L.N. 40 comes into operation on 1 March 2015.

23. According to the Clerk to the Subcommittee on Poverty, the Subcommittee was consulted at its meeting on 27 May 2014 on the Administration's proposed LIFA scheme. The Subcommittee in general supported the Scheme. Members noted that the administration of the Scheme would be put alongside with the schemes of SFAA which would be renamed as the Working Family and Student Financial Assistance Agency, and Head 173 under the Government Estimates would therefore need to be renamed accordingly.

Federation of Hong Kong Industries (Variation of Composition and Addition of Scheduled Groups) Notice 2015 (L.N. 41)

24. Under section 45(1) of the Federation of Hong Kong Industries Ordinance (Cap. 321), the general committee of the Federation of Hong Kong Industries (General Committee) is empowered to allot a person admitted as a full member of the Federation of Hong Kong Industries (Federation) to one of the groups specified in the First Schedule (scheduled groups). Under section 45(3), the General Committee may vary the composition of any scheduled group; or add any group to, or delete any group from, the First Schedule. Under section 45(4), any such variation, addition or deletion shall be published in the Gazette. Under section 45(5), the written approval of the Secretary for Constitutional and Mainland Affairs of such variation, addition or deletion is required if the exercise of the General Committee's powers under subsection (3) would result in a change in the entitlement of any person to vote at a general meeting of the Federation as referred to in section 20R of the Legislative Council Ordinance (Cap. 542).

25. L.N. 41 is made by the General Committee under section 45 of Cap. 321 to add the following five new scheduled groups to the groups of businesses specified in the First Schedule to Cap. 321: –

- (a) Spectacles and optical products;
- (b) Fur and leather garments;
- (c) Creative industries;
- (d) Design; and
- (e) Automation solutions.

26. L.N. 41 also makes the following changes to the descriptions of three existing scheduled groups: –

<u>Existing scheduled group name</u>	<u>New scheduled group name</u>
Electrical and optical products	Electrical products
Leather and fur garments and miscellaneous textiles	Home textiles, miscellaneous textiles and accessories
Automobile components	Automobile, aeronautical and advance components

27. The effect of the above amendments is that full members in the newly added scheduled groups are entitled to vote at the Federation's general meetings by virtue of section 20R of Cap. 542, and they will also be eligible to be registered as electors in the industrial (first) functional constituency.

28. According to the LegCo Brief (no reference number) issued by the Federation on 16 February 2015, the Federation considers it necessary to set up the five new scheduled groups so that it can better serve the sectors concerned as well as the industries at large. Members may refer to paragraph 10 of the LegCo Brief for the reasons for proposing minor changes to the names of the above three existing scheduled groups following the proposal of setting up the above-mentioned new scheduled groups.

29. L.N. 41 comes into operation on 17 April 2015.

30. As advised by the Clerk to the Panel on Commerce and Industry and the Clerk to the Panel on Information Technology and Broadcasting, the Administration has not consulted the Panels on L.N. 41.

Concluding Observations

31. In the light of the views of the members of the EDEV Panel on L.N. 36 to L.N. 38, Members may wish to form a subcommittee to study the policy aspects of these items of subsidiary legislation and the related commencement notice (L.N. 39) in detail.

32. No difficulties have been identified in relation to the legal and drafting aspects of L.N. 40 and L.N. 41.

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